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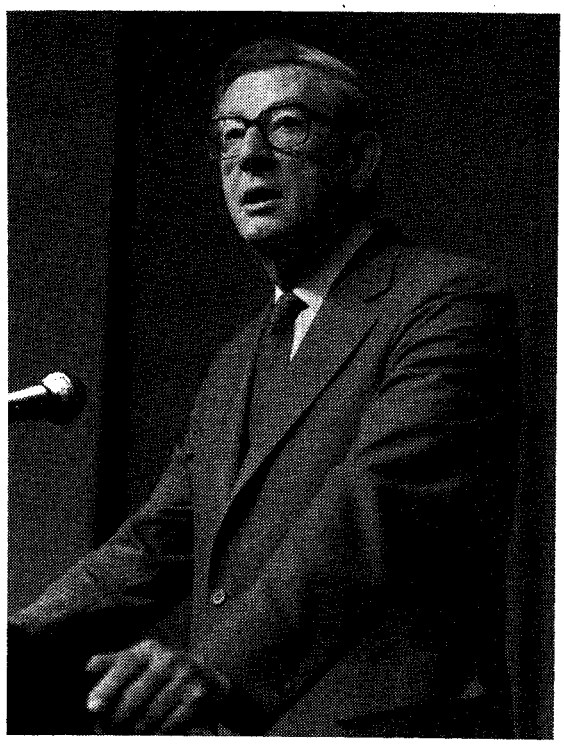
Just as most of us were not always students, although sometimes it seems that way, Professor Emeritus Christopher H. Munch was not always a professor. Before coming to the University of Denver College of Law, he was an active Air Force lawyer for fifteen years and spent over four years in the Far East One as chief legal counsel for the Fifth Air Force in Korea in 1951-1952, the next three as chief legal counsel of the Thirteenth Air Force in the Philippines and six months as one of two legal counsel with a Philippine Base Negotiating Team. During his time in Korea and the Philippines, he was chairman of the area Air Force Foreign Claims Commission, which reviewed and decided awards of damages for harm to private property attributable to military activities. In the Philippine assignment, his legal staff also participated in labor negotiations with local unions, rescue and repatriation of foreign nationals, and negotiations for temporary site usage, conducted between the U.S. Embassy and the Philippine Foreign Office.

After completing his tour of duty in the Far East, Professor Munch was assigned as the first Permanent Professor of Law and Chairman of the Law Department at the then new Air Force Academy. While there, among other matters, he instituted a course in International Law as part of the International Relations major.

Professor Munch took a sabbatical leave from the Air Force Academy in 1966 and joined the faculty of the University of Denver College of Law as a visiting Professor of Law. The following June, he retired from the Air Force and was appointed as a full time faculty member at DU, where he taught for 25 years until his retirement in 1991. While he is, for all purposes, a retired (Emeritus) professor, he agreed to teach full time for the Fall Semester of 1992, at the request of the College of Law Administration. Totalling 26 years that he has taught, counselled and supported law students at DU. During that time, he has assiduously avoided teaching the international aspects of his subjects out of respect for the superior scholarship and expertise of our Director of International Legal Studies, his long time friend and colleague, Professor Ved Nanda. He attends the lectures, receptions and other social functions sponsored by the International Law Society over the years. We sincerely invite him to continue to do so.



The Denver Journal of International Law & Policy dedicates this issue to Professor Emeritus William M. Beaney.

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The Denver Journal of International Law & Policy dedicates this issue to Professor Emeritus Christopher H. Munch.

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Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the Constitution of the Federal Republic of Germany

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I. INTRODUCTION

The changes in the foreign and domestic politics of Germany caused by unification have been and will continue to be reflected in the changes of the Constitution of the Federal Republic, also known as the Basic Law (*Grundgesetz*).[1] The constitutions[2] and draft constitutions[3] of the five new states of the Federal Republic of Germany reveal the direction that the future Constitution of the Federal Republic of Germany will take. They also reflect the difficult history of two dictatorships and the problems of a society in transformation towards democracy. The *Einigungsvertrag*, the "Treaty between the Federal Republic of Germany and the German Democratic Republic on the Achievement of the Unity of Germany,"[4] changed the present constitution of the Federal Republic of Germany and recommended amendments to the Basic Law.[5] Most of the prior changes to the Basic Law resulted from negotiations with the

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* The author was legal advisor to the committee "Constitution and Law" and to various other committees in the Parliaments of Saxony, Dresden, Federal Republic of Germany in 1991. The opinions expressed in this article are solely those of the author. He would like to express his gratitude to Mrs. Swetlana von Bismarck for her contributions to this article.

1. Grundgesetz der Bundesrepublik Deutschland of May 23, 1949 [hereinafter Basic Law] [GG] 1949 Bundesgesetzblatt [BGBl] I 1 (F.R.G.), *translated in* ELMAR M. HUCKO, THE DEMOCRATIC TRADITION, FOUR GERMAN CONSTITUTIONS 194-265 (1987).

2. Constitution of the State of Brandenburg, as adopted by plebiscite on June 14, 1992, 6 Gesetz-und Verordnungsblatt [GVBl] Brandenburg 121 (1992), to enter into force on Aug. 21, 1992, *Landesverfassung kann in Kraft treten*, DER TAGESSPIEGEL, Aug. 13, 1992 at 6; Constitution of the Free State of Saxony, as adopted by parliament on May 26, 1992, Drs. 1/1800, *Sächsischer Landtag beschlieszt Verfassung*, FRANKFURTER ALLGEMEINE ZEITUNG [F.A.Z.] May 27, 1992 at 1; Constitution of the State of Sachsen-Anhalt, as adopted by parliament on July 16, 1992, 31 GVBl Sachsen-Anhalt 600 (1992).

3. Draft Constitution of the State of Mecklenburg-Vorpommern of Apr. 30, 1992, Drs. 1/20000; Draft Constitution of the State of Thuringia of Apr. 10, 1991, Drs. 1/285.

4. *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag)* [Treaty between the Federal Republic of Germany and the German Democratic Republic on the Achievement of the Unity of Germany], Aug. 31, 1990, BGBl II 885; Gesetzblatt [GBl] G.D.R. I, 1627; Verfassungsgesetz [Verf.] art. 4., *translated in* 30 I.L.M. 457 (1991) [hereinafter Treaty of the Unity of Germany].

5. Treaty of the Unity of Germany, *supra* note 4, art. 4.

four former Allied powers, illustrated by the *Treaty on the Final Settlement with Respect to Germany*.[6] The present recommendations will affect the internal constitutional structure of the present united Germany.

The five states of the former German Democratic Republic entered into extensive parliamentary and public debates on the shape of their future state constitutions even before discussions of reunification began.[7] Due to their different political orientation, the constitutions and draft constitutions of these new states offer an intriguing spectrum of modern constitutional thinking in Germany. As a result, they will have considerable influence on the amendments to the Basic Law, which will shape the reunited Federal Republic of Germany as a part of the European Community.

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6. Treaty on the Final Settlement with Respect to Germany, F.D.R.-G.D.R.-U.K.-U.S., 1990 BGBl II 1318, *reprinted in* 29 I.L.M. 1188 (1990) [hereinafter Treaty on Final Settlement]:

> Article 1
>
> (1) The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date the present treaty comes into force. . . .
>
> (2) The united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law.
>
> (3) The united Germany has no territorial claims whatsoever against other states and shall not assert any in the future.
>
> (4) The Governments of the Federal Republic of Germany and the German Democratic Republic shall ensure that the constitution of the united Germany does not contain any provision incompatible with these principles. This applies accordingly to the provisions laid down in the preamble, the second sentence of Article 23, and Article 146 of the Basic Law for the Federal Republic of Germany.
>
> (5) The Governments of the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America take formal note of the corresponding commitments and declarations by the Governments of the Federal Republic of Germany and the German Democratic Republic and declare that their implementation will confirm the definitive nature of the united Germany's borders.
>
> Article 2
>
> The Governments of the Federal Republic of Germany and the German Democratic Republic reaffirm their declarations. . . According to the constitution of the united Germany, acts tending to and undertaken with the intent to disturb the peaceful relations between nations. . . are unconstitutional and a punishable offence. The Governments. . . declare that the united Germany will never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations.

7. The committee to change the constitution, *Verfassungskommission*, started working on January 16, 1992 and according to an agreement between the parties is supposed to finish its work by March 31, 1992. *Scholz und Voscherau Vorsitzende der Verfassungskommission*, F.A.Z., Jan. 17, 1992, at 1.

II. GERMAN CONSTITUTIONAL HISTORY

Before 1871, the multitude of independent kingdoms, duchies, counties, and free cities that later formed Germany were unable to unite as a nation due to their strategic position in the center of Europe. Reluctant to abandon their statehood completely, these states preserved many of their former rights in the Constitution of the German Empire, which left the inclusion of a bill of rights to the state constitutions.[8]

Following Germany's defeat in World War I, the newly declared democratic republic, the Republic of Weimar,[9] adopted a Constitution in 1919 that again reduced the power of the states, though they still retained considerable control.[10] A bill of rights was added,[11] but the rights were subjective[12] and could not be vindicated by any court and could be limited by ordinary legislation. As a result, this constitution proved to be ineffective[13] to withstand the burden of an economy crippled by the four victorious powers of World War I in the Versailles Treaty, a worldwide depression, and the advance of political extremism by the Communists on the one side and the National Socialists on the other.[14] One of the first victims of Germany's move toward autocratic centralization was the state of Prussia.[15] After gaining power in 1933, Hitler's National Socialists centralized the country and immediately abolished the states.[16]

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8. HUCKO, *supra* note 1, at 36, 121. For a detailed description, *see* GORDON A. CRAIG, GERMANY 1866 - 1945, at 38-41 (1980). Most notably, foreign policy and defense were assigned to the Reich.

9. Weimar, the city of the writer Johann Wolfang von Goethe, is a small town in Thüringen where the members of the National Assembly gathered in order to avoid the post-war turmoil of Berlin while writing the new constitution.

10. Constitution of the Weimarer Republic, arts. 5 and 12, *translated in* HUCKO, *supra* note 1, at 149, 152; CRAIG, *supra* note 8, at 419; ERICH RÖPER, *Verfassunggebung und Verfassungskontinuität in den östlichen Bundesländern* 149, 152 (1991).

11. Gerhard Anschuetz, *Die Verfassung des Deutschen Reiches vom 11, August 1919*, 14 KOMMENTAR 507 (1933, reprinted 1965): arts. 109-165("*Grundrechte und Grundpflichten*") [fundamental rights and duties].

12. *Id.* at 506.

13. HUCKO, *supra* note 1, at 60.

14. HANS SCHNEIDER, HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [Handbook of the Constitutional Law of the Federal Republic of Germany] (Josef Isensee and Paul Kirchhoff eds.) § 3(D), at 136. In the April, 1932 presidential elections 19.4 million votes were cast for Hindenburg, backed by democratic parties; 13.4 million for Adolf Hitler; and 3.7 million for Ernst Thälmann, the communist leader. The 5th Reichstag (Sept. 14, 1930) comprised of 577 parlamentarians, including 107 Nazis and 77 Communists; the 6th Reichstag (July 31, 1932) comprised of 608 parlamentarians, including 230 Nazis and 89 Comunists; and the 7th Reichstag (Nov. 6, 1932) comprised of 584 parlamentarians, and included 196 Nazis and 100 Communists. *Id.* at 138.

15. On July 20, 1932, following bloody brawls between Nazis and Communists, the Chancellor of the Reich, Franz von Papen, deposed the Prussian Government and became its Reich Commissioner. CRAIG, *supra* note 8, at 561.

16. On April 7, 1934, *Vorläufiges Gesetz zur Gleichschaltung der Länder*, the "Preliminary Law to Coordinate the Länder" was passed, appointing commissioners for all Länder, and the *Gesetz über den Neuaufbau des Reiches*, January 30, 1934 [RGBl] I, 75, HERMANN KINDER, WERNER HILGEMANN, LAW TO RESTRUCTURE THE REICH 195. The bad results for the

After World War II, the Allied powers wished to "de-nazify" and to democratize Germany, as well as to remove it as a strong power from the European theater. The Allies decentralized Germany again and restored federalism either by restoring old states[17] or by creating new ones.[18] Ten states, *Länder*,[19] were eventually established in the west to form the Federal Republic of Germany, with the Basic Law of May 23rd 1949, the *Grundgesetz*, as its constitutional basis.[20]

In the Soviet-controlled East, five states were created:[21] Mecklenburg-Vorpommern[22] in the North, Saxony in the South-East, Thuringia in the South-West, Sachsen-Anhalt in the West, and Brandenburg in the area surrounding Berlin.[23] The Soviet Union forced the East German puppet regime to abandon the newly established states and the rather liberal Constitution of 1949, which was proven to be ineffective in constitutional reality, and to return to centralism.[24] Following the reform movement and the growing dissent in the Communist countries — best represented by the mass exodus of East Germans via Hungary and Austria,[25] the demonstrations in Leipzig, Dresden, and Berlin,[26] and by the opening of the Berlin Wall on November 9th 1989[27] — East German leaders reluctantly yielded to public pressure and prepared accession to the Federal

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Nazis in the last election on March 5, 1933 prompted this decision because despite considerable harassment, communists and democratic parties obtained 81 and 268 votes as opposed to 288 for nazi parlamentarians. *Id.* at 576.

17. Bavaria, Bremen, Hamburg, and Baden were restored.

18. Hessen, Niedersachsen (Lower Saxony), and Nordrhein-Westfahlen were created.

19. RÖPER, *supra* note 10, at 153; their number was reduced to nine with the formation of Baden-Württemberg out of two states and increased again to ten when the Saarland joined the F.R.G. in 1957. Konrad Hesse, *Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland*, 34 MARGIN No. 92 (14th ed. 1984). In addition, West Berlin maintained special status under Allied control.

20. HUCKO, *supra* note 1, at 194-265. The Basic Law begins with a strong bill of rights section outperforming its American counterpart in several aspects. For instance, with the exception of the freedom of expression, the German Basic Law grants more rights in a less restricted way, such as the right to privacy, the right to one's own papers, and the supervision of telephone-tapping.

21. Befehl Nr. 1 über die Organisation der Militärverwaltung zur Verwaltung der sowjetischen Besatzungszone in Deutshland of June 9th, 1945 [Command number one concerning the organization of the military administration to administer the Soviet occupation zone in Germany], *reprinted in* v.Münch, 285.

22. The other half of Pomerania is now in Polish territory.

23. The latter two formed the heart of Prussia, which was again abolished — this time by the Allied powers — as an ill-conceived scapegoat for the rise of Nazism. Gesetz Nr. 46 des Kontrollrats betreffend Auflösung des Staates Preussen vom Feb. 25, 1947 [law number 46 of the supervising council concerning the dissolution of the state of Prussia], ABl des Kontrollrats Nr. 14, Mar. 31, 1947, at 262, *cited in* RÖPER, *supra* note 10, at 153.

24. *Id.* at 158.

25. Ferdinand Protzman, *Thousands Swell Trek to the West by East Germans*, N.Y. TIMES, Sept. 12, 1989, at A1.

26. *New Face, Old Politics*, NEWSWEEK, Oct. 30, 1989, at 52; PHIL. INQUIRER, Oct. 8, 1989, at A1.

27. Ferdinand Protzman, *Clamor in the East; East Berliners Explore Land Long Forbidden*, N.Y. TIMES, Nov. 10, 1989, at A1.

Republic of Germany.[28]

In joining the Federal Republic, East Germany reintroduced the *Länder*.[29] The Basic Law presupposes that each state has its own constitution,[30] and so does the East German "Law to Reintroduce the *Länder*."[31] Article 23(2) § 1 empowers the parliaments to write their own constitutions.

After East Germany acceded to the Federal Republic of Germany on Oct. 3, 1990,[32] the obligation of the five new states to enact constitutions derives from the Basic Law as well. All five state parliaments enacted preliminary organizational statutes[33] and drafted constitutions of varying stages of development,[34] and Brandenburg, Sachsen-Anhalt and Sachsen have enacted constitutions.[35] The disputes surrounding these constitutions and drafts have influenced the constitutional committee, which by now has begun drafting the new Federal Constitution of Germany.[36]

III. CHANGES IN THE BASIC LAW

The changes to the Basic Law have either been imposed by the Allies, after World War II, or were deemed necessary by the two German states themselves to achieve unification. In order to receive the consent of the Allied powers and to assure its neighbors of its peaceful intentions, the two Germanies agreed on important changes of the Basic Law. The two Germanies committed themselves to accept their borders after unification as definitive[37] in order to limit their military forces,[38] to finance

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28. Basic Law, art. 23 formed the constitutional basis for the accession of the five new states to the already existing Federal Republic of Germany. Article 146 suggests forming a new German state by joining the Federal Republic and the German Democratic Republic under a new constitution, but this alternative was not chosen. Burkhard Bastuck, *Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification*, 25 INT'L LAW. 251, 255 (1991).

29. *Verfassungsgesetz zur Bildung von Ländern in der Deutschen Demokratischen Republik (Ländereinführungsgesetz)* [Law of the constitution for the formation of the lands of the German Democratic Republic], July 22, 1990, art. 1(1), GBl I, Nr. 51 at 995.

30. Art. 28(I) § 1, Hans D. Jarass & Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, Kommentar, 370 art. 28 margin no. 1 (1989).

31. Art. 3(2) § 1; RÖPER, *supra* note 10, at 150.

32. Treaty of the Unity of Germany, *supra* note 4, at 457. According to article 1(1), the five new states join the Federal Republic, and according to article 1(2), the 11 Eastern and the 12 Western districts of Berlin form the new state of Berlin.

33. For example, *Gesetz zur Herstellung der Arbeitsfähigkeit des Sächsischen Landtags und der Sächsischen Landesregierung (Vorschaltgesetz)*, Oct. 27, 1990, Sächs GVBl, 1 (Law to Achieve the Working Capability of the Saxon Parliament).

34. Draft Constitution of the State of Brandenburg of May 5, 1991, 9 GVBl Brandenburg 96 (1991); Draft Constitution of the Free State of Saxony of June 1991, *as published by* The Committee For Constitution and Law; for Thuringia and Mecklenburg-Vorpommern, *see supra* note 3. RÖPER, *supra* note 10, at 151, n.7.

35. *See supra* note 3.

36. The committee began working on Jan. 16, 1992. *Scholz und Voscherau Vorsitzende der Verfassungskommission*, F.A.Z., Jan. 17, 1992, at 1.

37. Treaty on the Final Settlement, *supra* note 6, art. 1.

the withdrawal and the settlement of the Soviet military forces,[39] and to redefine the membership of a united Germany in NATO.[40] In treaties and negotiations with Poland[41] and the new leadership in Czechoslovakia,[42] Germany further sought to calm the fears and insinuations raised worldwide at that time.[43] The international obligation to change the Basic Law was fulfilled in article 4 of the Treaty on the Unity of Germany and was implemented upon ratification by both German parliaments.

A. *The Preamble*

The preamble of the former constitution of West Germany expressed the desire to reunite and the duty of the German people to exercise their right to self-determination. The former preamble characterized the Basic Law as a temporary constitution enacted for the benefit of those who

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38. *Id.* art. 3(2). The article states the obligation to reduce the number of troops to 370,000 men. The present number is about 600,000. Robert C. Toth, *U.S. and Soviets in Accord on Cutting Arms in Europe*, L.A. TIMES, Oct. 3, 1990, at A1.

39. Treaty on the Final Settlement, *supra* note 6, art. 4(1) only states the obligation to settle by treaty the conditions for and the duration of the presence of Soviet armed forces as well as the conduct of their withdrawal.

40. *Id.* arts. 5 and 6; Volker Busse, *Das certragliche Werk der deutschen Einheit und die Änderungen von Verfassungsrecht*, DIE ÖFFENTLICHE VERWALTUNG 345, 346 (1991).

41. *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenzen*, BGBl II 1329 (1991)(Treaty concerning the Confirmation of the Boundary between the Federal Republic of Germany and the Polish Republic), Nov, 14, 1990, F.R.G.-Pol. Jochen A. Frowein, *Germany Reunited*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [Journal of Foreign Public Law and International Law] 333, 341 (1991).

42. *Vertrag vom 27 Februar zwischen der Bundesrepublik und der Tschechischen und Slowakischen Föderativen Republik über gute Nachbarschaft und freundschaftliche Zusammenarbeit*, 21 BGBl II 461 (1992)(Treaty of Good Neighborship and Friendly Cooperation between the Federal Republic of Germany and the Czech and Slovak Federal Republic).

43. Regarding France, see Philip Jackson, *Fears of Germany Rekindled in France*, THE TIMES, Oct. 3, 1990 (quotes claim that more than 60% of the French are afraid of Germany). In contrast, another source cites only 27% of the French as feeling uneasy about unification. NORTH SPORTS FINAL EDITION, Oct. 3, 1990, at 18. Regarding Great Britain, *see Thatcher Anxious over German Domination, Congratulates Kohl*, Reuters, Oct. 3, 1990, *available in* LEXIS, Nexis Library, Current File.

Regarding Israel and the Jewish Community, see Douglas Devin, *A Few, Lonely Voices Fear the New Germany, The Face of the Colossus*, JERUSALEM POST, Oct. 3, 1990; *The New Germany*, JERUSALEM POST, Oct. 3, 1990. In a very unpleasant confrontation, the World Jewish Congress, later joined by many other Jewish Groups, attacked Chancellor Helmut Kohl for meeting Austrian President Waldheim on March 27, 1992. Kohl retorted by disclosing East German documents which showed the WJC conspired with East Germany's deposed dictator Honecker against unification - claims which the WJC pronounced as exaggerated by the East Germans. *Kohl Criticized for Waldheim Meeting, Responds Angrily to Major Jewish Groups*, WALL ST. J., Mar. 31, 1992 at A13.

Turkey's President Turgut Ozal joined anti-German critics and invoked Germany's Nazi past when Germany refused to deliver weaponry that Turkey needed to fight Kurdish separatists. *Turk Cites Nazism in Attack on Bonn over Kurdish Issue*, N.Y. TIMES, Mar. 30, 1992 at A6.

were denied their right of self-determination. These declarations referred not only to the population of the former German Democratic Republic but also to the vast stretches of originally German territory occupied by Poland and the Soviet Union after World War II. With the Treaty on the Unity of Germany, the declarations pertaining to reunification and self-determination were deleted and. substituted by the statement that the Basic Law now applies to the whole German people. The legislature thereby declared the process of reunification complete and relinquished one fourth of the territory of former Germany in the borders of 1937.[44] In addition, the reference to the Basic Law as a temporary constitution was deleted.

B. *Article 146*

Article 146 of the new Basic Law represents the result of hasty political negotiations rather than precise legal craftsmanship. The old article 146 stressed the temporary character of the Basic Law by promising a general referendum on a constitution after reunification. Due to a lack of coordination between Foreign Minister Hans-Dietrich Genscher and Minister of the Interior Wolfgang Schäuble,[45] and in order to assure support by the opposition,[46] this article was not deleted from the Basic Law but amended by a formulation parallel to that of the preamble. It states that "the Basic Law now applies to the whole German People." As a result, the present form of article 146 still appears to refer to the Basic Law as a temporary constitution subject to substitution by a new constitution and a referendum, which is arguably inconsistent with the preamble and with the political will of the present German Government.[47] The present constitution, therefore, may be vulnerable to being overruled by a simple majority in a referendum or even in the German parliament.[48] Two views attempt to reconcile this inconsistency. One possibility is to subject the amended constitution to a popular referendum, and another is to simply disregard the possible inconsistencies in its wording.[49]

C. *Articles 51(II), 135a, and 143*

The changes of the Basic Law articles 51(II), 135a and 143 involve the internal distribution of power in the federation, questions of finance, and the time-frame for adjusting the East German body of law to that of West Germany. Article 51(II) assures the bigger states in the Federation,

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44. Henry Kamm, *Anxiety Tugs at Germany's Jews, Bitterness Sears the Die-Hard Nationalists, Sense of Mourning, Not Elation, For the Disappointed Expellees*, N.Y. TIMES, Sept. 25, 1990 at A10.

45. WOLFGANG SCHÄUBLE, DER VERTRAG [The Treaty] 120-21 (1991).

46. *Id.*; Busse, *supra* note 40, at 345-54.

47. This is the opinion of the opposition Social Democrats. SCHÄUBLE, *supra* note 45, at 120.

48. Busse, *supra* note 40, at 351, n.47e.

49. For the latter view, see Busse, *supra* note 40, at 352.

those comprising more than 7 million inhabitants, that the smaller states cannot form a two-thirds majority against them in the *Bundesrat*, the upper house of Germany's national legislature.[50] This provision assured passage of the Treaty of the Unity of Germany by the *Bundesrat* with the required two-thirds majority.

Article 135a provides that the new Germany reserves the power to extinguish or restrict claims against the former East German Republic and to deny or restrict claims by victims of the actions of the Communist regime.[51]

Article 143 was changed to avoid issues that threatened to delay the signing of the Treaty of the Unity of Germany by the two German states. Article 143 grants a period of adjustment to the East German body of law.[52] East German law must comply with the constitutional requirements of the Basic Law by December 31, 1992. This applies most importantly to East Germany's more lenient criminal law regarding abortion, StGB article 153-155, which allows abortion once the mother has been informed about the medical risks.[53] The West German StGB article 218, which outlaws abortion, but creates exceptions that have virtually eroded the prohibition, was not to enter into force in the East.[54] Instead, the legislature was called upon to introduce a new law.[55] The new law advocated a more thorough information requirement for the mother but abandoned the exception-rule of StGB article 218. It was challenged before the Constitutional Court and will not enter into force until a decision has been rendered.[56] Until then, the East German StGB articles 153-155 will remain in force.[57]

The most controversial effect of article 143 is the constitutional assurance that it gives to article 41, which declares the brutal expropriations by the Soviet Union between 1945 and 1949 irreversible.[58] When challenged in the Constitutional Court, the German government defended its consent to these regulations as necessary to assure the Soviet Union's agreement to unification.[59] This view was accepted by the Constitutional

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50. *Id.* at 350. There are four states in this category: Baden-Württemberg, Bavaria, Lower Saxony, North Rhine-Westphalia.

51. *Id.*

52. SCHÄUBLE, *supra* note 45, at 229-50.

53. Rainer Beckmann, *Zur Verfassungsmässigkeit des Schwangerschaftsabbruchs im Einigungsvertrag* [Toward the constitutionality of abortion within the treaty], 2 M.D.R. 117, 118 (1991).

54. Treaty of the Unity of Germany, *supra* note 4, art. 9(II), in conjunction with annex II Ch. III, matter C, para. I, Nos. 1, 4 and 5; Beckmann, *supra* note 53, at 118; Nomi Morris, *Tough Challenge for Germany - A Unified Abortion Law*, S.F. CHRON., Feb. 11, 1992 at A10; Busse, *supra* note 40, at 351.

55. Treaty of the Unity of Germany, *supra* note 4, art. 31, para. IV §1.

56. *Der Bundesrat stimmt Fristenregelung mit Beratungspflicht zu*, F.A.Z., July 11, 1992 at 1; *Karlsruhe setzteine knappe Frist für Anträge*, F.A.Z., Aug. 6, 1992 at 1.

57. Treaty of the Unity of Germany, *supra* note 4, art. 34, para. 4 § 4.

58. Basic Law art. 143(III).

59. Secretary of State Kastrup in his pleadings before the federal Constitutional Court.

Court in 1991.[60] The most bizarre effect of this rule is that those members of the German resistance movement against Hitler, whom the Nazis were unable to expropriate in the turmoil of the last days of the war, were subsequently expropriated by the Soviet or East German authorities as "capitalists, fascists or aristocrats" between 1945 and 1949, and will not be able to return to their homes. Those whose property was expropriated by the Nazis before 1945, along with other victims of Nazism like Jewish Germans, political opponents, and those whose property the East German Communists expropriated after 1949, are entitled to a return of their old property or indemnification.

The absurdity of this result of expropriation along with other factors suggest that the East German leaders, many still imbued with Communist ideas or connected to the East German secret police,[61] succeeded in justifying the brutal results of the Communist reign of East Germany.[62] This result is evidenced by the foreseeable decline of the Soviet Union as a political force coupled with the weak proof advanced for the foreign relations argument during the oral arguments in the Constitutional Court. Justifying these results was in accord with West German financial experts afraid of having to pay enormous amounts of compensation.[63]

IV. FUTURE CHANGES OF THE GERMAN CONSTITUTION

Decisive changes of the German Federal constitution will take place within the next ten years. The German constitution will have to adapt to the changes caused by unification,[64] by the creation of the European

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Judgment of Apr. 23, 1991, Entscheidung des Bundesverfassungsgericht [BVerfGe], 1 BvR 1170, 1174, 1175/90 (F.R.G.), *reprinted in* 44 NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.] 1597, 1598 (1991).

60. 44 N.J.W., *supra* note 59, at 1597.

61. Lothar de Maiziere, East Germany's first and last democratic prime minister, who signed the Unification Treaty for East Germany, had to step down from most of his political posts after unification due to charges that he had worked for the East German secret police, STASI. Rolf Soderlind, *East German Politician Faces New Stasi Allegations*, Reuters, Feb. 16, 1992, *available in* LEXIS, NEXIS Library, Current File.

62. Walter Leisner, *Das Bodenreform-Urteil des Bundesverfassungsgerichts*, 44 N.J.W. 1569 (1991).

63. "Der Bundesfinanzminister sitzt auf einem Pulverfasz, denn es geht um viele Milliarden D-Mark. Mir hat er damit zu verdanken, wenn es nicht noch teurer wird." SCHÄUBLE, *supra* note 45, at 255. ("The Minister of Finance sits on a powder keg, since this is a matter of billions of D-Mark. He should thank me if it doesn't get more expensive").

64. The Basic Law, article 5, recommends the German legislative bodies to consider above all, but not exclusively, the following issues for amendment:

> 1. The inclusion of political aims into the Basic Law.
> 2. The application of Basic Law, article 146, and the question of a referendum on the new constitution.
> 3. The strengthening of federalism with possible changes of Basic Law, article 24(I). The old German states witnessed a constant erosion of their rights due to Federal supremacy clauses and due to the delegation of jurisdiction to the European Community and have therefore agreed to strengthen their role against the Federation. Eckart Klein, *Der Einigungsvertrag: Verfassung-*

Community,[65] and by Germany's new role in the world.[66] This article will

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sprobleme und aufträge, 14 DIE ÖFFENTLICHE VERWALTUNG 569, 575-76 (1991). *See also* Busse, *supra* note 40, at 352-53. Among others the process of unification on a European scale has led the Länder to demand consultation and voting rights with regard to foreign relations. *Bundesstaat oder Staatenbund?, Streit über die aussenpolitischen Kompetenzen der Länder*, F.A.Z., Mar. 21, 1992, at 4; Klein, *supra*, at 576.

4. The forming of a new state by joining the states of Berlin and Brandenburg. *Id.*

Regarding these four points, article 5 constitutes an agreement between the major parties rather than between the two Germanies, with the Social Democrats and the Greens in favor of a new constitution, and the Christian Democrats and the Liberals in favor of a limited revision. Busse, *supra* note 40, at 352.

65. The ratification of the Maastricht treaty is accompanied by changes of the Basic Law. A bill to change the Basic law has been forwarded to the Bundesrat. This bill includes, *inter alia*, the insertion of a new article 23 to accommodate the rights of the Länder in a future, more integrated European Community, and to allow and regulate the transfer of powers from the German federal level to the EC, as a supranational entity; changes to article 24 regarding the transfer of powers from the state level; article 28 will be changed to allow citizens from other EC states to vote on a communal level; and article 88 will reduce the powers of the German Federal Bank in favor of a European one. *Bundesstaat oder Staatenbund?, Streit über die aussenpolitischen Kompetenzen der Länder*, F.A.Z., Mar. 21, 1992 at 4; *Der neue Europa Artikel im Grundgesetz, Nach der Einigung Deutschlands wird die Verfassung auf die Einheit Europas verpflichtet*, F.A.Z., July 22, 1992, at 4.

A further, rather complex change of the Basic Law regards its right to asylum in article 16. As immigration control will be abolished along with custom controls at intra-EC frontiers, Germany's very liberal right to asylum will have to be lowered to an EC average level. *Die Leute haben den Zirkus satt, CDU und CSU beharren auf Grundgesetzänderungen zum Asylrecht*, F.A.Z., Mar. 17, 1992 at 5.

66. This primarily concerns the question whether the German army should be allowed to participate in UN peace keeping actions or even in combat operations, such as the actions against Iraq. The German Ministry of Foreign Affairs and the oppositional Social Democrats have argued that the Basic Law would not permit the German army, *Bundeswehr*, to participate in such actions. They cite article 87a which allows the Bundeswehr only to act in defense of Germany or where the Basic Law contains an express provision. Many in the Christian Democratic Union and most legal scholars, however, interpret article 87 only to prohibit the internal use of the Bundeswehr, i.e. a prohibition to use it as a police force. Instead, they argue, the permission and the obligation to send troops under UN command derives from article 24(II). *Nahe dran am echten Krieg*, 30 DER SPIEGEL 22, 27-28 (1992); Albrecht Randelzhofer, *in* Kommentar zum Grundgesetz (Theodor Maunz and Günther Dürig eds.), Art. 24(II), Margin no. 44, 46 and 56 (Dec. 1989 update). This question will be clarified by the Constitutional Court in its decision on an action by the Social Democratic Party against the participation of German Navy units in surveillance of the coasts of Yugoslavia. *Organklage der SPD beim Verfassungsgericht eingebracht*, F.A.Z., Aug. 10, 1992 at 2. For a discussion of the constitutional problems, see generally, Thomas Giegerich, *German Contribution in the Persian Gulf*, 49 ZAÖ. R.V. 1, 38-40 (1989).

From a political point of view, due to Germany's past, a general anti-militarist attitude in the population, Krieg, *supra*, and the rather contradictory demands by the international community evidenced by the criticism of Germany for not participating in combat actions against Iraq, and yet the condemnation for political intervention against Serbian mass military attacks against light armed Croatian militias — attempts to change the Basic Law have failed so far. The continued bloodshed in Bosnia and Croatia, however, will probably change public opinion. Ian Murray, *Bonn Fails to Widen Role of the Army*, THE TIMES, Jan. 17, 1992; *Parteien uneins über UNO-Einsätze der Bundeswehr*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2; CDU-MdB Karl Lamers, *Von deutscher Drückebergerei*, 12 DER SPIEGEL 22

have to limit its scope to the changes of the constitution that have already been dealt with in the constitutions and draft constitutions of the five new German states. The Treaty on the Unity of Germany, article 5, among others, recommends the German legislature to include political aims in the constitution.[67] The recommendation of the Treaty on the Unity of Germany will cause the political discussions that have been fought on this subject on a state level, and which mirror the slow process of integration of the Eastern states into a Western constitutional system, to be repeated on the Federal level, where the problems of integration will surface again. Therefore this article will first describe the constitutional doctrine of fundamental rights and state aims in state constitutions, and then will analyze its realization in the draft constitutions of the new states, and will finally describe the analogies that can be drawn on a Federal level.

A. *State Constitutions and Fundamental Constitutional Rights*

The inclusion of fundamental rights in the constitutions of the five new states — though not essential from a legal point of view — assures their citizens of the rights guaranteed by the Basic Law and serves as a means of identification with the new federal state. A constitution identifies the organs of a state: their creation, their relationships to each other, their powers, and their limitations. In addition, it identifies the fundamental rights of its subjects.[68] The Basic Law allocates the powers to the federal organs and guarantees fundamental rights without regard to the federal or state level.[69] Since the German federal tradition presupposes

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(1992); FDP-MdB and Foreign Minister Hans-Dietrich Genscher, *Bald werden sich die Deutschen an Blauhelm-Einsätzen beteiligen*; Marc Fisher, *Germany Facing Harsher Criticism*, WASH. POST, Mar. 31, 1992, at A11. Only 22% in the East and 38% in the West are in favor of German participation in UN actions. Renate Köcher, *Viel Zündstoff für die Verfassungsdebatte*, F.A.Z., Dec. 4, 1991, at 5; *Minister of Defense Volker Rühe "Das ist keine Drohgebärde,"* 30 DER SPIEGEL 32, 34 (1992).

67. German constitutional law has so far differentiated between political aims, *Staatszielen*, and fundamental rights, *Grundrechten*. Political aims do not accord rights to an individual but define objective standards to be met by the state. Konrad Hesse, 14 MARGIN No. 82, at 213 (1984). The translations of *Staatsziel* vary: "a norm describing a goal to be pursued by the state," Philip Kunig, *The Principle of Social Justice, in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW 187, 194 n.22 (Ulrich Karpen ed. 1988); or "state objective," Eckart Klein, *Human Rights of a 3d Generation, in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW 72 (Ulrich Karpen ed. 1988). In contrast, fundamental rights are subjective rights of a defensive or even positive character. Of a defensive character are the classical freedoms; of a positive character are the institutional guarantees, for example those that give private schools a right to state support. Basic Law art. 7. Private ownership is both, art. 14.

68. GEORG JELLINEK, ALLGEMEINE STAATSLEHRE [General Government Theory] 505 (3rd ed. 1914); Peter Badura, *Direkte Teilhabe oder mittelbare Demokratie*, F.A.Z., Dec. 13, 1991, at 8. This is very similar to the American doctrine. THOMAS C. MARKS & JOHN F. COOPER, STATE CONSTITUTIONAL LAW 2-6 (1988).

69. Konrad Hesse, *Grundzüge des Verfassungsrecht in der Bundesrepublik Deutsch-*

statehood of the *Länder* in the fullest sense, the primary task of their constitutions is to define the organizational powers on a state level.

When allocating these different powers, the Länder are left with a wide margin of discretion that finds its limitations in the principle of homogeneity.[70] According to the principle of homogeneity, the *Länder* are obliged to observe the republican and democratic structure based on the rule of law, *Rechtsstaatsprinzip*, as well as on social justice, *Sozialstaatsprinzip*.[71] The principle of homogeneity excludes, for example, the possibility of a state becoming a monarchy or redistributing the allocation of power but allows it to choose different electoral systems or government structures.[72] The principle of homogeneity above all applies to the protection of fundamental constitutional rights, such as human rights, citizen's rights, or institutional guarantees.[73] As a result, state constitutions may not diverge from the tenets laid out by the Basic Law but are free to create new rights.[74]

Nevertheless, fundamental rights are mainly protected by the Basic Law, which directly applies in the *Länder*,[75] and which preempts conflicting state law.[76] Therefore, legislatures need not enumerate fundamental rights in the state constitutions at all. Even mere references to the Basic Law appearing in some of the state constitutions[77] appears to be superfluous from a technical point of view.

Many *Länder* have nevertheless added fundamental rights sections to their constitutions, which rarely confer constitutional protection to substantial rights not already recognized by the Basic Law, including most notably minority rights[78] and social rights.[79] For instance, minority

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land, 17 MARGIN No. 90 (1990); THEODOR MAUNZ & REINHOLD ZIPPELIUS, DEUTSCHES STAATSRECHT, 115 (28 ed. 1991); Badura, *supra* note 68, at 8.

70. MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

71. Basic Law art. 28(1) §1; MAUNZ & ZIPPELIUS, *supra* note 69, at 114; Kunig, *supra* note 67, at 187, 189. A similar requirement upheld the 1949 Constitution of the G.D.R., art. 109(1) §1.

72. Judgment of Dec. 18, 1968, 24 BVerfGE 367, 390 (F.R.G.)(regarding monarchy); Judgment of June 10, 1953, 2 BVerfGE 307, 319(regarding allocation of power); Judgment of Oct. 23, 1951, 1 BVerfGE 14, 44 (F.R.G.)(regarding electoral systems); Judgment of July 22, 1969, 27 BVerfGE 44, 56 (F.R.G.)(regarding government structures); MAUNZ & ZIPPELIUS, *supra* note 69, at 116.

73. Basic Law art. 28(3); MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

74. Basic Law art. 142.; MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

75. Hesse, *supra* note 69; MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

76. Basic Law arts. 31, 142.

77. Constitution of Baden Württemberg, art. 2, one of the old states; Draft-Constitution of Mecklenburg Vorpommern by D. Poetzsch-Heffter — a reference to the fundamental rights is enviseaged in the preamble, Sven Hölscheidt, *Verfassungsberatungen kommen gut voran*, 32 DAS PARLAMENT [Das Parl.], Aug. 2, 1991, at 7.

78. Constitution of Schleswig Holstein, art. . .for the Danish minority; Draft-Constitution of Brandenburg of May 31, 1991, art. 26, 2 GVBl No. 9, 96 (1991) for the Sorben (Wenden), a Slavic minority; Draft-Constitution of the Free State of Saxony of October 1990, arts. 6 and 6a for the Sorbs and the Silesians, a German minority whose mainland now belongs to Poland.

rights had already received a high level of protection in article 113 of the Constitution of Weimar.[80] Although social rights had not been afforded protection, the Constitution of Weimar nevertheless included rather contradictory liberal and socialist economic doctrines.[81]

The example of the state constitutions and drafts has rekindled the discussion of minority and social rights in the Basic Law.[82] Although the Basic Law is unlikely to incorporate similar changes, the phrasing of old fundamental rights in the new drafts and the inclusion of new rights and state aims reflect the state of the German society and the changes it is undergoing. The language pertaining to these social rights in the drafts of the five new states is reminiscent of the past socialist regime, but it is this transitional language that represents the present state of their populations.[83] The slow adoption of Western constitutional doctrine mirrors this gradual change. In addition, the inclusion of fundamental rights helps to integrate and to stabilize the population,[84] still defiant of state authority after nearly sixty years of national-socialist and communist dictatorships.[85]

In addition, state constitutions with fundamental rights stress the autonomy of the states against the federal authority and work towards strengthening federalism.[86] The creation of a strong identification with the state, instead of with the Federal Republic, will be more successful in the East due to several factors, such as historic frontiers, less exposure to modern media or a "circling-of-the-wagons mentality" in the face of perceived Western hegemony.[87] Confirming this trend, the reallocation of powers between the states and the federal institutions has been specifically mentioned in the recommendations for an amendment of the Treaty of the Unity of Germany.[88]

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79. *See e.g.* Draft Constitution of Brandenburg art. 26 (rights of the Sorbs), art. 29 (right to adult education), art. 47 (right to a home), art. 48 (right to work); Draft Constitution of the Free State of Saxony, art. 6a (rights of the Sorbs), art. 7 (right of a decent living), art. 9 (rights of children). According to the Saxon draft, however, these rights do not have the same force as fundamental rights.

80. OTTO KIMMINICH, DEUTSCHE VERFASSUNGSGESCHICHTE 492 (1970).

81. Schneider, *supra* note 14, §3.

82. Klein, *supra* note 64, at 576 (regarding minorities, i.e. the Frisian and Danish minority in the North of Germany and the Sorbs, a Slavic minority in the states of Brandenburg and Saxony). Thomas Darnstädt, *Schöne Worte fürs Volk*, 11 DER SPIEGEL 82, 90 (1992). MP for the Social Democrats, Hertha Däubler-Gmelin.

83. Saxony Minister of Justice, Steffen Heitmann, *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992, at 4.

84. Speech of Marko Schiemann, Member of the Saxon-Parliament, at the constitution seminar of the Konrad-Adenauer-Endowment, Sept. 12, 1991, at 3.

85. Heitmann, *supra* note 83, at 4.

86. MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

87. Bavaria stands as the only example in the West to stress its autonomy.

88. Treaty of the Unity of Germany, *supra* note 4, art. 5.

B. *Constitutional Developments in the Five New States*

1. Developments After the 1989 Revolution and Before Reunification

Constitutional developments in the five new states have shown two trends, one trying to preserve a modified version of socialism and a perceived identity of East Germany, and the other preparing the five new states for accession to the Federal Republic of Germany and its liberal Basic Law. In the period between the opening of the Berlin Wall on November 9, 1989 and the accession to the Federal Republic on October 3, 1990, the one-party dictatorship of the SED[89] slowly ceded its place to a "Round Table" government, a transitional government of a motley opposition movement and of the old leaders, to be found in most countries that abandoned communism at that time.[90] The draft constitution of this "Round Table"[91] favored independence from the Federal Republic of Germany and adhered to some socialist economic concepts, but it stressed the importance of human rights.[92]

Fundamental rights in this draft constitution enjoy a higher level of protection than in the Basic Law.[93] In addition to increased social rights, regional Round Tables tried to find alternatives to the Basic Law's allocation of powers by reinforcing the role of parliament.[94] Some other draft constitutions, such as those written by the professors of the University of Leipzig or by the heads of certain administrative districts,[95] are blatantly

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89. Sozialstische Einheitspartei Deutschland, Unified Socialist Party of Germany, that takes its name from the partially forced union between the social democratic party, SPD, and the Communist party, KPD, on Apr. 21 1946. The dissenting social democrats were persecuted and many of them were killed.

90. Peter Häberle, *Der Entwurf der Arbeitsgruppe "Neue Verfassung der DDR" des Runden Tisches*, 39 JAHRBUCH DES ÖFFENTLICHEN RECHTS NF 319-349 (1990).

91. The transitional government rejected reenactment of the 1949 Constitution. RÖPER, *supra* note 10, at 150 n.4.

92. Draft Constitution of the Working-Group "New Constitution of the GDR [!]" of a Round Table (Apr. 4, 1991), *reprinted in* 2 KRITISCHE JUSTIZ [Krit.J.] 226 (1990). The Draft Constitution addresses human rights in arts. 1-40; the right to work in art. 27; the unlimited possibility to expropriate in art. 31; the absence of employers' rights to defend against strikes in art. 39(5) and (6); and the independence of the G.D.R. in art. 41ff. *See also* Ulrich K. Preuss, *Introductory Remarks Regarding Expropriations*, 2 KRIT.J. 226 (1990). The history of this Draft Constitution is described in Uwe Thaysen, DAS PARL. 71, 257, 296 (1990).

93. This higher level of protection is reached by enumerating rights that the Basic Law includes only through interpretations by the Constitutional Court, or by scholars, but it does not specify or add any new rights not recognized by the Basic Law. An example of the former is the right to leave the country, Draft Constitution art. 6(1), or the right to obtain one's own data and the right to privacy, arts. 8(1) and 8(2). An example of the latter is the prohibition to discriminate on grounds of sexual orientation, Draft Constitution art. 1(2) § 2.

94. For the Draft Constitution by a Round Table in Mecklenburg-Vorpommern, see Hölscheidt, *supra* note 77, at 7.

95. Speech of Marko Schiemann, Member of the Saxony Parliament, before the Constitution Committee of the three middle administrative districts (*Bezirksverwaltungen*) of

socialist and attempt to save the old regime.[96] In contrast, the Round Table in Saxony decided to draft a constitution that was not only inspired by the Basic Law but also anticipated reunification.[97] In Mecklenburg-Vorpommern a second draft constitution avoided conflicts on fundamental rights or economic theories by limiting its scope to an organizational statute.[98] Only the revised form of the Saxon draft constitution and the drafts in Mecklenburg-Vorpommern survived to be considered by the state parliaments elected in the fall of 1990. This might be welcomed as a slow but steady retreat of the old regime and its ideologies or as a victory for the West German constitutional doctrine. On the other hand, the development of alternatives or ameliorations was neglected in favor of rather hasty, Basic Law-oriented draftsmanship.[99]

As in the elections to the parliaments of the five new states, the sometimes Utopian grass roots optimism of the civil rights movements did not find a majority and their drafts were discarded. On the Federal Level, this development was mirrored by the fate of an alternative constitution[100] presented to the public by a motley group of left-wing and green prominent citizens from the West and the East. This constitution attempted to transform society into a peaceful ecological society with a grass root-based government.[101] Its phrasing and content evoked the communist past of some of its authors, including the writer Christa Wolf.[102] However, only a few of the proposals made by the group have been introduced into the discussion of the committee to change the constitution.[103]

2. Constitutional Developments in the Parliaments

Since the 1990 parliamentary elections in the five new states, procedural rules such as the composition of the constitutional committees and voting requirements have gained importance. Constitutional committees were established in all five new states, although only Brandenburg created its committee through legislation.[104]

In Saxony, Saxony-Anhalt, and Thuringia, the committees are com-

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Dresden, Leipzig and Chemnitz, Apr. 18, 1990.

96. *Id.*

97. Concluding Remarks to the First Gohrisch Draft Constitution (1990).

98. Verfassung für Mecklenburg-Vorpommern, Draft by von Mutius and Starck (Apr. 1991), *reprinted in* KOMMISSIONS-DRUCKSACHE 15 (June 5, 1991).

99. Jürgen Schwabe, *Anmerkungen zum Verfassungshandwerk*, 10 ZEITSCHRIFT FÜR RECHTSPOLITIK 361-363 (1991).

100. *See* Volker Zastrow, *Schöne Ideen, Vorschläge eines "Kuratoriums" zur Grundgesetzreform*, F.A.Z., Jan. 15, 1992 at 10.

101. *Id.*

102. *Id.*

103. The oppositional SPD still favors a referendum. Zastrow, *supra* note 100, at 10. The ruling CDU, especially the Eastern CDU, ranks amending the constitution as a low priority in the face of daily problems. Interview with Stefan Heitman, Minister of Justice of Saxony, *reprinted in* Günter Bannas, *Ein langer Wunschzettel*, F.A.Z., Oct. 16, 1991, at 14.

104. 4th Draft Constitution of Brandenburg 26 (1991).

posed of members of the parliament in proportion to their representation. Legal experts also participate in their sessions. Following the distribution of seats in Brandenburg, fifteen members of parliament and fifteen non-parliamentarians, representing various social groups and nominated by the parties, serve on the committee.[105] In Mecklenburg-Vorpommern, eleven parliamentarians are accompanied by four experts nominated by the four parties represented in parliament; four experts from the civil rights movement not represented in parliament; one representative from the government; and legal advisors who do not vote.[106] The composition of the committees will be decisive features of the constitutions. Admitting representatives to these committees without any democratic legitimation may be in deference to the role civil rights movements played in the peaceful revolution in Mecklenburg. However, neither the civil rights groups nor the social groups represent the population to be governed by the constitution.[107]

A point of dispute is whether to enact the constitutions by plebiscite or by vote in parliament. In addition, the parliaments must decide whether the vote should be on one constitution, on alternative constitutions, or even on each proposed article. This issue has been given widespread media attention, especially by the newspapers that are still dominated by socialists who hope to score points on such popular issues as the right to work.[108] The major parties have avoided taking a clear position in order to maintain their bargaining positions.

From a legal point of view, the parliaments have been given the powers of the *pouvoir constituant*, free to adopt a constitution.[109] Some have argued that reintroducing the Länder under the Basic Law reintroduced the former constitutions as well.[110] The parliaments would then have to conform to the former law, requiring in Saxony, for example, a two-thirds majority to create a new constitution.[111] The Saxon constitution was finally adopted by a two-thirds majority vote in parliament with the consent of the oppositional Social Democratic Party.[112]

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105. Hölscheidt, *supra* note 77, at 7.

106. Christian Starck, *Verfassungsgebung in den neuen Ländern*, 1 ZEITSCHRIFT FÜR GESETZGEBUNG 1, 8 (1992); Hölscheidt, *supra* note 77, at 7.

107. In Brandenburg the constitutional committee has now decided to continue its work without its non-parliamentarians. *Die CDU will die Verfassung mittragen*, F.A.Z., Dec. 21, 1991, at 4.

108. Interview with Professor Karl-Heinz Schönburg, *reprinted in Die grosse Furcht der Unternehmer vor sozialen Rechten, Brandenburgs Verfassungsentwurf geht diese Woche ins Landtagsplenum*, NEUES DEUTSCHLAND, Dec. 17, 1991, at 5. Neues Deutschland is the former party paper of the SED, formerly the ruling socialist party. In Saxony, the PDS attempted to force parliament by plebiscite to have a plebiscite on the constitution. 10 Informationsdienst PDS (May 19, 1992).

109. Albrecht Randelzhofer, Speech Given at a Seminar of the Konrad Adenauer-Stiftung in Berlin, Sept. 9, 1991 (not published).

110. RÖPER, *supra* note 10, at 168.

111. *Id.* at 168; 1947 Constitution of Saxony, art. 92(2).

112. *Sächsischer Landtag beschlieszt die Verfassung*, F.A.Z., May 27, 1992, at 1.

From a political point of view, given the distrust of authorities in the East and given that the constitutions of the five new states are supposed to have an integrating effect immediately, a plebiscite on alternative constitutions should be permitted. However, a plebiscite may cause embarrassment due to absenteeism of a population preoccupied with adapting to Western economic standards.[113] In Brandenburg, the legislators dared to submit their constitution to a plebiscite, but although the constitution was accepted by an overwhelming majority, voter turnout was below 50%.[114]

The deadlines of the constitutions had to be postponed several times. Brandenburg designated October 15, 1991 for the second and third sessions in parliament, but eventually had to postpone the sessions following heavy criticism of its draft.[115] Thuringia set the end of 1992 as the final date for its constitution.[116] The other states have made informal commitments that had to be postponed. For example, Saxony's informal time schedule was similar to Brandenburg's,[117] but even the sessions of the constitutional committee have been interrupted due to procedural disputes over the admission of legal advisors.

Similar problems occurred at the Federal level. The most important issue will be whether Basic Law article 146, or other concerns, require a general referendum on the final draft or on the amendments of the constitution.[118] Procedural problems arose even before the constitutional committee convened for the first time.[119] The ruling Christian Democratic Union (CDU) attempted to dissociate the time frame for the committee's final report from the year of general Federal elections in 1994 in order to prevent the oppositional SPD and other parties from utilizing populist constitutional issues.[120] The problem of advisors and special interest groups also reappeared as Members of the *Bundesrat* and the *Bundestag* requested to be included in the deliberations.[121]

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113. Köcher, *supra* note 66, at 5. Prior to reunification, only 14% of the West German population was in favor of a reform of the Basic Law. After reunification, the upheavals in the East, and the ensuing debate on immigration policy in Western Europe, 26% of the West German and 58% of the East German population favored reform.

114. *Id.*

115. DER TAGESSPIEGEL, Sept. 17, 1991, at 7; F.A.Z., Dec. 19, 1991, at 5.

116. Thüringer Landtag Drucksache 1/285 1 (Apr. 10, 1991) (referring to art. 18(2) of the Preliminary Constitution).

117. Radio Interview with Christoph Partsch, Legal Advisor in the Parliament of the Free State of Saxony, on Sachsen Radio, July 1991.

118. Darnstädt, *supra* note 82, at 82, 90, and 93.

119. *Uneinigkeit über den Zeitplan der Verfassungskommission*, F.A.Z., Nov. 8, 1991, at 2.

120. *Id.*; Darnstädt, *supra* note 82, at 82, 90.

121. *Id.*; *Vogel fordert mehr direkte Demokratie*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2.

3. Selected Aspects of the Contents of the State Constitutions

a. Plebiscites

The drafters of the Basic Law witnessed the constant threat to parliamentarism posed by the disapproval of its constituency in the Weimar Republic,[122] so they incorporated purely indirect democracy into their document.[123] In contrast, the new states have all incorporated various forms of plebiscites into their draft constitutions in an attempt to enable democratic participation by an electorate that has little experience in democratic politics. The Western state constitutions also included plebiscitarian elements, but they proved to be prohibitive in constitutional reality.[124] In accordance with growing criticism in the West, especially by environmentalists and the parties of the left,[125] and in an attempt to mark a difference with the old regime, all the draft constitutions contain varying elements of direct democracy.

The constitution of conservatively-ruled Saxony[126] permits citizens to demand that parliament enact a statute by collecting 40,000 signatures.[127] Should parliament refuse or neglect to enact the statute, a minimum of 450,000 signatures is necessary to initiate a referendum.[128] In the final draft, the CDU proposed, as a bargaining chip, a requirement that at least 50%(!) of the eligible votes would be necessary to pass a referendum.[129] This nearly prohibitive obstacle was dropped, and instead the number to initiate a referendum was raised from 200,000 to 450,000.[130] In addition, the Saxon draft constitution proposes that a referendum may be initiated by one-third of the members of parliament on a statute already voted on, but not yet promulgated.[131]

In Brandenburg, governed by a coalition of the Social Democrats and the Eastern Green Party, only 20,000 signatures are needed to demand that parliament enact a statute,[132] and initiating a referendum requires only 80,000 signatures.[133] An affirmative vote by at least one quarter of

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122. CRAIG, *supra* note 8, at 416-17.

123. Wolfgang Graf Vitzthum, *Citizens' Participation in State Functioning*, *in* RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 159-60, 169 (Christian Starck ed., 1987).

124. Graf Vitzthum, *supra* note 123, at 171-72.

125. *Id.*

126. In Saxony, the center-right CDU forms the government alone.

127. Constitution of the Free State of Saxony, art. 71(1).

128. *Id.*, art. 72(2).

129. *Id.*, art. 72(5). The Gohrischer draft demanded a majority of at least one-third of the eligible votes; the SPD, the oppositional Social Democratic party, demanded a majority of at least one-fifth; the PDS, the party succeeding the formerly ruling communist SED, proposed a simple majority of the votes.

130. *Compare* Draft Constitution art. 72(5) *with* Constitution art. 72(2).

131. Constitution of the Free State of Saxony, art. 73.

132. Constitution of the State of Brandenburg, art. 76(1).

133. *Id.*, art. 77(3).

the eligible votes is sufficient to pass the act.[134] In addition, the Brandenburg constitution permits 150,000 signatures to demand enactment of a statute, 200,000 signatures to initiate a referendum, and a two-thirds majority of at least half of the eligible voters to dissolve parliament.[135]

Although the states differ in population,[136] the rift between the requirements of the two states is apparent. While the obstacles to a plebiscite were shifted to an earlier stage in the Saxon constitution, Brandenburg entrusts a mere one quarter of its electorate to bypass the legislative mechanism of its otherwise representative democracy. To grant a fraction of the population considerable influence appears to be dangerous in a society that has found it easier to adapt to Western materialism than to Western democratic thinking.[137] But even in Saxony, the communist PDS lost no time and had no difficulty in obtaining the required 40,000 signatures to demand a referendum.[138] Especially in a time of economic reconstruction, the population in the five new states tends to cherish such "advantages of the old system" as the alleged absence of unemployment and the availability of kindergartens.[139] In addition, a rather quixotic voting pattern by the citizenry in the five new states[140] undermines confidence that the Eastern population will master the responsibilities of direct democracy. For example, the PDS is apparently the only party with confidence of obtaining the required votes from its still well organized supporters, and it favors the elimination of all minimum requirements in plebiscites.[141]

Finally, some plebiscitarian characteristics in the state constitutions might conflict with the Basic Law and, therefore, might be considered unconstitutional. Article 2(4) of the Brandenburg constitution, for example, puts legislation by plebiscite on equal ground with legislation by parliament. The Basic Law, however, interpreted in accord with the principle of homogeneity, gives priority to a representative democracy at the state level, while accepting certain forms of plebiscites.[142] State law that decisively alters the distribution of powers is unconstitutional.[143] To give

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134. *Id.*, art. 78(2).

135. *Id.*, arts. 76(1), 77(3), 78(2). The numbers in the draft constitution had been slightly lower, 100,000 and 150,000. Draft Constitution arts. 78(1), 79(3).

136. Saxony has 3.71 million citizens; Brandenburg has 1.95 million; Saxony-Anhalt has 2.23 million. Starck, *supra* note 106, at 17.

137. Köcher, *supra* note 66, at 5.

138. They obtained 47,037 signatures. *Kein Volksentscheid zu Sachsens Verfassung*, NEUES DEUTSCHLAND, May 26, 1992.

139. *Id.* A similar development can be witnessed in other countries recently liberated from Communism, such as Poland. *Many Poles Now See '81 Martial Law as Justified*, N.Y. TIMES, Dec. 22, 1991, at A8.

140. Compare the smooth voting patterns in the Western state to the rather abrupt and incoherent changes in the Eastern states. Köcher, *supra* note 66, at 5.

141. Alternate Draft Constitution of the Free State of Saxony, art. 72(5), proposed by the PDS and the Eastern Green Party.

142. Jarass & Pieroth, *supra* note 30, at 370.

143. MAUNZ & ZIPPELIUS, *supra* note 69, at 114, 438.

plebiscites equal effect would reduce the parliament's power decisively and transform Brandenburg into a direct democracy. As a result, Brandenburg constitution article 2(4) might be declared unconstitutional by the court. In addition, the Brandenburg constitution grants plebiscitarian rights to foreigners and stateless persons as well.[144] This would clearly conflict with the present Basic Law.[145]

On the Federal level, these developments began to take shape when the Social Democratic Party demanded more elements of direct democracy in the new constitution.[146] Opponents argue that plebiscites on a federal level would allow minorities to take advantage of absenteeism and push through populist or even minority views.[147] The shift of power from the states to the Federal level has decreased resistance to plebiscites on the state level. However, such resistance remains strong at the Federal level, rendering the implementation of plebiscites at the Federal level improbable.

b. Fundamental Rights and Political Aims

The constitutions in the five new states attempt to mix traditional and newly developed fundamental rights with political aims. Fundamental rights, *Grundrechte*, are subjective rights of a defensive or even positive character,[148] while political aims, *Staatsziele*, do not accord rights to an individual but define objective standards to be met by the state.[149] Except for one of the Mecklenburg-Vorpommern draft constitutions, all of the new states have chosen to include fundamental rights sections similar to that of the Basic Law in order to stress the rights East Germans are now able to enjoy. Careless rewording of Basic Law articles in the state constitutions and blind copying of negligent formulations in the Basic Law are possible disadvantages of this practice.[150] Some of the new

144. Peter J. Winters, *Keine grundsätzliche Immunität, Brandenburgs Verfassungsentwurf*, F.A.Z., Dec. 19, 1991, at 4. The draft constitution left this open to interpretation since it did not define "citizens," *jede Bürgerin und jeder Bürger*, as entitled to start a plebiscite in article 78(1) or to vote in article 23(1). Schwabe, *supra* note 99, at 363. The Constitution in article 76(1) uses *Einwohner*, resident, and article 22(1) uses *Bürger* as well.

145. Judgment of Oct. 31, 1990, 80 BVerfGe 37-59, 60-81 (decision of the Constitutional Court on voting rights of foreigners on the community level in Hamburg and Schleswig-Holstein).

146. *Vogel fordertmehr direkte Demokratie*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2.

147. Zastrow, *supra* note 100, at 10; Badura, *supra* note 68, at 8.

148. The classical freedoms are defensive by nature, and the institutional guarantees that give private schools a right to state support, for example, are positive. Basic Law art. 7. Private ownership is both, art. 14.

149. Hesse, *supra* note 67, at 213.

150. Schwabe, *supra* note 99, at 362, 363. For an example of careless rewording, *see* Saxon draft constitution art. 7(6), which reduces the state's duty to observe a political aim by profuse definition; Brandenburg draft constitution arts. 23(1) and 78(1) do not define the legal term citizen and use it differently, *jede Bürgerin* as opposed to simply *Bürgerin*. For an example of careless copying, *see* Saxon draft constitution art. 17(1), which copies the unfortunate wording of Basic Law art. 3(1) ("*..vor dem Gesetz gleich*") that appears to ex-

states have decided to delete fundamental rights that have been implied into the Basic Law by the Constitutional Court.[151] These clarifications appear to help avoid misconceptions about the existence of such rights.[152] Unfortunately, other unwritten fundamental rights that may be even more important to East Germans, such as the right to leave the country, have also been left out.[153]

The principle of homogeneity permits states to grant additional, or more extensive fundamental rights, and some of the new states have chosen to do so.[154] Brandenburg's draft created a variety of new fundamental rights, such as the right to social security, to a home, to work,[155] to political participation,[156] to education for adults,[157] and to co-determination in factories.[158] Several of these rights are remnants of the old East German concept of socialism, though the population and the politicians are slow to admit that the advantages from these rights are non-existent.[159] For instance, the right of political participation is ill-defined and superfluous,[160] and the general right to social security is already included in the *Sozialstaatsprinzip*, the principle of social justice.[161] The right to co-determination is forwarded by the Social Democratic Party on a federal

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clude the legislature from the principle of equality. The same equivocal definition is found in Brandenburg draft constitution article 13. The Round Table draft article 2 had replaced law, *Gesetz*, by public authority, *öffentliche Gewalt*.

151. For example, the right to privacy, *allgemeines Persönlichkeitsrecht*, developed from Basic Law arts. 1 and 2. Judgment of June 3, 1980 54 BVerfGE 148, 153, 208, 217; Judgment of Feb. 8, 1983 63 BVerfGE 131, 142. The extent of this right is difficult to phrase in an article. Part of the right to privacy, the unwritten right to one's own papers, *Recht auf informationelle Selbstbestimmung*, was developed in Judgment of Dec. 15, 1983, 65 BVerfGE 1, and has been included in Brandenburg draft article 12 and Saxon draft article 32.

152. Rita and Frank Taubenfeld, *Problems of Designing Stable Democracies*, 24 INT'L LAW. 689, 706, 707 (1990). The authors arrive at the curious conclusion that there is no right to privacy in the Federal Republic, only the right to one's papers, even though both rights are implied. *Cf.* 54 BVerfGE 148, 153 and 65 BVerfGE 1.

153. The Round-Table draft article 6(1) specifically provided for this right.

154. Whereas Basic Law article 8 extends the right to assemble only to Germans, Brandenburg draft article 24(1) and Saxon draft article 22 extend this right to everyone.

155. Brandenburg Draft Constitution arts. 45, 47 and 48.

156. *Id.*, art. 22.

157. *Id.*, art. 29. Article 36 even grants a right to vacations for professional, cultural or political education for adults.

158. *Id.*, art. 50.

159. For a description of the old communist attitude towards social rights as a tool to combat capitalism and towards constitutions as a mere description of a transitional phase in society, *see* Karl-Heinz Schönburg, *Die grosse Furcht der Unternehmer vor sozialen Rechten*, NEUES DEUTSCHLAND, Dec. 17, 1991, at 5. In the Eastern states, 90% of the population would like to have a right to a home, 83% a right to a place in kindergarten, 85% a right to work. Köcher, *supra* note 66, at 5.

160. Such a right is included in the *Allgemeine Handlungsfreiheit*, the general freedom to act, which is a right interpreted into the Basic Law article 2(1). Judgment of Jan. 16, 1957, 6 BVerfGE 32, 36.

161. *See generally* Kunig, *supra* note 67, at 187-204.

level,[162] but the right is already included in federal statutory law to a reduced degree.[163] The final Brandenburg constitution attenuated the rigor of these rights by ambiguous wording that could be interpreted as merely defining state aims.[164] The Saxon constitution attempts to accommodate similar demands from its electorate with western constitutional doctrine by a slightly confused phrasing referring to some of these social rights as political aims.[165]

Some of the social rights incorporated in the state constitutions infringe on federal constitutional law and, therefore, must be considered unconstitutional. For example, Brandenburg draft constitution article 51 prohibited the lockout of workers, a subject matter that is Federal concurrent legislation.[166] The final constitution does not contain lockout provisions.

On the Federal level, demands for including social rights have resurfaced in the constitutional committee.[167] Brandenburg's Social Democrats have retreated from rhetoric appealing to a population still imbued with socialism, and they now lean toward opinions more consistent with Western constitutional doctrine. Nevertheless, the effects of their promises linger on.[168] Those who support the inclusion of social rights in the constitution remain unimpressed by the economic effects of those rights and the collapse of socialism.[169] The state draft constitutions demonstrate that some inclusion as political aims might be considered. However, this will depend on whether the new Federal constitution will be subjected to a public referendum. In that case, the doctrinal difference between political aims and fundamental rights should be stressed in order to avoid a dilution of the normative force of the latter.[170] In addition, the question

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162. DAS GRUNDSATZPAPIER FÜR DEN SPD VORSTAND, ZUR VERFASSUNG DES DEUTSCHEN STAATES [The Basic Paper of the Executive Board of the SPD, Regarding the Constitution of a German State], *reprinted in* 26 RECHT UND POLITIK 207, 212 (1990) [hereinafter Basic Papers of the SPD].

163. Judgment of Mar. 1, 1979, 50 BVerfGE 290.

164. *See* art. 45(1) (right to social security); art. 47(1) (right to a home); art. 48(1) (right to work); art. 21(1) (right to political participation); art. 29(1) (right to education); art. 50 (right to co-determination).

165. For example, article 7 bears the title, "Decent Living Conditions as a *Staatsziel*," and recognizes the right to work, art. 7(1), and the right to a decent residence, art. 7(1), as political aims.

166. Basic Law art. 74.

167. Günter Bannas, *Dem Verfassungsausschuss stehen zähe Beratungen bevor*, F.A.Z., Oct. 16, 1991, at 14.

168. *Opinion of the Liberal Party, FDP*, F.A.Z., Dec. 19, 1991, at 5.

169. Ninety percent in the East and sixty-six percent in the West favor a right to a home; eighty-three percent in the East and sixty-six percent in the West favor a right to kindergarten; eighty-five percent in the East and forty-nine percent in the West favor a right to work. Köcher, *supra* note 66, at 5.

170. Basic Papers of the SPD, *supra* note 166, at 208. Inconsistent with this demand, the Brandenburg constitution enumerates ambiguously worded articles under the heading "2nd Main Chapter: Rights and Political Aims."

whether the Basic Law should remain neutral on economic issues[171] will be resolved when social rights or the prohibition of lock outs are forwarded again.[172]

Similarly the inclusion in the state constitutions of environmental protections[173] will influence the shaping of the Federal constitution. In addition, private interest groups like animal rights and ecological movements have proposed to include such interests as "co-creationship" or the "preservation of the natural resources of life" as political aims.[174] As a result, the constitutional committee no longer disputes inclusion of some protection of the environment as a state aim in the Federal constitution.[175]

In addition, the new states' drafts reveal trends that will enrich the discussion on the amendments of the Basic Law. The attention that the state constitutions give to minorities and foreigners[176] will probably result in a change of standing for foreigners in the Basic Law as well.[177] Families and children may also benefit from the attention given to them in the state constitutions.[178]

Moreover, real or perceived shortcomings of the Basic Law will be open to discussion again. For instance, the Basic Law's conditional prohibition of private primary schools,[179] an "un-liberal" and "un-dogmatic"

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171. Judgment of Mar. 1, 1979, 50 BVerfGE 290, 336; Hesse, *supra* note 67, at no. 22 (Das Grundgesetz läszt bestimmte Fragen, etwa solche der Wirtschaftsverfassung bewuszt offen, um hier freier Auseinandersetzung und Gestaltung Raum zu lassen) [The Basic Law leaves open certain questions, for example, that of constitutional guidelines for the economy, with the intention of enabling free discussion and modelling]; Volker Kröning, *Kernfragen der Verfassungsreform*, 5 ZEITSCHRIFT FÜR RECHTSPOLITIK 161, 162 (1991).

172. Hartmut Kliemt, *Im Wettlauf der Gruppenwünsche, Die verletzlichen Chancen für eine gute Wirtschaftsverfassung in der Demokratie, Das Grundgesetz der Bundesrepublik hat sich bewährt*, F.A.Z., Feb. 1, 1992, at 15.

173. *E.g.* Brandenburg art. 39; Mecklenburg-Vorpommern draft art. 10; Saxony art. 10; Saxony-Anhalt art. 35; Thuringia draft art. 19.

174. *Tierschützer fordern "mitgeschöpflichkeit als Staatsziel*, F.A.Z., Feb. 26, 1992, at 1; Darnstädt, *supra* note 82, at 90.

175. Bannas, *supra* note 167, at 14. All parties in the FRG now agree to include such a political aim. BERLINER MORGENPOST, Nov. 17, 1991, at 4.

176. *See e.g.* Brandenburg draft art. 26 (Sorbs), art. 24 (the right to assemble applies to foreigners as well), and art. 23 (might include foreigners, though unconstitutional under the present Basic Law); Saxon draft art. 6, 6a (Sorbs and other minorities), art. 22 (the right to assemble applies to foreigners as well). The Basic Law grants the right to assemble only to German citizens, art. 8, and the right of foreigners to assemble is guaranteed by art. 2, *Allgemeine Handlungsfreiheit*, but can be limited by legislation.

177. At the same time, the very liberal right of asylum will probably be reduced. Sixty-seven percent in the East and seventy-four percent in the West are in favor of such a reduction. Köcher, *supra* note 66, at 5.

178. *E.g.* Brandenburg art. 27 (protection of marriage, family, unmarried hetero- or homosexual couples, and single parents), art. 28 (rights of children); Saxony art. 9 (protection of children as a political aim). The Basic Law protects the institutions of marriage and family, art. 6(1). Children are protected by arts. 1-19 but not specifically. Illegitimate children have a right to equal treatment in accordance with art. 6(5).

179. Art. 7(5).

remnant of anti-elitist thought after World War II, will be open for discussion. Although the state drafts decline to explicitly allow private primary schools, most treat private schools benevolently.[180]

Surprisingly, neither the state constitutions nor the constitutional committee at the federal level attempt to reform or to reformulate the ambiguous wording of the Basic Law.[181]

4. Alternative Concepts of a Constitution: The Case of the State of Brandenburg.[182]

Brandenburg's draft constitution differed most from those of the other states as well as from the present Basic Law. It revealed a different, but interesting, concept of society, including proposals from the opposition parties at the Federal level. Brandenburg's draft constitution — and many of the dissenting opinions in other state draft constitutions — appeared to come close to violating federal law in order to put pressure on the process of amending the Basic Law.[183] This was, therefore, both a constitutional and a political challenge.[184]

The Brandenburg draft demonstrates the gradual transition from communist constitutional doctrine to that of a modern, liberal democratic society more than any other state constitution. Communist constitutional doctrine perceives constitutions as a momentary description of the state of progress of a society towards socialism.[185] Such a constitution tends to portray the relations between its citizens and towards the state more or less truthfully[186] and puts little emphasis on fundamental rights.[187] The Brandenburg draft heavily emphasized fundamental rights, but many of its articles still tended to reorganize society as a whole and to educate its citizens. For example, Brandenburg draft article 13(2) stated that every-

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180. Anxious to invite private schools to oppose their state schools, which are still dominated by the teachers of the old regime, Brandenburg and Saxony have given private schools a right to be admitted.

181. Schwabe, *supra* note 99, at 362.

182. Brandenburg is governed by the Social Democratic Party and the Eastern Green Party. As a result, it is the only Eastern state not ruled by the CDU or a coalition of the CDU and the FDP. Its premier, Manfred Stolpe, SPD, has been accused of cooperating with the former Secret Police, STASI, but so far has refused to step down. Rolf Soderlind, *East German Politician Faces New Stasi Allegations*, Reuters, Feb. 16, 1992, *available in* LEXIS, Nexis Library, Current file. The oppositional CDU so far has not succeeded in placing a convincing opposition leader in Brandenburg. Lothar de Maiziere renounced his post as party leader after similar allegations were made as against Stolpe. *Id.*

183. *Land ohne Geheimdienst*, 34 DER SPIEGEL 50, 50-53, Aug. 19, 1991; Professor Josef Isensee, *quoted in Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992, at 4.

184. CDU Member of the Brandenburg Parliament Blechinger, *quoted in Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992 at 4.

185. Schönburg, *supra* note 159, at 5.

186. Taubenfeld & Taubenfeld, *supra* note 152, at 706 n.28, at 707 n.30.

187. The fundamental rights contained in the Constitution of the German Democratic Republic, although superficially impressive in number, were merely declarative and were not enforceable as subjective rights.

one owed everyone else recognition as equals, but the extent of this third-party norm appeared questionable.[188] The adopted constitution did not include this article. Another example of social organization is Constitution article 46, which imposes an affirmative duty upon everyone to defend others from imminent attack, pursuant to the laws.[189] Both of these norms attempt to educate the Brandenburg citizens rather than to protect them against the state. In addition, the inclusion of various social rights, such as the right to work, to a home, or to a place in kindergarten, contributes to the idealistic, if not utopian, character of the constitution.

Burdening the constitution with policy formulations furthers the misconception of the role of a constitution. To achieve the new social norms, the Brandenburg draft exhorted political action. Article 9(2) assured that the state would abolish criminal punishment for abortion during the first trimester of pregnancy. Draft article 2(6) stated confusingly that Brandenburg would assert its already existing rights in the federation.[190] Article 12(3) asserted that Brandenburg would not accept an intelligence service working against subversive activities as a reaction to the formerly omnipotent and omnipresent Eastern secret service, *Staatssicherheitsdienst*, the Stasi.[191] Neither of these draft articles were adopted into the final constitution.

Although the Brandenburg draft constitution was hailed as the most progressive German constitution by some,[192] it failed to distinguish sufficiently between fundamental rights and political aims.[193] The lack of any distinction between fundamental rights and political aims in the Brandenburg draft constitution further undermined its credibility. Oblivious to economic and social conditions, the social rights may not have been fulfilled. The disenchantment resulting from a constitution that makes more promises than it can keep might be detrimental to fundamental rights as well.

Furthermore, some norms in the draft constitution conflicted with the present Basic Law and contributed to a lack of credibility because

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188. Schwabe, *supra* note 99, at 363; Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms*, *in* RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 19, 47 (Christian Starck ed. 1987).

189. According to the law, everyone must help out when there are accidents, catastrophes, and emergency hardships.

190. Critics have called it a comical article. Schwabe, *supra* note 99, at 363.

191. Stephen Kinzer, *Germans will see Stasi Files*, N.Y. TIMES, Nov. 15, 1991, at A6; Ralf Georg Reuth, *Es wird manche überraschungen geben, die Akteneinsicht in der Gauck-Behörde*, F.A.Z., Dec. 27, 1991, at 5.

192. Minister of Interior Ziel (SPD), *quoted in*, F.A.Z., Dec. 19, 1991; Gustav Just (SPD), Head of the Constitution Commission, *quoted in*, 34 DER SPIEGEL 50, Aug. 19, 1991.

193. The heading for Brandenburg draft articles 5-56 is "Fundamental Rights and Political Aims," with no further distinction regarding the character of each article. Saxony's draft, to a lesser degree, suffers from the same confusion. For instance, it has different article headings, but phrases fundamental rights and political aims in a confusingly similar fashion. *See e.g.* arts. 7, 9.

they may have been unenforceable. The provision in the Brandenburg draft banning a secret service conflicted with the Basic Law because the article violated the principle of the "defendant democracy."[194]

The assurance of cultural autonomy for Sorbs[195] beyond state borders is controversial at best and tarnishes the otherwise remarkable protection of minorities in the constitution.[196] Also, the anti-nuclear and anti-military stance[197] conflicts with federal jurisdiction on this subject matter. It should be added, however, that some constitutions in the western states, introduced shortly after World War II, also contain social rights,[198] such as the prohibition of lock outs, that have been interpreted by the courts as having no force. Nevertheless, including daily politics and utopian strategies in a constitution dilutes its normative force.

Finally, a constitution hindering the ability of a democratically elected government to act will defray its credibility. The Saxon draft constitution's dissenting opinions featured a number of institutions that would have slowed or thwarted decision making. The citizens commissioner, *Bürgerbeauftragter*, was supposed to represent the citizens against the government.[199] If the government did not follow the recommendations of the commissioner, a committee had to be formed to resolve the conflict.[200] Similar types of commissioners have been envisaged to ensure human rights, the protection of the environment, equal rights, and the affairs of foreigners.[201] These commissioners have been branded as parliamentarian escapism or as rulers without a majority.[202] Even more prob-

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194. The concept of a defendant democracy was introduced as a reaction against the Weimar Constitution's neutral stand against its own enemies. The concept gives the Constitutional Court, among others, the power to eliminate parties opposed to democracy. Basic Law art. 21(2). In addition, basic rights can be forfeited. Basic Law art. 18. Günther Dürig, *An Introduction to the Basic law of the Federal Republic of Germany*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW 11, 15-16 (Ulrich Karpen ed. 1988).

This article was taken out of the final draft of the constitution. Winters, *supra* note 144, at 4.

195. Brandenburg Constitution art. 25(2).

196. Saxon constitution art. 6(a) is similar but excludes the controversial language.

197. Article 39(9) states that Brandenburg will attempt not to accept nuclear arms on its territory. Equally ripe for conflict was draft article 56, which stated that Brandenburg would abolish lifelong confinement in prison and would grant participatory rights to inmates, a subject matter of federal jurisdiction. Brandenburg constitution article 54 no longer contains such a provision.

198. Uwe Thaysen, *Verfassungsrechtliches Licht im Osten?*, DER TAGESSPIEGEL, May 27, 1992, at 7.

199. Art. 53 (Dissenting opinion of the Social Democratic Party).

200. Art. 53(a)(5).

201. Art. 53 (Dissenting opinion of the Green Party and the PDS).

202. Thaysen, *supra* note 199, at 7 (Dietrich Rauschning at the Hearings of the Saxon parliament, June 15, 1991). However, similar types of commissioners exist in many states for the protection of the right to one's own papers and for the protection of soldiers on the federal level. Basic Law art. 45(b). These federal commissioners are justified by the difficulty of the executive to control use the right of one's own papers against itself and with the problematic position of soldiers when defending their rights against their superiors.

lematic are committees formed to resolve conflicts in which the political parties are not represented according to their strength.[203] A senate-like institution, representing communities,[204] would certainly slow down legislation, as would a committee to assess the impact of new technologies on nature and society.[205] Although some of these institutions might help decrease the growing alienation between the politicians and their electorate, they may lead to a growing immobility of the parliament or to the rule of a minority even more dangerous to the credibility of a democratic constitution. Nevertheless, faced with the necessity to achieve a two-thirds majority for the constitution, Brandenburg's ruling politicians had to dress down most of their controversial demands.[206]

V. CONCLUSION

The reunification of Germany has led to important changes in the country as well as in the German Federal Constitution. Germany once again had to pay a very high price for starting World War II, and its constitution now reflects the end of this development. Contradictory expectations from Germany's neighbors regarding its participation in international military actions find their parallel in the constitutional debate on such actions. At the same time, Germany prepares for further integration into the European Community.

With regard to internal politics, the controversies about the draft constitutions of the five new states have shown a deep concern for attaining a very high level of fundamental rights as well as a high level of social rights. The former concern originates from a deep distrust of government and is easily comprehensible in light of East Germany's recent history. Nevertheless, it should be noted that the rest of the East European countries have shown far less concern and readiness to master their past through constitutional safeguards. The concern about social security shows a contradictory dependance on government by a population that had been forced to renounce individualism and entrepreneurship.

On the federal level, these conflicting messages now have to be taken into account when amending the Basic Law. The new amended German Federal Constitution will stress the importance of preserving the environment, and of creating an economy with a strong sense of social justice and perhaps with more elements of direct democracy. However, sudden or abrupt changes in the German constitutional system will not occur because a two-thirds majority is needed to pass any of the amendments.[207] Given

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203. Art. 49(a)(2) (Dissenting opinion by the SPD, the Green Party and the PDS).

204. Art. 3(a) (Dissenting opinion of the Green Party; *See Zum Landtagsentwurf der Verfassung des Freistaates Sachsen*, DIE GEMEINDEKAMMER, Dresden, June 18, 1991.

205. Art. 47(a) (Dissenting opinion of the SPD).

206. *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992 at 4; *Beratungen in Potsdam über die Landesverassung für Brandenburg*, F.A.Z., Mar. 3, 1992, at 4.

207. Basic Law art. 79(2); Andreas Thewalt, *Schon jetzt lässt der Wahlkampf grüssen*, BERLINER MORGENPOST, Nov. 17, 1991, at 4.

the present distribution of power, the Christian Democrats and the Liberals in government are far from reaching such a majority with the Social Democrats, the Green Party and the PDS. The conflicts over the new Federal constitution have shown, however, that both sides are willing to compromise. The integration of the Eastern and Western parts of Germany will have to be achieved by reaching a common economic level.[208] Nevertheless, the debate over amendments to the Basic Law kindled by the draft constitutions in the five new states will also have an integrating effect on the reunited Germany.

208. Kröning, *supra* note 171, at 165.

A Unified Concept of Population Transfer

CHRISTOPHER M. GOEBEL*

Population transfer is an issue arising often in areas of ethnic tension, from Croatia and Bosnia and Herzegovina to the Western Sahara, Tibet, Cyprus, and beyond. There are two forms of human population transfer: removals and settlements. Generally, commentators in international law have yet to discuss the two together as a single category of population transfer. In discussing the prospects for such a broad treatment, this article is a first to compare and contrast international law's application to removals and settlements.

I. INTRODUCTION

International attention is focusing on uprooted people, especially where there are tensions of ethnic proportions. The Red Cross spent a significant proportion of its budget aiding what it called "displaced people,"[1] removed *en masse* from their abodes. Ethnic cleansing, a term used by the Serbs, was a process of population transfer aimed at removing the non-Serbian population from large areas of Bosnia-Herzegovina.[2] The large-scale Jewish settlements into the Israeli-occupied Arab territories continue to receive publicity. Theoretically speaking, why not take these and other mass removals or settlements of people, and examine them under a single category, called population transfer?

Recent discussions at the United Nations and elsewhere, led by human rights activists, have hinted at such a unified treatment of population transfer, in an effort to focus attention on "stateless people" faced with either removal from an area or settlement into one.[3] A conference in 1992 deliberated on situations occurring in what were called "sovereign

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1. International Committee of the Red Cross, statement at the 48th Session of the U.N. Commission on Human Rights (Feb. 19, 1992). These operations were in Africa, Latin America, Asia, the Middle East, and Europe, which reflects the broad scope of the problem.

2. Congressional Committee Print, *Ethnic Cleaning* at 5.

3. Just in the last two years, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities [hereinafter "U.N. Sub-Commission"] has begun to adopt resolutions covering both forms of movement under the single category of population transfer. *See* "The Human Rights Dimensions of Population Transfer Including the Implantation of Settlers and Settlements," U.N. Doc. E/CN.4/Sub.2/1990/17; U.N. Doc. E/CN.4/Sub.2/1991/21.

states" (e.g. Poland, claiming to have experienced principally large-scale removals in the form of expulsions by Hitler and Stalin), as well as countries "occupied" now or at some point in recent time (e.g. Western Sahara, The Baltics, East Timor and Tibet, by massive settlements principally, plus removals), "nations without a state" (e.g. Kurdistan, principally by removals), the lands of "indigenous peoples" (e.g. Aboriginals of Australia and Chakmas of the Chittagong Hills Tracts, by settlements and removals) and the lands of "ethnic minorities" (e.g. Albanians in Kosova, principally by removals), and others.[4] This approach toward removals would take into account situations ranging from the more traditionally recognized expulsion of a minority from a country, to the forced or forcible resettlement of a significant number of indigenous people for a dam project. Settlements would include those occurring on a large scale both across U.N.-recognized borders and internally. In any event population transfer, however defined, should not be confused with refugee movements[5] nor normal migration on an individual basis for economic reasons.[6] For years now, some in the policy-making community have mingled population transfer's two forms.[7] Despite such discussions, commentators on international law traditionally have not followed suit.[8]

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4. Report of the U.N.P.O. Conference on Human Rights Division of Population Transfer (D. Goldberg, Rapporteur) (published by U.N.P.O., the Hague, 1992) [hereinafter *U.N.P.O. Conference Report*].

5. Though when refugee movements are large, such a distinction becomes difficult. Refugees are defined as moving freely out of their own political motivation. RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393 (2d ed. 1988); Resolution on Asylum, 1950, Institute of International Law at its Bath Session, art. 1, 45 AM. J. INT'L L. Supp., 15 (1951). In contrast, settlers and removed people in the context of this paper, rather than being motivated by a personal, individual desire for political asylum, are treated as a group phenomenon whereby planning and implementation of the movement, and the ultimate motivation, belongs to governments. It is often difficult to tell whether a refugee moves freely. One difference is that refugee movement always occurs across international frontiers, whereas population transfer can also occur within them. Regarding the Kurdish people, the period before the Second Persian Gulf War saw movements that were population transfer, the removal of people caused in part by Iraqi government's use of poison gas, *see Minority Rights Group, The Kurds: Massacre by Gas* (1989); *Middle East Watch, Human Rights in Iraq* (Jan., 1990), whereas flows post-Second Gulf War, involve refugee flows. *For example*, the landmark UN Security Council Resolution 688, adopted by the Security Council at its 298nd meeting, addressed refugees. U.N. Doc. S/RES/688 (1991).

6. Regarding migration, *see generally* PLENDER, INTERNATIONAL MIGRATION LAW, *supra* note 5. *See also* Myron Weiner, Security, Stability and International Migration (Dec. 5-6, 1991) (unpublished manuscript presented at the Conference on the Impact of International Migration on the Security and Stability of States, Center for International Studies, Massachusetts Institute of Technology) (differentiates between normal migration and population movement with substantial government involvement).

7. *See, e.g.*, T. Scudder & E. Colson, *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People*, in INVOLUNTARY MIGRATION AND RESETTLEMENT 267 (1982).

8. Existing literature such as Israel Shahak, *A History of the Concept of 'Transfer' in Zionism*, 18 J. PALESTINE STUD. 22, n.3 (1989), and Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. REV. 207 (1975) [hereinafter *Law and Transfers*], treats population transfer as principally the removal of people, whereas other

Besides a handful of scholars, including those recognized herein, few have published lately on a form of population transfer. A unique aspect of this paper is that, while examining a broad conception of transfer, it does compare removals and settlements under applicable international law from World War II onward. Indeed, to some extent population transfers must be examined on a case-by-case basis; rather than doing so, this paper serves as an overview of issues.

In the context of this paper, as a basic rule, transfers of both sorts are meant to have in common the element of moving a large numbers of people, in relative rather than absolute terms,[9] and state involvement or acquiescence in the movement. The specific people involved can be categorized as either removed people or settlers, and in the latter case original inhabitants of the area receiving settlers. From there, analysis becomes more difficult. Forced removals, in specific circumstances, have been adjudged crimes against humanity. Settlements as well as removals, under certain restrictions, have violated doctrines of humanitarian law. Discrepancies exist between the two types of transfer, along such doctrinal lines, but also whether the element of consent is a criteria proper to population transfer.[10] The extent to which those differences resolve themselves and the two types of transfer collapse into a broad, yet coherent category of treatment will depend on the future development of international law towards, not only the practices themselves, but their effects on all those affected by population transfer.

II. THE PRACTICE OF POPULATION TRANSFER

A. *Population Transfer as a Crime Against Humanity and Possible Extensions*

The mass removal of citizens across internationally recognized borders of a state, is called mass deportations or expulsions. Transfers, such as those at the hands of Nazi Germany, violate the Nuremberg principles and constitute war crimes or any crimes against humanity in times of

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writings touch on "settlements" as an isolated phenonmenon as compared with removals. *See, e.g.*, Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

9. *Cf. U.N.P.O. Conference Report*, *supra* note 4, at 7 ("Should numbers be part of the definition, or should the definition focus on the rational and intention involved in the transfer?"). The Report proposed a unified definition of "population transfer": "the movement of large numbers of people, either into or away from a *certain territory*, with state involvement or acquiescence of government and without the free and informed *consent* of the people being moved or the people into whose territory they are being moved." *Id.* (emphasis added). That definition turns on the element of consent. Also, it raises the issue of territorial definition, treated herein.

10. The U.N. Sub-Commission was "*[c]oncerned* that the movement of people is often achieved either without free and informed consent of those people being moved or without the consent of those people into whose territory they are being moved." U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3. *See also* U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

international[11] and, it has been argued, civil war.[12]

The expulsion of masses of non-Serbs from eastern Croatia across front lines, by bus and other methods, was accomplished through coercion, including threats, violence and discrimination.[13] Similarly, in Bosnia, the deportation or mass displacement of people in order to create ethnically pure areas was an important strategy to Serbia.[14] These expulsions contributed to a substantial number of the masses of non-Serbs who exited Bosnia.[15] Occurring during international war, these expulsions could surely be adjudged crimes against humanity. Had they occurred earlier, before the international community reconized the independence of Croatia and Bosnia-Herzegovina, the situation would have been deemed civil war with the front lines inside national boundaries.[16] The coercive tactics of "ethnic purification"[17] allegedly used by the militia would not change with the varying classification of the war. It would be arbitrary to use crimes against humanity to draw a strong distinction between international and civil war.

As seen through the nature of the above examples, the treatment, under international law, of removals of people depends on whether the transfer occurred during belligerency. Yet, out of belligerency and into peacetime, mass expulsions across borders of citizens,[18] or aliens who were in the originating territory lawfully such as Asians from Uganda,[19] are

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11. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279, 39 AM. J. INT'L. L., Supp. 257, 260 (1945), arts. 6(b)-(c) Aug. 8, 1945 [hereinafter "Major War Criminal Agreement"]; Nuremberg Indictment, Count 3, §§ B, J; *See* Alfred M. De Zayas, *Forced Resettlement*, 8 ENCYCLOPEDIA PUB. INT'L L., 234, 235-36 [hereinafter De Zayas, *Forced Resettlement*]; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3. This should be distinguished from deportations on an individual basis. Lapidoth, *Expulsion of Civilians from Areas under Israeli Control in 1967*, 2 EUR. J. INT'L L., No. 1, 97, 102-04 (1991) (it is inconclusive whether deportation of individuals, as opposed to *en masse*, has been prohibited under customary international law). U.N. General Assembly Resolution 95 (1) of December 11, 1946, gave expression to the general applicability of the Nuremberg principles. 2 OPPENHEIM, INTERNATIONAL LAW 616-19 (7th ed., 1952). *But see* J. STONE, NO PEACE NO WAR IN THE MIDDLE EAST 17 (1969).

12. *Law and Transfers*, *supra* note 8, at 221.

13. *See* Human Rights Watch, War Crimes and Bosnia-Herzegovina, at 75-81.

14. *See id.* at 71. *See also* John F. Burns, *Bosnian Strife Cuts Old Bridges of Trust*, N.Y. TIMES, May 22, 1992, at A-8 (noting that although forced deportations have also been carried out by Muslim Slavs against Serbians, the process appears to have been more systematic on the part of the Serbs).

15. Human Rights Watch, *supra* note 13, at 199. (categorizing as an international armed conflict involving two states, Yugoslavia and Bosnia-Herzegovina.)

16. For an analysis of the conflict in former Yugoslavia as a civil war, *see generally*, Charles Lewis Nier, III, Note, *The Yugoslavia Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflict in the Modern World*, 10 DICK. J. INT'L L. 303 (1992).

17. Burns, *supra* note 14.

18. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 4, art. 3, Nov. 4, 1950, came into force Sept. 3, 1953, 213 U.N.T.S. 222.

19. *See* Richard Plender, *The Ugandan Crisis and the Right of Expulsion Under In-*

circumscribed closely by human rights law.[20] This is due to any presence of discriminatory or racist characteristics in the expulsions.[21]

Of course, not all governments undertaking removals across international borders lack concern for those being removed. Some are motivated by the desire as a sovereign to "save" a threatened minority abroad by "inviting" it into its territory. An example has been where an element of exchange is involved, like the 1922-23 swap of Greeks and Turks.[22] In such cases, despite any state benevolency, jurists have focused on more than just the attitude of the state. The perspective of the transferees counts, too. The Institut de Droit International, in its 1952 session, expressed concern for those being removed, especially as to whether their movement is voluntary.[23]

The argument has been forwarded that crimes against humanity should apply to the removal of people outside of armed conflict that starts and finishes within the territory of a state. It relies on the analogy to apartheid in South Africa.[24] Relocation of millions of blacks to artificially created homelands in the land-locked interior of the country, an effort by zonation programs of the development branch of the government, met sufficient international condemnation to be considered censured under customary international law. Part of the government's action in transferring the people was racism and discrimination. Yet, other massive removals within borders, such as have occurred in Guatemala,[25] East

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ternational Law, 9 INT'L COMM. JURISTS, REV. 19, 27-30 (1972).

20. *See* PLENDER, INTERNATIONAL MIGRATION LAW, *supra* note 5, at 474 n.174, 477; R.C. Chhangani, Notes and Comments, *Expulsion of Uganda Asians and International Law*, 12 INDIAN J. INT'L L. 400, 402, 405-07 (1972); *Law and Transfers*, *supra* note 8, at 244-45.

21. According to the U.N. Sub-Commission, "the practice of population transfer [referring to both removals and settlements] is discriminatory in its application and . . . inherently leads to widespread and systematic discrimination." U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

22. *See* Alfred M. De Zayas, *A Historical Survey of Twentieth Century Expulsions*, REFUGEES IN THE AGE OF TOTAL WAR 15, 17-20 (A. Bramwell, ed., 1988)[hereinafter De Zayas, *Historical Survey*].

23. 44 *Annuaire* 138 (1952) (Sienna Session of 1952). *See also* PLENDER, INTERNATIONAL MIGRATION LAW, *supra* note 5, at 474. During the Nuremberg trials, it was recognized that the government's motive for transfer could go beyond ill-treatment of those transferred. An individual could escape liability if he was motivated by military necessity. De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Writing about removals, De Zayas says, "most transfers of population are not likely to be voluntary." Alfred M. De Zayas, *The Legality of Mass Population Transfers: The German Experience 1945-48*, 12 E. EUR. Q. 1, 6 (1978)[hereinafter *German Experience*].

24. *German Experience*, *supra* note 23, at 253; De Zayas, *Forced Resettlement*, *supra* note 11, at 236. *But see* Lapidoth, *supra* note 11, at 104 (drafters of the Nuremberg Charter may have considered mass deportations for forced labor and extermination).

25. *See* Philip, *The Maya of Guatemala* (Minority Rights Group Report No. 62, 1989); *Counterinsurgency and the Development Pole Strategy in Guatemala*, 12 CULTURAL SURVIVAL Q. 3 (1988); *The Indians of Guatemala: Problems and Prospects for Social and Economic Reconstruction* (Cultural Survival, Fall, 1987); *Witness to Genocide* (Survival International, 1983); *Guatemalan Refugees Now Threatened by Relocation* (Survival International Urgent Action Bulletin, 1984).

Timor,[26] Australia,[27] Brazil,[28] Egypt, Argentina and Paraguay,[29] have not met with the same degree of international disapproval. At least in the last five instances, relatively without belligerency in the sense of armed conflict, some deference may have been given to governments' motivation for development.[30] Still, if, as in South Africa, the effect on those being moved rises to the level of systematic racial discrimination, any large scale population transfer may violate customary international law.[31]

At least one international body has treated removal within borders with disapproval. The invasion of Cyprus by Turkish troops in 1974 resulted in the widespread eviction and population transfer of over 170,000 Greek Cypriots from their homes in the northern part of Cyprus. In *Cyprus v. Turkey*, the European Commission on Human Rights discussed population transfer "The Commission . . . considers that the transportation of Greek Cypriots to other places, in particular the forcible excursions *within* the territory controlled by the Turkish army, and the deportation of Greek Cypriots . . . constitute an interference with their private life."[32] The Commission thus linked a form of population transfer, the removal of people, to the right to private life. This right is related to the right to security of persons. Because the Commission saw forced transpor-

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26. *See* JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 142 (1987); F. HIORTH, TIMOR PAST AND PRESENT 61 (1985); Steven Erlanger, *East Timor, Reopened by Indonesia, Remains a Sad and Terrifying Place*, N. Y. TIMES, Oct. 21, 1990, at 18.

27. *See* Minority Rights Group, *Aboriginal Australians*, Report No. 35 (1988)(in Queensland, mining policies effectively destroyed some of the economic and social basis of Aboriginal traditional lifestyle and involved large-scale removals).

28. *See* Minority Rights Group, *What Future for the Amerindians of South America*, Report No. 15 (1977). The Sobradinho Dam project resettled about 60,000 urban and rural people. Michael Cerna, *Involuntary Resettlement in Development Projects* (World Bank Technical Paper No. 80, 1988).

29. *See* Cerna, *supra* note 28. In Egypt dam projects have removed and resettled at least 170,000 people; in the border between Argentina and Paraguay, submersion projects have removed some 45,000. *Id.*

30. If there is sufficient public interest for the transfer and proper compensation towards those being moved, these factors should play into the determination of the transfer's permissibility. Claire Palley, Population Transfer and International Law 3 (draft paper presented at the UNPO Conference).

31. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987) [hereinafter RESTATEMENT FOREIGN RELATIONS]:
"A state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide. . .(f) systematic racial discrimination,. . .or (g) a consistent pattern of gross violations of internationally recognized human rights." *Accord* Barcelona Traction, Light & Power Co., Ltd., 1970 I.C.J. 3, 32. *See also* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d)(i),(ii), 660 U.N.T.S. 195 [hereinafter "Discrimination Convention"], which prohibits racial discrimination within the borders of a state, occurring in conjunction with limitations on freedom of movement and residence; Palley, *supra* note 30, at 4. *See infra* note 88 for further discussion of freedom of movement.

32. Cyprus v. Turkey, Cases 6780/74 and 6950/75, 4 EUR. HUM. RTS. REP. 72-74 (1976)(Commission report)(emphasis added). There were also settlements of Turks coming from Turkey.

tation as an infringement of the right to private life, the case sets a precedent regarding the use of force to transfer populations, Thus, emphasizing voluntariness.

Most importantly, in terms of any division between transfers across borders and those only within, the language in *Cyprus v. Turkey* distinguished between removal within the boundaries of the territory controlled by the Turkish army, and forced removals across borders. The Commission condemned both transfers. This invites greater scrutiny towards removals occurring, like in northern Cyprus, under some belligerent conditions, such as military occupation, even though only within state borders.

In brief conclusion about removals: Belligerency has been present in situations highly condemned under international law, though this constraint is reduced by the presence of systematic racial discrimination, as in Uganda or South Africa. Voluntariness is an important issue to removals. In order to invoke crimes against humanity, the blatant lack of voluntariness in the victims of World War-II era transfers is key. Furthermore, the issue of voluntariness has some importance regardless of the state's intention.

B. *Population Transfer Under Humanitarian Law*

The Baltic States, Cyprus, East Timor, the West Bank, Tibet, the Western Sahara, and Eritrea have been or are locations of the other form of population transfer: settlements.[33] These movements, unlike some expulsions, have never been formally adjudged crimes against humanity. Because these situations have been sites of military occupations, the settlements of the occupants' people has raised the issue of humanitarian law, the part of international law which emphasizes the protection of the individual not only during and following belligerency, but, according to some scholars, also during peacetime occupations.[34]

Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War presents one of the clearest examples of positive international law governing population transfer. It states:

> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. . . . Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.[35]

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33. Palley, *supra* note 30, at 5. For the only situations not documented elsewhere in this article, *see* Minority Rights Group, *Eritrea and Tigray*, Report No. 5, at 4-14 (1983); International Federation for the Protection of Ethnic, Religious, Linguistic and Other Minorities, Comm. H.R., 43rd Sess., Agenda item 8, 1991.

34. *See infra* note 53.

35. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 49, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter

Furthermore, the Geneva Convention may outlaw population transfers into occupied lands, not only during hostilities but afterwards until a final political settlement has been reached in those lands.[36] Protocol I to the Geneva Convention states that the Geneva Convention applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self determination as enshrined by the Charter of the United Nations,"[37] and contains language similar to article 49.

These provisions dictate that, but for certain specific exceptions, settlements in an occupied territory contravene international law. While forced or forcible movement is illegal under these codes,[38] an important issue is that of voluntary movement. On the one hand, the voluntary nature of an act should not be interpreted to legalize what would otherwise be considered a violation of an international standard;[39] especially if the movement involves the purposes and effects, on both those transferred and original inhabitants, that the Geneva Convention was crafted to prevent.[40] On the other hand, there are legal difficulties inherent in defining "voluntary." In this regard, it should be pointed out that most settlements, if not forced, are facilitated by government actions. Once such tool is incentives, like increased industrialization in the area targeted for transfer as occurred in Soviet-occupied Estonia and Latvia.[41] Even if voluntary settlement on an individual basis were permissible under article 49, the settlement programs of the 1980s and 1990s, especially the ambitious ones like those of the Indonesian[42] and Chinese[43] governments, must

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Geneva Convention].

36. *See id.* arts. 1, 2, 4, 17, 47, 6 U.S.T. at 3518, 3518, 3520, 3530, 3548, 75 U.N.T.S. at 287, 288, 290, 300, 318.

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1, para. 4, 1125 U.N.T.S. 3, 7 [hereinafter Geneva Protocol I].

38. *Cf.* De Zayas, *Forced Resettlement*, *supra* note 11, at 236 (regarding the other form of transfer, removals: "The clear prohibition of forced resettlement in time of war has been codified.")

39. The UN Sub-Commission has recognized the link between the right to security of persons and the issue of population transfer, broadly defined. U.N. Doc. E/CN.4/Sub.2/1990/L.60, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/28, *supra* note 3. In other contexts involving that right, the consent of an individual does not legitimize violations of an international norm. *See* Richard B. Lillich, *Civil Rights*, in 1 HUMAN RIGHTS INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 120-124 (Theodore Meron ed. 1984) (explaining the right to life norm).

40. Roberts, *supra* note 8, at 84.

41. *See* Romauld J. Misiunas, *The Baltic Republics: Stagnation and Strivings for Sovereignty*, *in* THE NATIONALITIES FACTOR IN SOVIET POLITICS AND SOCIETY 214 (Lubomyr Hajda & Mark Bessinger eds. 1990). *See also* V. PURINA & J. JANSEVICS, LATVIJAS PSR SOCIALISTISTIKA DARBA DALISANAS SISTEMA [THE SOCIALISTIC DIVISION OF LABOR SYSTEM IN THE LATVIAN S.S.R.] 48 (1978); U.N. GAOR, Comm. H.R., 48th Sess., Agenda Item 12, (1992) (Statement of the Estonian Delegation, Feb. 26, 1992). *Cf.* GEOFFREY A. HOSKING, THE FIRST SOCIALIST SOCIETY: A HISTORY FROM WITHIN 399 (1st ed. 1985).

42. *See generally* MARIEL OTTEN, TRANSMIGRASI: MYTHES AND REALITIES, INDONESIAN RESETTLEMENT POLICY, 1965-1986 (1986).

be examined to determine whether they meet the criteria of "voluntary" settlements on an individual basis.

In the case of settlements, these difficulties about voluntariness lead, to the question of whether consent should be relevant at all to a broad concept of population transfer. Yet, in the instance of removals, voluntariness is of paramount concern. Comparing these to settlements, the different weight put on voluntariness will have to be reconciled for the two categories of transfers to be collapsed satisfactorily into a single category for legal treatment.

Just as national security might motivate governments to remove minorities through expulsion,[44] civilian settlements across the internationally recognized borders of a state are sometimes claimed to be necessary for the security of the transferring power and, therefore, essential to that power in order to preserve public order and safety.[45] For example, control of the regions at the borders of Indonesian-dominated lands has been said to have an explicit strategic objective that depends on settlements.[46]

In the Israeli Supreme Court's most important decision on population transfer, *Beth-El*,[47] Justice Witkon sustained a prior opinion that the fact that requisitioned lands are intended for Jewish *civilian* settlements does not deprive such requisitioning of its security character.[48] In addition, although no terrorist activity actually took place, Justice Witkon refused to distinguish the present case from one in which it had occurred.[49] Those stances, regarding control of border regions, have in common the use of civilians to gain control of other civilians, i.e. original inhabitants and their areas. Even if population transfer were intended for national security purposes, settlements can cause conflicts among people that set-

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43. *See* HUMAN RIGHTS ADVOCATES & THE INTERNATIONAL CAMPAIGN FOR TIBET, THE LONG MARCH: CHINESE SETTLERS AND CHINESE POLICIES IN EASTERN TIBET 5-9 (1991) [hereinafter Tibet Report]; ASIA WATCH, MERCILESS REPRESSION: HUMAN RIGHTS ABUSES IN TIBET 15 (1990); Sechin Jagchid, *Discrimination Against Minorities in China*, in HUMAN RIGHTS CASE STUDIES 389, 401-02 (Willem A. Veenhoven, ed. 1975); 134 Cong. Rec. 15,500, 15,501-02 (daily ed. Oct. 11, 1988) (China trip report by Sen. Leahy); Note, *Human Rights in Tibet: An Emerging Foreign Policy Issue*, 5 HARV. HUM. RTS. J. 193 (1992)(China has been attempting since 1983 to dilute the Tibetan identity by transferring numerous Han Chinese into Tibet). While the note adds in a footnote 25 that "[w]hether the Chinese are intentionally transferring Han into Tibet is a matter of complex debate," id. at 196. *See infra.* text accompanying notes 115 and 119 for other issues on the transfer that are important.

44. *See* DeZayas, *Forced Resettlement*, *supra* note 11, at 236.

45. Roberts, *supra* note 8, at 84.

46. Budiardjo, *The Politics of Transmigration*, 16 THE ECOLOGIST No. ⅔, at 111 (1986) (as related in 1985 by the then Indonesian transmigration [i.e., resettlement] minister).

47. H.C. 606/78, Ayub v. Minister of Defense 33(2) PISKEI DIN 113 *summarized in* 9 ISR. Y.B. HUM. RTS. 337 (1979) [hereinafter Beth-El].

48. *Id.* at 340.

49. *Id.* at 339. *See* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 186 (1957). Cf. H.C. 302/72 Sheikh Suleiman Abu Hilu v. Israel 27(2) PISKEI DIN 169 *summarized in* 5 ISR. Y.B. HUM. RTS. 384 (1975) (Court unanimously upheld arguments that steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area).

tlements may only exacerbate security problems.[50]

The issue of control over civilians points to the viewpoint of original inhabitants. Though voluntariness or consent from the settlers' perspective is a confused, inconclusive subject, it might gain significance, as further explained below,[51] regarding how others are affected by the settlements.

National security arguments may lead to attempts to suspend human rights. Article 4(1) of the International Covenant on Civil and Political Rights[52] permits states in urgent circumstances to suspend or breach the right to liberty and security of the person, a right which may be affected by population transfer. Such derogation, however, has little relevance, if any, when settlements are undertaken by a government in order to change the demographic structure or the political, cultural, religious and other characteristics of the original inhabitants in the receiving area.[53] The permanent nature of such changes means that population transfer should never be justified on temporary grounds necessary for derogation.

This is true where transfer occurs during prolonged occupations. Prolonged occupations have received some attention as a distinct category, having the characteristic of "belligerency ending."[54] The main conventions relating to military occupations, including the Geneva Convention and 1907 Hague Regulations[55] provide no meaningful variation in the rules because of the length of an occupation[56] and, indeed, may cover not

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50. *See generally* Marcus Colchester, The Social Dimensions of Government Sponsored Migration and Involuntary Resettlement: Policies and Practice, (1986) (unpublished manuscript prepared for the Independent Commission on Inter-national Humanitarian Issues in Geneva)(available through author of present article). In the context of the occupied Arab territories, Roberts and, Falk & Weston, lend support for two points: first, settlements are almost never necessary for genuine military or security purposes and do not, in fact, serve any such purpose; second, even if justified for military needs, the transfer still constitutes a violation of rules of international law. *See* Roberts, *supra* note 8, at 84; Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: in Legal Defense of the Intifada*, 32 HARV. INT'L. J. 129, 147-48 (1991). *Cf.* U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

51. *See infra* text accompanying notes 107.

52. International Covenant on Civil and Political Rights, art. 4(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 174 [hereinafter Political Covenant].

53. The U.N. Sub-Commission was "[d]isturbed by reports concerning the implantation of settlers and settlements in certain countries, including particular occupied territories, with the aim to changing the demographic structure and the political, cultural, religious, and other characteristics of the countries concerned." U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; *see also* U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3. Derogation, generally, is "extremely troublesome from the human rights viewpoint." Lillich, *supra* note 39, at 120.

54. *See* Roberts, *supra* note 8, at 51-53. *Cf.* Falk & Weston, *supra* note 50, at 142.

55. Convention Respecting the Laws and Customs of War on Land, with Annexed Regulations, *signed* Oct. 18, 1907, § 3, 36 Stat. 2277, 205 CONSOL. T.S. 277, 295-97 [hereinafter Hague Regulations].

56. The exception is the "one year after" provision of article 6, paragraph 3 of the Geneva Convention. Geneva Convention, *supra* note 35, art. 6, para. 3, at 3522, 75 U.N.T.S. at 292. However, this provision is of little importance. *See* Roberts, *supra* note 8, at 55-56;

only belligerent occupations but, also situations in which the belligerency has subsided.[57] Moreover, in peacetime the rights of the occupant diminish markedly as compared with those of a belligerent occupation.[58] Where population transfer extends from belligerent to prolonged occupation and then into peacetime, the occupier may assert relatively fewer rights. That, again, brings into doubt the "temporariness" justification mentioned above.

Yet Justice Landau, concurring in *Beth-El*, supported the Israeli settlements against this obvious doubt, saying that the hope that a political solution someday will be reached justifies population transfer.[59] Regarding any particular occupation, Israeli or otherwise, even if one were satisfied that the Hague Regulations, and not the Geneva Convention, were in effect,[60] article 43 of the Hague Regulations limits the freedom of the occupier to undertake population transfer, especially in extended or peacetime occupation.[61] Though many of the above cited sources have developed around the occupied Arab territories, it bears mentioning that the Chinese and Indonesian governments see Tibet and East Timor, respectively, as important military zones.[62] Even if these were legitimate governmental interests related to national security during peacetime, the governments would not automatically gain free discretion to undertake population transfer.

Should conventional law, including the relatively lenient Hague Regulations, be applicable, that discretion must include reference to the hu-

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COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 22 (Jean S. Pictet ed. 1958); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 57, 59 (1982).

57. *See* Roberts, *supra* note 8, at 52; Adam Roberts, *What is Military Occupation?*, 55 BRIT. Y. B. INT'L L. 249, 253 (1984). *But see* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 43 (1987). "[T]here are, in fact, so many situations in which the applicability of the Geneva Conventions . . . has been denied that the common practice has been rejection of the law, rather than its formal recognition and implementation." *Id.*

58. C. Lleewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 GROTIUS SOC'Y TRANSACTIONS 149, 159-60 (1923). *See also* Roberts, *supra* note 57, at 273-79. Where military necessity exists, an occupying government has "considerable discretion." Falk & Weston, *supra* note 50, at 138. But military necessity generally ends when belligerency stops.

59. Beth-El, *supra* note 47, at 392.

60. *See* Yoram Dinstein, *The Judgment in the Matter of Pitchat Rafiah*, 3 TEL AVIV UNIV. L. REV. 934 (Hebrew, 1973).

61. *See* Falk & Weston, *supra* note 50, at 142 (a duty is imposed upon the occupant vis-a-vis the original inhabitants). *Cf.* H.C. 337/71, Christian Society for the Holy Places v. Minister of Defense, 26(1) PISKEI DIN 574, *summarized in* 2 ISR. Y. B. HUM. RTS. 354, 355 (1972).

62. Regarding East Timor, *see* BURGER, supra note 26, at 142-43; Budiardjo, *supra* note 46, at 111; *See Generally* FRANK CHALK & KURT JONASSON, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 378-83 (1990). Concerning Tibet, *see* TIBET REPORT, *supra* note 43, at 2-4; *What McMahon Wrought*, THE ECONOMIST, May 23, 1987, at 59.

manitarian concerns of all individuals affected by population transfer.[63] The needs of both the settlers and original inhabitants who are affected become particularly relevant as an occupation moves through the stages, from belligerent, to prolonged, and into peacetime.

If prolonged and even peacetime occupations are reasons for continuing prohibition of settlements, that is a sign that the positive law prohibiting settlements is moving away from any necessity for belligerency.[64] This may be compared to cases of removals, where any presence of racism and discrimination may be pushing any prohibition, based on either positive or normative law, away from the need for belligerency.

C. *Population Transfer Under Principles Regarding Colonialism*

The practice of population transfer is also part and parcel of colonialism. One case of population transfer into territory that has been "colonized", according to the formal U.N. regime, is the Western Sahara.[65] The Moroccan takeover of this area was marked by clear tactics including the settlement of over 200,000 Moroccans as well as removal by "brutal tactics" of some groups of original inhabitants in the area.[66] The Western Sahara situation was before the International Court of Justice.[67] The connection of population transfer to colonialism is patently clear. Condemnations of colonialism came from the ICJ,[68] and subsequently the U.N. General Assembly[69] and noted experts.[70] In situations of traditional

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63. Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 111-12 (1978); Falk & Weston, *supra* note 50, at 142.

64. The literature on prolonged occupations has not addressed population transfer in its other forms.

65. *See generally* VIRGINIA THOMPSON & RICHARD ADLOFF, THE WESTERN SAHARANS: BACKGROUND TO CONFLICT (1980); DAVID LYNN PRICE, THE WESTERN SAHARA (The Washington Papers, vol. 7, no. 63 1979).

66. CLAUDE BONTEMS, LA GUERRA DU SAHARA OCCIDENTAL [THE WAR OF THE WESTERN SAHARA] 72 (1984). *See also* JOHN DAMIS, CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE 61-69 (1983). Although the brutality of Moroccan forces is well known and documented, it should be noted that not all of the population movement was forced by the Moroccans. Some of it was encouraged by the Polisario Front, a pro-independence movement, in face of the invasion. *Id.* at 72.

67. Western Sahara, 1975 I.C.J. 12 (Oct. 16). *See* THOMPSON & ADLOFF, *supra* note 65, at 167.

68. The ICJ declined to declare the Western Sahara "terra nullius" but also failed to declare the territory Moroccan or Mauritaurian. Western Sahara, 1975 I.C.J. at para. 162. The Western Sahara case does not discuss population transfer directly, the opinion is important nonetheless for the connection it makes between self-determination and colonialism. *See* Western Sahara, 1975 I.C.J. at para. 162; *See also Self-Determination: The Cases of Fiji, New Caledonia, and the Western Sahara*, 82 PROC. AM. SOC'Y INT'L L. 429, 439-42, (Michael P. Malloy, ed. 1988). From this connection it is arguable that population transfer effects the right to self-determination. *See Id.* at 443 (discussing this possible effect). *But see* DAMIS, *supra* note 66, at 60 (positing that the Court's decision was essentially political).

69. *See* DAMIS, *supra* note 66, at 94, citing U.N. Doc. A/35/595 (1980), also referring to the right of the Sahrawi population to self-determination.

70. *See, e.g.*, The Right to Self-Determination, Implementation of United Nations Resolutions, U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, para. 69 (1980).

colonialism, a nexus has been established between the use of force and its effect on a people's identity.[71] As a reuslt, the U.N. acted.

D. *Some Limits on Jurisprudence and Positive Law*

Western Sahara and its aftermath may be contrasted with situations of indigenous groups, such as the Chakmas of the Chittagong Hills Tracts, or various sparsely inhabited Amazonian provinces of Bolivia, Peru, Ecuador, Colombia, Venezuela, and Brazil. These face what most consider to be settlements by ethnically distinct, dominating groups encouraged or even forced by U.N. recognized governments.[72] The abovementioned nexus between force and peoples' identity may exist even in these situations of transfer.[73] In contrast to the Western Sahara and other situations of traditional colonialism, however, these settlements have occurred within the governments' U.N. recognized borders. At issue is the possible constraint of article 2.7 of the U.N. Charter, which states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."[74] Like situations of removals solely within domestic frontiers,[75] the concurrent presence of systematic discrimination, genocide,[76] or gross and persistent violations of human rights[77] countenances article 2.7. So does the moral pressure of publicists like Theodoropoulos who recognizes colonialism outside the traditional U.N. definition. He asserts that South Africa is the chief paradigm of "settler colonial-

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71. The U.N. General Assembly, in the context of colonialism, noted that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principles of non-intervention." Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/5217, Supp. No. 28, at 121 (1970) [hereinafter Declaration on Friendly Relations]. The prohibition on the use of force is also now a rule of customary international law. *Nicar. v. U.S.*, 1986 I.C.J., at 98-101.

72. *See* Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 668 n.71 (1988) (approximately 300,000 Bengalis were settled in the Tracts from 1978-88); Written statement submitted by The Nordic Saamic Council et al. at the U.N. Sub-Comm., 43rd Sess. Item 15, U.N. Doc. E/CN.4/Sub.2/1991/NGO/3. Colchester, *supra* note 50, at 12 (regarding the other regions)

73. *See* Hannum, *supra* note 72, at 668; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

74. U.N. CHARTER, 59 Stat. 1031, TS No. 993, 3 Bevans 1153 (1969). The U.N. Sub-Commission has not limited its concern to settlements occurring across international frontiers. *See* U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

75. *See, e.g., supra*, text accompanying note 24 (example of South Africa).

76. *See discussion infra* III.B.2.

77. *See* RESTATEMENT FOREIGN RELATIONS, *supra* note 31, § 702. U.N. resolutions directly or indirectly authorize the U.N. Sub-Commission to undertake studies or working groups to address consistent patterns of extreme human rights violations, even though they occur within the borders of a given state. Admittedly, international bodies today do not emphasize de-colonization. For example, the U.N. did not oppose apartheid under the pretext of decolonization. Therefore, any law on settlements within domestic frontiers will develop apart from traditional colonialism.

ism."[78] The South African government undertook removals, through zonation, in order to clear the way for accomplishment of the other form of population transfer: settlements.[79] These started as well as finished within the boundaries of that state.

For settlements as well as removals occurring in such territorial limits, prohibition would be more meaningful if the prohibition came from positive law in a rule explicitly about transfer. Then they would be less sensitive to issues defining territory. The following issues point to the conclusion, based on a limited analysis, that removals within international frontiers are closer to benefitting from concrete law, such as the Geneva Convention and doctrines on crimes against humanity, than are settlements.

The only positive law directly prohibiting settlements comes from the Geneva Convention. The definition of territory covered by the laws is crucial. Whether an occupation is belligerent or peaceful, the territory must be under some form of occupation.[80] It is true that Protocol I, also addressing transfers, applies beyond situations of military occupation,[81] but its language prohibiting transfer still refers strictly to transfer into or out of areas under occupation. These two instruments also refer to removals, which are somewhat constrained by the need for occupation.[82] Removals, unlike settlements, have fallen subject to crimes against humanity. Related commentary shows that, in general, prohibitions on removals may be less constrained by the very idea of territorial definition. For example, there is the view espoused by some scholars, such as Palley, that it was just as "unlawful" for the Allies after World War II to deport Germans *en masse* as it was for the Germans to do so to others during that War.[83] Upon further examination such a view may implicate, e.g., the deportation of Germans from Sudetenland, even though this area was not

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78. C. THEODOROPOULOS, COLONIALISM AND GENERAL INTERNATIONAL LAW: CONTEMPORARY THEORY OF NATIONAL SOVEREIGNTY AND SELF-DETERMINATION 65 (1988). Theodoropoulos writes of "settler colonialism," calling it "colonialism" where restrictions are "imposed on a colonial people by a colonial power existing geographically not apart from its colony but instead within the colonial territory." *Id. Cf.* A. JAMES, SOVEREIGN STATEHOOD 18 (1986) (Whether a state enjoys exclusive power over a territory is not a precise criteria for determining what constitutes a colonial territory). Today, the U.N. does not emphasize de-colonization; for example, de-colonization was not the pretext for U.N. efforts against apartheid.

79. Colchester, *supra* note 50, at 20.

80. Unlike removals, massive and permanent settlements across borders of states, excluding repatriation of refugees, are a policy implemented uniquely into areas experiencing prolonged occupations. Settlements, as defined in this paper, almost never occur anymore from one sovereign state to another. *See* Hucker, *Migration and Resettlement Under International Law*, in *The International Law and Policy of Human Welfare* 338-9 (R. MacDonald et. al. eds. 1978).

81. *See supra* text accompanying note 35. Note, few states have ratified.

82. *See* Lapidoth, *supra* note 11, at 98-99.

83. Palley, *supra* note 30, at 17. *See generally* De Zayas, *Historical Survey*, *supra* note 21.

technically "occupied" by the responsible transferors.[84] Furthermore, there is the argument, buttressed by the analogy to the situation in ex-Yugoslavia, that crimes against humanity also apply to removals during civil war within international frontiers.[85]

Referring to these last such removals, more authoritatively than the opinion of scholars, is the Protocol Additional II to the Geneva Convention, which applies to armed conflicts with or without an international character.[86] Protocol II restricts population transfer, through article 17 in the form of removals but not settlements. This exclusivity further supports the above comparison.[87] The comparison is reinforced by reference to international deliberations. *Turkey v. Cyprus* condemned removals that, while occurring in an area technically under occupation, started and ended there.[88] By contrast, settlements starting and ending within a territory under occupation have not fallen subject to comparable concerted deliberations. Thus as the above analysis—though limited in scope—indicates, there may be some imbalance in a comparison of existing law about the two sorts of transfers when they occur within frontiers. Any imbalance may be overcome by future developments in international law towards dealing with the effects of population transfer.

III. THE EFFECTS OF POPULATION TRANSFER

Along with the actual movement of people, an adequate recognition of the effects of population transfer is important, even though these effects may be less detectable than the movement itself.[89] Discrepancies under international law may exist between the two forms of population transfer, for example the question of territorial status. If the effects of any population transfer rise to the level of gross and consistent violations of international human rights, that may be a violation of customary inter-

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84. Also regarding state practices, the definition of a territory as "occupied" is key for settlements.

85. De Zayas, *Law and Transfers*, *supra* note 8, at 221. *See supra* note 13 and accompanying text.

86. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, *entered into force* Dec. 7, 1978, U.N. Doc. A/32/144 (1977) [hereinafter Protocol II]. Protocol II supplements Article 3 of the Geneva Convention, which applies "in the case of armed conflict not of an international character," by extending it to inter-state conflicts where signatories are capable of carrying out "sustained and concerted military operations." *Id.* at art. 1.

87. Article 17 reads: "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." *See* International Committee of the Red Cross, statement at the 48th Session of the U.N. Commission on Human Rights, at 3, Feb. 1992.

88. *See supra* note 30 and accompanying text.

89. The fact that "[p]eople and socio-cultural systems respond to forced relocation in predictable ways," Scudder & Colson, *supra* note 7, at 267, suggests some hope for the establishment of international norms recognizing any costly and disruptive results from population transfer.

national law, though not necessarily codified *per se* to refer directly to population transfer.

A. *Effects on Those Being Moved: Freedom of Movement and Other Rights*

In modern times, the most significant limitations on a state's right to control the movement of people is based not on principles of economic interdependence, but on rules designed to protect human rights.[90] Article 13 of the Universal Declaration of Human Rights[91] provides:

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

The right to freedom of movement, an essential part of the right to personal liberty,[92] is most likely part of customary international law.[93] Emphasis of that status is the inclusion of freedom of movement in the Discrimination Convention.[94] Yet, despite any special status for freedom of movement, international law has yet to prescribe a satisfactory framework for movement involved in modern population transfer.

As the issue of voluntariness is more complicated in cases of settlements than removals, so goes freedom of movement. The Universal Declaration, article 13, refers to movement both within and across a state's internationally recognized borders.[95] Settlers moving across borders unquestionably have the right to leave their country. That raises a threshold question: are settlers *freely* leaving their country? A government will have varying levels of participation in population transfer: it will sponsor

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90. PLENDER, *supra* note 5, at 62.

91. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948)[hereinafter Universal Declaration].

92. Lillich, *supra* note 39, at 189; *cf.* U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3 (freedom of movement and security of persons in conjunction with population transfer).

93. Rapporteur's Report by Fausto Pocar, Vice-Chairman of the Human Rights Committee, at the European Workshop on the Universal Declaration of Human Rights: Past-Present-Future, U.N. Doc. HR/PUB/89/1, at 101 (1988); Daniel Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World*, 11 CASE W. RES. J. INT'L L. 95, 95-96 (Winter 1979); *cf.* Lillich, *supra* note 39, at 151 (rights to transnational movement "seem well-established in conventional and perhaps even customary international human rights law"). *But see id.* for the position that the right to internal movement, distinct from movement across borders, is not part of customary international law. Lillich's reasoning, however, is based on the weak evidence that internal exile, such as that practiced by the former Soviet Union, was not universally condemned.

94. *See* Turack, *supra* note 93, at 96.

95. The latter movement refers to the right to leave and to return to a country. The Universal Declaration grants both citizens and aliens the right to leave any country but limits the right to return, of course, to citizens of that country. Article 12(1) and (2) of the Political Covenant also allows both citizens and aliens the right to leave, but subjects the right to article 12(3).

settlers, for example financially, or encourage their movement, possibly without any financial support. In either situation, the degree to which settlers are informed about all aspects of their transfer, including their destination, affects whether they are consenting thereto in an informed manner. If uninformed, they are not voluntarily, or freely, leaving the country.[96] The Discrimination Convention prohibits the use of racially discriminatory measures restricting the individual's right to leave or return to his or her country. After the population transfer has taken place, settlers who move across borders have the right to return to their home land, should they so choose.[97]

Population transfer within a state's recognized borders can violate the right to internal movement. Under the Universal Declaration, the right to free internal movement is inextricably linked to the right to choose one's residence.[98] Depending on the specifics involved, governments may violate them both by removing people from their residences due to, or as part of, transfer across as well as within a country's borders.[99]

Although containing similar language as the Universal Declaration, the Political Covenant is qualified by its article 12(3), which permits restrictions on the right to internal movement if such restrictions "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. . . ." These restrictions may come into play in situations of economic development causing massive forced removals.[100] Limits on governmental abuse include article 12(3) provisions that such exceptions be

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96. That poses further problems for the transferring government as well as settlers, when the latter, facing rough conditions, choose to return to the country of origin. A government might not have an adequate infrastructure to aid them, as equally in their return as in their original movement. For example, settlers from the central islands of Indonesia reportedly have not been adequately informed of conditions in the outer, Indonesian dominated islands. *See generally* Ria, *Transmigrasi Bedol Desa: Indonesian Island Village Resettlement from Wonogiri to Bengkulu*, 26 BULL. OF INDONESIAN ECON. STUD. No. 1, 48 (April 1990); World Bank Rep. No. 5597-IND, in Indonesia Rep.—Hum. Rts. Supp. No. 10 (Aug. 1985).

97. The motivations of the sponsoring or encouraging governments, to create permanent change in an occupied area, cast doubts on the existence of a meaningful right to return. *See, e.g.*, Mansour, *L'emigration des juifs sovietiques et le processus de paix israelo-palestinien* [*The immigration of Soviet Jews and the Israeli-Palestinian peace process*], LA POLITIQUE ETRANGÈRE 329 (July 1990).

98. Article 13 of the Universal Declaration mentions both rights.

99. Given the absolute character of the right to free movement, people should enjoy that same right whether or not they are classified as citizens of the state whose government is undertaking population transfer. A possible objection is that the Discrimination Convention fails to prohibit general discrimination against aliens by states based on nationality, citizenship, and exclusions as between citizens and non-citizens. *See* arts. 1, 2 & 3.

100. *Cf.* De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Without mentioning whether states may properly derogate from the relevant provision of the Political Covenant, De Zayas writes that forced resettlement is "incompatible" with the freedom of movement provisions in both the Universal Declaration and the Political Covenant.

"necessary" and "consistent with other rights recognized in the present Covenant," and that exceptions for *ordre public* require specific, factual justifications of a compelling state interest. Regarding removals, then, one can make a distinction—extremely preliminary, only—between such transfers in Egypt, Paraguay and Argentina, which may have some development rationale, and cases like East Timor and Guatemala, which seem to feature relatively less.

Cases of internal dislocation, or removal, occur in situations of interstate or civil war where masses of dislocated people suffer due directly to armed conflict. At the time of writing, in Bosnia, deals involving Serbs and Croats were reported towards carving Bosnia into "communal protectorates,"[101] where the comparison to zonation in South Africa is vivid. This threatened thousands of Bosnian Muslims, whose coalition had tried to preserve a multi-religious community, with displacement or removal within borders.[102] The extent to which those who caused any transfer violated international law depends on a balancing of the right to internal free movement, backed by the Protocol II[103]—doubtfully customary law[104]-prohibiting dislocation related to conflict; and the Political Covenant's derogations and restrictions on the right to free movement, permissible for state parties signatories.

Conflicts may arise between different aspects of the right to freedom of movement. Although part of customary international law, the rights to leave and to return to a country are "difficult if not impossible to implement."[105] They become difficult in the context of population transfer, because they might conflict with the right to internal movement. Unless consistent with article 12(3) of the Political Covenant, settlers entering neighboring lands cannot force original inhabitants, against their will, to be removed; as a logical extension, settlers cannot force original inhabitants into exile.[106] Should original inhabitants go into exile, they must enjoy the right to return. Furthermore, they have both the right to choose their residence and the right to security of persons.[107]

The conflict that settlement across borders poses with the right to free internal movement takes on an added complication in cases of prolonged military occupation. There might be an element of conflict between humanitarian and human rights law. The Universal Declaration

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101. *Lean on Croatia, Too*, INT'L HERALD TRIBUNE, May 14, 1992, at 8.

102. *See* Human Rights Watch, at 13; *See also* Burns, *supra* note 14. For treatment of removals occurring across international frontiers, see *supra* text accompanying notes 12.

103. *See supra* Section II.D.

104. *See* Palley, *supra* note 30, at 7 (Few states have signed Protocol II).

105. Lillich, *supra* note 39, at 151.

106. Article 9 of the Universal Declaration states that "No one shall be subjected to arbitrary arrest, detention or exile."

107. The right to security of persons is given more concrete meaning by the guarantees against arbitrary arrest and detention, and against interference with one's privacy, family, home, or correspondence spelled out in articles 9 and 12 of the Universal Declaration, respectively.

guarantees original inhabitants the right to freedom of movement and residence within the borders of each state, but article 78, paragraph 1 of the Geneva Convention provides: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or internment."[108] A case-by-case analysis of population transfer during prolonged occupation, where an occupant transfers its own people into the occupied territory and these people in turn obstruct the movement of original inhabitants, may turn on an assessment of "imperative reasons of security" given by the occupant.

Where such arguments fail, there is a clear connection between settlements and the violation of human rights, stemming from the right to free internal movement. Nevertheless, as in the preceding paragraph the violation does not occur to settlers' rights, but to original inhabitants'. The infringement is a by-product, though an important one, of transfer; whereas in cases of isolated, massive removals the infringement on this right may be more part and parcel of the actual population transfer because those to whom it occurs more likely are the actual transferees. At least where gross and persistent such violations would support the permeability of internationally recognized frontiers for U.N. or other attention, this supports the above-mentioned possibility that removals as a general rule may more easily overcome any limitations of territorial definition. Yet case-by-case analysis may prove otherwise. In any event, further developments in human rights are important, if a broad concept of population transfer is to move even further away from the requirement of belligerency that originates from crimes against humanity and humanitarian law.

B. *Effects on Original Inhabitants*

1. Effects of Population Transfer on Self-Determination

The voluntariness or consent of original inhabitants is important for more than just freedom of movement. For example, when a transfer policy, such as settlements, is motivated by a desire to control original inhabitants, the perspective of these people becomes relevant: did they accept to receive settlers?

Take original inhabitants to whom self-determination applies,[109] and

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108. Geneva Convention, *supra* note 35, art. 78, para. 1.

109. The right, or principle, of self-determination in contemporary international law is still to a large extent unclear in its precise scope and content. *See generally* Thurer, *Self-determination*, in *Encyclopedia Pub. Int'l L.* Instalment 8, 470 (R. Bernhardt ed. 1975). The author of the present article does not intend to express an opinion on such scope and content, but rather, for purpose of discussion, assumes that self-determination applies to original inhabitants in question. *See also* U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, *supra* note 70, at para. 7 (self-determination pertains "to all peoples and nations, and . . . a prerequisite of the enjoyment of all the rights and freedoms of the individual"); *but see* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CON-

who are also faced with population transfer. One historical example occurred after World War II. The original inhabitants of Germany received Germans removed from Poland and Czechoslovakia by these countries' governments. De Zayas is of the opinion that these population transfers were illegal in international law because the legitimate sovereign, the receiving state, had not *consented* to receive them.[110]

By virtue of self-determination's applicability, the original inhabitants on the receiving end must have had unique identifiable characteristics, including race or ethnicity, language, religion, culture, tradition and history, which set them apart from their neighbors. Original inhabitants may not be like Germany, a well-established sovereign; instead the self-determination of original inhabitants may be as an ethnic minority, indigenous people, nation without a state, or territory under occupation. In such an event, it is more likely that population transfer will endanger the above special characteristics than in the instance of a sovereign state.[111]

Any group to which self-determination applies should have the opportunity to "freely determine their political status and freely pursue their economic, social and cultural development. . . ."[112] When their land is subject to an occupying or otherwise alien power's population transfer, original inhabitants may be stripped of the opportunity to determine their status and to pursue their development and, thus, denied in overt ways their access to self-determination. In the case of settlements, the denial might occur when administrators and settlers of an occupying or

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FLICTING RIGHTS 41 (1990) (Most countries either have not specifically addressed the right to self-determination, or have done so in such general terms that nothing is added to an understanding of its content).

110. De Zayas, *Historical Survey*, *supra* note 22, at 18.

111. *See* U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3; Colchester, *supra* note 50, at 4. Third World *countries* often "view themselves as unrepresented and disfavored in the development of international law," Mose L. Floyd, *Iraq's Invasion of Kuwait Sparks Migration into Jordan: A Third World Nation Copes With the Administrative Nightmare of a Refugee Population*, 5 G'TOWN IMMIG. L. J. 57, 65 (1991), and thus without as much protection from international law. Minorities, indigenous, and other "stateless" groups have greater reason to view themselves as unrepresented, disfavored, and unprotected. *Cf.* P.J.I.M. de Waart, *Statehood and International Protection of Peoples in Armed Conflicts in the 'Brave New World': Palestine as a U.N. Source of Concern*, 5 LEIDEN J. INT'L L. 3, 24 (Feb., 1992) (concern expressed over the U.N. protecting the right to self-determination of a stateless group against a state's discrimination based on race, creed, or color).

112. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/4684 (1960), Preamble, para. 2. *See also* Declaration on Friendly Relations, *supra* note 71, at 121. The International Covenant of Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/6316 (1967) [hereinafter Economic Covenant], imposes the obligation on states to "promote the realization of the right of self-determination" and to "respect that right." Relevant to self-determination is whether people are distinct and have a capacity for self-management and ". . . a common desire to establish an entity capable of functioning to ensure a common future." Right to Self-Determination, *supra* note 70, at para. 56. For other elements relevant to self-determination, *see generally* Hannum, *supra* note 109, at 27-49.

dominating power flood into the land of a distinct people, i.e. original inhabitants, and appropriate for themselves superior positions in different aspects of society.[113]

The problem becomes more acute and troublesome if alien superiority resulted in subjugation, domination and exploitation of the original inhabitants, which effects have been denounced as contrary to the U.N. Charter and as constituting denials of fundamental human rights.[114] In his writings about the other form of transfer, removals, at the level of sovereign or occupied states, De Zayas has recognized the economic risks of exploitation. He believes that in addition to being willing to receive masses of expelled people, a state must also be economically capable of doing so.[115] "In addition, the social and cultural adequacy of the receiving state ought to be considered,"[116] thereby referring to political domination and social subjugation. But slow to be recognized is that these same effects may play out in cases of settlements, and that may happen even where the unit of self-determination being affected is not an occupied state. If the sheer scale of a population transfer causes original inhabitants to become a minority in their own homeland, that dampens the possibility that they will ever realize self-determination.[117]

International law's taking account of such effects will depend on resolution of the dilemma over how to measure respect for a country's domestic jurisdiction. For the future, the key factor may be whether and how original inhabitants in areas flooded by settlers, originating and ending within U.N.-recognized borders, are recognized as being accorded and then realizing self-determination. Developments in rights of indigenous peoples and related land rights are also relevant,[118] but these have come

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113. That reasoning applies in cases of military occupation, *see* Eide, *Human Rights in a Pluralistic World,* in THE UNIVERSAL DECLARATION IN SPACE AND TIME 23, 42 (UNESCO, 1990) (those under military occupation are entitled to express self-determination), but such a denial is also possible in cases of outside domination that do not involve military occupation. A people's right to "enjoy and utilize fully and freely their natural wealth and resources," provided for in articles 1 and 25 of the Economic Covenant, might be jeapordized. That Covenant also states, in the same article referring to self-determination, "In no case may a people be deprived of its own means of subsistence." Furthermore, a transferring government might violate original inhabitants' right to an adequate standard of living, in article 11 of the Economic Covenant, by restricting their freedom of movement. *See* U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3 (all above rights mentioned in conjunction with population transfer).

114. Declaration on Friendly Relations, *supra* note 70.

115. De Zayas, *Historical Survey, supra* note 22, at 3. He adds: "The arrival of millions of expellees in a country already incapable to feed itself *necessarily* leads to chaos, both for the native population of the receiving state and for the arriving expellees" (emphasis added). *Id.*

116. *Id. Cf.* VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION 76 (1985) (effect on political processes of mixing societies deeply divided along cultural lines).

117. *See* Yoram Dinstein, *Collective Human Rights of Peoples and Minorities,* 25 INT'L & COMP. L.Q. 105, 109 (Jan. 1976) (effects of diluting and dispersing a minority).

118. For example, as land rights relate to self-determination. For a discussion of the relationship between self-determination, land and indigenous rights, *see generally* Hannum,

slowly. In the revised text of the Draft Universal Declaration on the Rights of Indigenous Peoples, the right to self-determination was included in only a compromising manner.[119] In what has been considered as a bedrock convention on indigenous rights, there are provisions dealing with removals identified in the Draft as "forcible relocation," and these are "weak."[120] The possibility was mentioned that there may be some imbalance in a comparison of positive law about the two sorts of transfers when they occur within frontiers. Depending on future developments in indigenous rights, settlements may make up some of that differential.

Self-determination does not always imply total independence from outside groups, but it does give those to whom it applies some control over their own destiny.[121] Logically, settlements across or within international frontiers may prevent a distinct group from determining its own status and development *particularly* when the influx to them is *unwanted*. Therefore, self-determination, should it apply to original inhabitants faced with population transfer, brings into play the element of consent. Self-determination would thereby plug a gap that existed between removals and settlements by virtue of the relatively greater pertinence to removals of other concepts of consent. Shifting attention, in cases of settlements, away from governmental motives for transfers and towards the point of view of those directly affected is not inconsistent with existing treatment of the more traditionally recognized form of transfer, removals. For removals, it was recognized that, in addition to the motives of any

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supra note 72, at 670-77. In his article *A Historical Survey of Twentieth Century Expulsions*, De Zayas makes the connection between land rights, respect therefore, and humane approaches to the problem of population transfer. However, his examples, which are removals and not settlements, occur across international frontiers. Nevertheless, he opines that the gradual public sensitization to the "right of peoples to their native soil," and that "the best and most human solution [to problems caused by population transfer] would be the increased permeability of national frontiers." De Zayas, *Historical Survey*, *supra* note 22, at 33-34. *See also id.* at 23; De Zayas, *German Experience*, *supra* note 23, at 5-6 ("The broad authority of sovereign states to pursue legitimate ends [through population transfer] should not be exercised to the detriment of a people's right to inhabit their native soil.").

119. U.N. Doc. E/CN.4/Sub.2/1990/42, Annex II. Only minor changes were introduced for the 1991 session.

120. Hannum, *supra* note 72, at 72, citing to International Labour Organization Convention No. 107 concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, art. 12, *reprinted in* 1 Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7 & Adds.1-4 (1986) (Jose R. Martinez Cobo, Special Rapporteur), 96, 100, *originally released as* E/CN.4/Sub.2/1982/2 Add. 1, 63, 67.

121. Van Dyke, *supra* note 116, at 221 ("an exercise of self-determination does not necessarily mean that the choice will be for independence. One of the potential choices is for autonomy within the framework of the state and given reasonableness on both sides this is the choice, or compromise that will be made."); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. No. 2, 114, 124 (1991) ("sufficient degree of autonomy within the existing state structure"); United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22 (self-determination may only imply "self-development").

government, the perspective of those affected—in particular, their voluntariness—counted also. In addition, where it can be shown that the governmental motivations, racism and discrimination, condemned under removals, exists also for governments undertaking settlements, will lend more support for a broad concept of population transfer.

2. Effect of Population Transfer on Rights Regarding Genocide

There has been concern that people subjected to massive population transfer, either by facing settlers or by themselves being removed, have been threatened with genocide.[122] For instance, in Indonesian-ruled East Timor population transfer occurred in both forms, and, due to inhumane conditions imposed, genocide happened concurrently.[123] The U.N. has adopted the following definition of genocide, through the Genocide Convention: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," then names several specific acts.[124]

"The right of peoples to physical existence corresponds to the prohibition of genocide."[125] In focusing, therefore, on the effects of population transfer on the right to existence, at least two issues arise. One is the distinction between genocide and ethnocide. The latter is a sub-category of the former. Yet, "[t]he suppression of a culture, a language, a religion, and so on is a phenomenon that is analytically different from the physical extermination of a group."[126] Concern over genocide in the sense of mass death applies to relatively few cases of population transfer. The meaning of ethnocide, which might also coincide with denial of self-determination, is proper in situations of population transfer.[127]

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122. *See* U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3; DeZayas, *Forced Resettlement*, *supra* note 11, at 236 (expressed concern over genocide for removals, but not for settlements). For some concern expressed over genocide for settlements as well as removals, which the author of the present article cannot confirm as actual genocide, *see* CHITTAGONG HILL TRACTS COMMISSION, LIFE IS NOT OURS: LAND AND HUMAN RIGHTS IN THE CHITTAGONG HILL TRACTS, BANGLADESH (May, 1991); The Chittagong Hill Tracts, INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS [IWGIA] NEWSLETTER No. 1 (July/Aug., 1991); *They Are Now Burning Village After Village: Genocide in the Chittagong Hill Tracts*, IWGIA Doc. No. 51 (W. Mey ed. Dec. 1984).

123. *See* CHALK & JONASSOHN, *supra* note 62, at 379. *See also* Erlanger, *supra* note 26 (100,000 to 200,000 East Timorese died from 1974 to 1980); Budiardjo, *supra* note 46 (200,000 died); F. HIORTH, TIMOR PAST AND PRESENT 61 (1985) (in 1975, an estimated 650,000 East Timorese lived on the island).

124. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1949, 78 U.N.T.S. 277. Those acts include: "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." *Id. Cf.* RESTATEMENT FOREIGN RELATIONS, *supra* note 31, § 702.

125. Dinstein, *supra* note 117, at 105.

126. CHALK & JONASSOHN, *supra* note 62, at 23.

127. Distinctions between ethnocide and genocide are de-emphasized by focusing on

A second issue important to the relationship between population transfer and the right to existence is *intent*. "[T]he essence of genocide is not the actual destruction of a group—in our case, a people—but the intent to destroy it as such."[128] This implies that if a group, for example a "people" however defined, is destroyed, but no intent to destroy existed, then no genocide occurred. Conversely, one individual murder would fulfill this definition of genocide if the act was designed to further the extinction of a people.

The situation of the Kurds after the Second Gulf War involved population transfer in the form of massive removal.[129] Payam Akhavan believes the requisite intent existed, stating that "it was not in question that the deliberate policy of the Iraqi authorities had resulted in conditions which were so extreme as to cause the mass exodus of Kurds to neighboring States."[130] Given that the receiving end was "inhospitable regions where their survival may be threatened," Akhavan recommends that the International Court of Justice give an advisory opinion on whether this constitutes " 'deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part' within the meaning of the Genocide Convention."[131] A positive response would mean genocide occurred, and could not be overlooked by those who cite to Article 2(7) of the U.N. Charter.[132] Depending on such a judgement, removals could cause genocide.

Depending upon circumstances, the governmental intent required to raise an act to genocidal level may vary. For example, a high degree of centralized authority and quasi-bureaucratic organization in the government, like that of Iraq, has not always been required. According to Chalk and Jonassohn, an exception has been "when the victim group is numerically small." They give as an example the phenomenon of population

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existence rather than extermination, a constructive, preventative approach to the subject. Some causes are common to both forms, one of which is discrimination. For example, prevention of discrimination would remove religious intolerance, described by a U.N. Sub-Commission study as "one of the decisive causes of genocide." The Genocide Study, U.N. Doc. E/CN.4/Sub. 2/416, cited in WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 121 (1983).

128. N. ROBINSON, THE GENOCIDE CONVENTIONS, as quoted in Dinstein, *supra* note 117, at 105.

129. Some of the international discussion of post-second Gulf War Kurdistan was in terms of refugees rather than forced transfer. *See, e.g.*, Security Council Resolution 688, *supra* note 5.

130. Payam Akhavan, *Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice*, 12 HUM. RTS. L.J. No. 8/9, 297 (1991).

131. *Id.* at 297-98.

132. Akhavan states that "given its status as a 'crime against humanity,' an inference that genocide exists would definitely put into question the proposition that the matter is one 'essentially within the jurisdiction' of Iraq." *Id.* at 298. *See also* Leslie Gelb, *The Strange Story of Mr. Bush Dealing With Saddam*, INT'L HERALD TRIBUNE, May 5, 1992, at 4.

transfer, "such as the indigenous tribes wiped out by colonizing settlers."[133] Settlements would be a possible cause of genocide. One need think no further than the Indonesian presence in East Timor.

In summary about genocide: governmental participation in population transfer might take the form of force, as in the case of some removals. Or it might take the form of encouragement or sponsorship, as in the example of some settlements. Although containing less obvious intent, the latter involvement needs to be examined even further through concerted case study for the extent to which it may raise the results on those affected by the movement to the level of genocide. Like voluntariness or consent, and freedom of movement arguments, legal reasoning regarding genocide is more obvious to cases of removal, but may apply also to settlements. Relatively blind to issues of the permeability of frontiers, while not requiring a state of belligerency, the concept of genocide is crucial to any broad concept of population transfer.

IV. CONCLUSION

The law on genocide, like self-determination, refers to groups rather than individuals. Any development of the consciousness of international law towards collectiveness is important to a wholistic legal approach towards uprooted people.[134] Given the varying constraints along the lines of belligerency and territorial definitions, as well as other differences between removals and settlements mentioned above, international law is distant from treating removals and settlements as one category *per se*. A broad treatment should be pursued, however, especially where the motivations and effects of both types may be egregious. Some of what were called variances or differences may be just noise, coming from the law on population transfer being undeveloped and, thus, somewhat confusing. The coherent legal study of population transfer will gain speed as the realization grows that it is "inaccurate to use the passive voice to describe much of the world's population flows."[135]

133. CHALK & JONASSOHN, *supra* note 62, at 28.

134. Should a wide concept of population transfer take hold, a legal regime that relies on rights, especially those of groups, will avoid confusing legal categories. As shown by the cumbersome distinction between pre-and post- Second Gulf War movements of Kurds, it might be difficult to divide refugee flow as a more individual phenomenon from any acceptable, broad definition of massive population transfer. *Cf.* Palley, *supra* note 30, at 3 n.2.

135. Weiner, *supra* note 6, at 7.

GATT - Will Liberalized Trade Aid Global Environmental Protection?

URSULA KETTLEWELL*

I. INTRODUCTION

The Polluter-Pays Principle has been accepted by the majority of industrialized nations as the mechanism for controlling global pollution.[1] This principle charges the polluter, not society as a whole, for abating the cost of pollution prevention and control.[2]

Last spring, the *Wall Street Journal* published an article titled *GATT*[3] *Report Says Trade Liberalization will Aid Global Environment Protection.*[4] According to this report,[5] further reduction of protectionist measures in all likelihood will lead to "a substantial increase in global environmental quality . . . even if *no* new environmental policies were introduced."[6]

This paper examines the use of proposed GATT rules[7] as a means for reducing global pollution to enhance overall environmental quality. In other words, do the international rules for trade incorporate the Polluter-Pays Principle to reduce environmental degradation? This article begins by giving a general background of both the Polluter-Pays Principle and GATT. A discussion of the role of the Polluter-Pays Principle in international rules of trade follows. The article concludes with recommendations for incorporating the Principle into GATT to achieve its claim that more liberalized trade will lead to an overall increase in global environmental quality.

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1. The Organization for Economic Cooperation and Development (OECD) adopted this Principle for achieving sustainable development without environmental harm. For a discussion of the OECD and the Polluter-Pays Principle, see part II-A of this paper. For an in-depth discussion of how nations have adopted this principle, see Ursula Kettlewell, *The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter-Pays Principle*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 429 (1992).

2. Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 96 (1984).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A12, 55 U.N.T.S. 194 [hereinafter GATT]; see *infra* sec. II-B for a general discussion of GATT.

4. Bob Davis, WALL ST. J., Feb. 12, 1992, at A2, col. 3.

5. This report, titled *Trade and the Environment* is a study conducted by the Secretariat of the Geneva-based GATT, [hereinafter The Study]; *see* 9 INT'L TRADE REP. (BNA) 310 (1992).

6. *Id.* at 34 (emphasis added).

7. Currently the eighth round of trade negotiations called the Uruguay Round is taking place to further liberalize the international rules of trade. See *infra.* part III-B for a discussion of the proposed provisions.

II. THE POLLUTER-PAYS PRINCIPLE AND GATT - BACKGROUND

A. *The Polluter-Pays Principle*

The Polluter-Pays Principle was initially devised by economists to maximize resource allocation.[8] Since then, most industrial nations have recognized the value of the Principle as a pollution abatement device.[9] In 1972, the Organization for Economic Cooperation and Development (OECD)[10] endorsed the use of the Polluter-Pays Principle to further its goals.[11] The OECD defined the Principle as follows:

> The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays-Principle." This Principle means that the *polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state.*[12] In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and or consumption. Such measures should *not be accomplished by subsidies* that would create significant distortions in international trade and investment.[13]

Therefore, the application of the Polluter-Pays Principle requires the internalization of all production costs including external costs,[14] "that is,

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8. *See* STUDIES IN INTERNATIONAL ENVIRONMENTAL ECONOMICS (Ingo Walter ed. 1976).

9. *See* Wetstone & Rosencranz, *supra* note 2, at 96.

10. The OECD was organized in 1960 to promote policies designed:
(1) to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
(2) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
(3) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.
The western industrialized nations, Australia, New Zealand, Japan, and Turkey are members of this organization and they produce the majority of world trade. OECD, COMPENSATION FOR POLLUTION DAMAGE, inside front cover (1981).

11. *Id.*

12. *Note on the Implementation of the Polluter-Pays Principle*, OECD Doc. ENV (73) 32 (Final) of January 21, 1974, *reprinted in* 14 I.L.M. 238, 239 (1975) [hereinafter *Note on the Implementation of the Polluter-Pays Principle*]. The OECD defines an acceptable state as that state decided by the public authorities which "implies that through a collective choice and with respect to the limited information available, the advantage of a further reduction in the residual social damage involved is considered as being smaller than the social cost of further prevention and control." In other words, the "acceptable state" is defined by a government as the level of pollution tolerated as acceptable.

13. OECD, *Guiding Principles Concerning International Economic Aspects of Environmental Policies, reprinted in* 11 I.L.M. 1172 (1972) (emphasis added) [hereinafter *Guiding Principles*].

14. Jean Philippe Barde, *National and International Policy alternatives for Environmental Control and Their Economic Implications*, in Studies In International Environmen-

damage caused by pollution."[15]

However, the OECD recognized that in order for the Principle to work, it must be uniformly applied by all nations. This, in the opinion of the OECD, can only be accomplished "through the adoption of a common basis for Member countries' environmental policies."[16] But, recognizing that such harmonization of policies and standards does not exist, the OECD encouraged its members to strive toward this goal in order "to avoid the unjustified disruption of international trade patterns and of the international allocation of resources which may arise from diversity of national environmental standards."[17]

The OECD recommended the implementation of the Polluter-Pays Principle through a variety of means such as direct or indirect regulation, taxes, permits, product and process standards, and pollution charges.[18] The OECD also recommended the use of economic instruments to add "more flexibility, efficiency and cost-effectiveness in the design and enforcement of pollution control measures"[19] to aid in a more consistent application of the Polluter-Pays Principle.[20]

In summary, the Polluter-Pays Principle as been advanced as the means to abate and control pollution. In other words, if polluters bear the cost of pollution prevention and control, market failure and distortions of trade will be avoided, while at the same time national environmental goals will be realized.[21]

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tal Economics 138 (Ingo Walter ed. 1976). External costs, or externalities, refer to costs associated with the use of a resource that is not reflected in the product price. For example, discharging production waste into a river is an external cost because clean-up of the pollution in the river caused by the waste is not borne by the producer but by future users. This constitutes improper cost allocation which will result in overproduction resulting in a misallocation of resources and - in the opinion of many economists - ultimately will lead to "market failure." *See* ORRIS C. HERFINDAHL & ALLEN V. KNEESE, QUALITY OF THE ENVIRONMENT; AN ECONOMIC APPROACH TO SOME PROBLEMS IN USING LAND, WATER, AND AIR 7 (1965). It is the opinion of these economists that if such "market failure" is not corrected, it will lead to all types of pollution.

15. Pollution is defined by economists as a misallocation of resources due to improper product pricing. *See* Kenneth R. Reed, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 513-14 (1970).

16. *Recommendation on the Implementation of the Polluter-Pays-Principle*, OECD Doc. C (74) 223 (1974), *reprinted in* INT'L PROTECTION ENV'T 313 (1975).

17. *Guiding Principles*, *supra* note 13, at 1173.

18. *Note on the Implementation of the Polluter-Pays Principle*, *supra* note 12, at 239.

19. *OECD Council Regulation on the Use of Economic Instruments in Environmental Policy*, *adopted* Jan. 31, 1991, *reprinted in* 14(2) INT'L ENVTL. REP. (BNA) No. 5, sec. 2, at 23 (1991).

20. *Id.* Examples of such economic instruments are, amongst others, emission charges or taxes, marketable permits, deposit-refund systems, and some forms of financial assistance consistent with the Principle.

21. *See* Kettlewell, *supra* note 1, for an in-depth analysis of the Polluter-Pays Principle and problems associated with its implementation.

B. *GATT*

1. Creation of GATT

Unlike the Polluter-Pays Principle, the international rules of trade were not developed to maximize resource allocation and avoid distortions in trade. Instead, these rules were advanced to maximize the free flow of trade in order to increase the general economic standard of living of the global community.

In 1946, the leaders of the world community determined an international trade organization was needed to oversee international trade and prevent the reoccurrence of conditions,[22] which, in their opinion, were partially responsible for the Second World War.[23] The Economic and Social Council (ECOSOC) of the United Nations met to draft a charter for an international trade organization (ITO).[24] This charter consisted of three parts, the first dealing with the ITO, and the other two parts with the multilateral trade agreements for tariff reductions. However, the U.S. Congress failed to approve the Charter, and as a result the ITO never came into existence.[25] The multilateral trade agreements (part 2 and 3 of the Charter), on the other hand, were adopted under separate trade authority[26] and became known as GATT.[27]

The goals and objectives of these agreements were enunciated in its Preamble:

> Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, . . .[28]

In order to accomplish these goals of economic prosperity and growth, the

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22. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOKLYN J. OF INT'L L. 11, 16 (1992).

23. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 31 (1990)[hereinafter THE WORLD TRADING SYSTEM]. Protectionist measures such as quota-type restrictions adopted by the United States and other industrialized nations prevented the free flow of international trade.

24. 1 UN ESCOR Res. 13, U.N. DOC. E/22 (1946).

25. THE WORLD TRADING SYSTEM, *supra* note 23, at 34.

26. The President of the United States was delegated statutory authority to negotiate multilateral tariff reduction agreements. An Act to Extend the Authority of the President Under sec. 350 of the Tariff Act of 1930 and for Other Purposes, 79th Cong., 1st Sess., 59 Stat. 410, (codified as amended at 19 U.S.C. secs. 1351-1366 (1945).

27. GATT, *supra* note 3. Twenty-four nations initially signed these agreements in 1947. GATT was adopted in the U.S. through the Protocol of Provisional Application PPA. *See* THE WORLD TRADING SYSTEM, *supra* note 23, at 35.

28. GATT, *supra* note 3, Preamble, 55 U.N.T.S. at 194. *reprinted in* INTERNATIONAL TRADE AND INVESTMENT, SELECTED DOCUMENTS 21 (John H. Barton & Bart S. Fisher eds. 1986) [hereinafter TRADE AND INVESTMENT].

parties agreed to enter into "reciprocal and mutually advantageous *arrangements* directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[29] These arrangements became by far the most important multilateral agreements governing international trade.[30]

2. Organization of GATT

GATT is not considered a self-executing treaty,[31] and all multilateral decisions are made by the CONTRACTING PARTIES[32] in accordance with the provisions of Article XXV. However, even though GATT was conceived as an agreement, not an organization, over the years it has taken on the characteristics of both.[33]

The CONTRACTING PARTIES are still the source of the primary decisions made by GATT. Each contracting party is a member of the CONTRACTING PARTIES which meet once a year. Decisions are normally made by consensus, even though each contracting party has one vote.[34] However, since 1960 the majority of the work of the Contracting Parties has been carried out by the GATT Council.[35] It meets monthly and oversees all the work of the various GATT working parties, committees and panels.

3. GATT Rules which Govern Trade

The work which is carried out by these various groups is governed by the rules contained in the original agreements on tariffs and trade, and subsequent rounds of trade negotiations.[36] These rules are based on two

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29. *Id.* (emphasis added).

30. Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. (BNA) 10599 (Oct. 1991).

31. Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C.J. INT'L L. & COM. REG. 497, 500 (1991). However, the author states that two recent judgments from the Court of Justice of the European Community, which first declared GATT not to be a treaty, indicated a change in its position.

32. CONTRACTING PARTIES refers to actions taken by the contracting parties jointly and not by a governing body like the ITO which was never created. *See* GATT, *supra* note 3, art. XXV. 55 U.N.T.S. at 272.

33. Youri Devuyst, *GATT Customs Union Provisions and the Uruguay Round: The European Community Experience*, 26 J. WORLD TRADE 15, 16 (Feb. 1992).

34. *Id.* at 17.

35. *Id.* Council membership consists of those contracting parties who wish to participate. The Council was created in the 16th Session of GATT (1960) GATT Doc. SR. 16/11, at 160 (1960).

36. Seven negotiating rounds have been successfully completed, with the eighth round currently in progress. *See* Jackson, *supra* note 22, at 11. Each round generally lasts four years, except for the last two rounds which have taken longer. The Tokyo Round lasted five years, and the Uruguay Round has been in progress since 1986. *See* Judith H. Bello & Alan F. Holmer, *Recent Developments -U.S. Trade Law and Policy Series No. 19: The Uruguay Round: Where Are We?* 25 INT'L LAW. 723, 724 (1991). GATT is primarily used as a forum for trade negotiations. Over 100 nations are now members and over 200 separate multilat-

primary principles, (1) non-discrimination (MFN)[37] and (2) trade barrier reductions,[38] to further the goals and objectives of GATT. Therefore, by extending like treatment to like products of trading partners and prohibiting import surcharges for the protection of domestic industry,[39] trade is liberalized to the extent of negotiated tariffs.

In addition to these tariff concessions, GATT also tries to eliminate or reduce non-tariff barriers, such as quantitative restrictions,[40] subsidies,[41] and dumping of domestic goods on foreign markets,[42] in order to promote fair trade. The Tokyo Round was most successful in accomplishing some of these reductions.[43]

However, GATT grants a number of exemptions from its provisions to permit a contracting party to protect superior national interests.[44] GATT also provides a waiver procedure where any contracting party can be excused from a GATT obligation if two-thirds of the CONTRACTING PARTIES approve.[45] The question is whether the provisions as a whole or the exemptions advance the goal of the Polluter-Pays Principle - to reduce global pollution?

III. THE POLLUTER-PAYS PRINCIPLE AND GATT - INTERPRETATION

Environmental protection was not an issue when GATT came into

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eral agreements make up the GATT legal system. *See* Hauser, *Proposal for a Multilateral Agreement on Free Market Access (Mafma)*, 25 J. WORLD TRADE 76, 79 (Oct. 1991).

37. GATT, *supra* note 3, art. I, 55 U.N.T.S. at 196. General Most-Favoured-nation Treatment (MFN). This provision requires non-discriminatory treatment of all GATT contracting parties regarding the importation and exportation of all goods and transfer of payments. For example, this would prohibit one nation from giving preferential treatment to one or more of its GATT trading partners without extending that same treatment to all other GATT members.

38. GATT, *supra* note 3, art. II, § 4, 55 U.N.T.S. at 200. This article extends domestic protection of domestic products to imported foreign goods through negotiated tariffs. It requires that "[n]o contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement."

39. Jackson, *supra* note 22, at 40.

40. GATT, *supra* note 3, art. XI, 55 U.N.T.S. at 224.

41. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250.

42. GATT, *supra* note 3, art. VI, 55 U.N.T.S. at 212.

43. The Tokyo Round was opened in September, 1973 at a meeting of the Ministers in Tokyo. The meeting was open to GATT members and non-GATT members. 102 countries participated in the negotiations. The Tokyo Round lasted more than five years with many delays resulting from economic uncertainty, political conditions, and legislative processes. The Round was opened for signature on April 12, 1979. *See* TRADE AND INVESTMENT, *supra* note 28, at 152. During this round not only traditional tariff reductions were negotiated, but codes "on the use of subsidies and countervailing measures, antidumping standards, and government procurement" were adopted. *See* Bello & Holmer, *supra* note 36, at 724.

44. GATT, *supra* note 3, 55 U.N.T.S. art. XII at 228, art. XVIII-B, at 252. Article XII and XVIII-B provide for economic exceptions to safeguard its balance of payments; Article XIX permits a protection against import surges; Article XX permits a nation to uphold its public policies; and Article XXI permits an exception for essential security interests.

45. GATT, *supra* note 3, art. XXV, 55 U.N.T.S. at 272.

being. Rules for trade liberalization were drafted without considering their environmental effects. It was not until the early seventies that the global community became interested in environmental issues. The Declaration on the Human Environment[46] was adopted at the U.N. Conference on the Human Environment held in Stockholm, Sweden, in 1972. It enunciated the principle of state responsibility[47] and liability[48] for extraterritorial environmental harm.

These principles were interpreted by the OECD to mean that each State has a general obligation of diligence to protect the environment.[49] Therefore:

> A State must constantly have available adequate legal and physical means for ensuring normal compliance with its international obligations [and] . . . it must equip itself, *notably where protection of the environment is concerned*, with the laws and administrative regulations, in both the civil and criminal fields, necessary to achieve this end.[50]

Since the Declaration on the Human Environment, many nations, including the U.S., have adopted a variety of environmental regulations to carry out the mandate of the Declaration.[51] Environmental awareness continues to grow, and with such serious threats as global warming and ozone depletion constantly in the public eye, it is no longer possible to negotiate liberalized trade agreements without considering their environmental effects.

A. *Interpretation and Implementation of GATT Rules*

Over the past 45 years many trade disputes have been negotiated. However, only recently have they involved environmental claims. These disputes generally involve Article XX exemptions which permit nations to pursue their own domestic policies relating to safety, health, and the

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46. *Stockholm Declaration on the Human Environment*, at 7, U.N. Doc.A/Conf. 48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972). This Declaration was the product of the U.N. Conference on the Human Environment which convened in Stockholm, Sweden in June, 1972.

47. *Id.* at 1420, Principle 21.

48. *Id.* Principle 22.

49. *Observations on the Concept of the International Responsibility of States in Relation to the Protection of the Environment*, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 380, 382 (1977) [hereinafter LEGAL ASPECTS]. For an in-depth discussion of state responsibility for environmental harm, see Kettlewell, *supra* note 1, at 437-445.

50. LEGAL ASPECTS, *supra* note 49, at 384.

51. For example, some of the environmental laws passed by the United States are: Clean Air Act, 42 U.S.C § 7401 (1970), as amended by 42 U.S.C. § 7612, Pub. L. No. 101-549 (1990); Clean Water Act, 33 U.S.C. § 1251 (1972); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976); Toxic Substances Control Act, 15 U.S.C § 2601 (1976); and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980).

conservation of exhaustible natural resources.[52] The outcome of two of these disputes indicates that GATT not only fails to accept the Principle, but also prevents its application if the result would restrict trade.

1. The Superfund Excise Tax Dispute

In 1988, GATT was given an opportunity to determine whether it recognized the Polluter-Pays Principle in its interpretation of international rules of trade. The dispute involved two excise taxes imposed by the United States.[53] The first involved an 11.7 cents per barrel petroleum tax on foreign oil, as opposed to the 8.2 cents domestic tax. The panel had no difficulty in finding that this differential violated the national treatment provision of Article III(2) and the United States was asked to reduce that tax.[54] The other excise tax imposed a tax on certain "downstream chemicals equivalent to the tax they would have borne had their inputs been sold in the United States."[55] In this case, the panel had a much more difficult time reaching its conclusion.

The EC and Canada objected to the tax arguing that the pollution created in the production of these chemicals occurred in the producing country, not the U.S. Therefore, they should not be taxed upon entry into the U.S. They also argued that chemicals produced in the U.S., but exported, should not be exempt from the tax, since the pollution occurred in the U.S. The EC pointed out that these, "tax adjustments departed from the principles adopted by the OECD Council in 1972 . . . In particular from the Polluter-Pays Principle which meant that the polluter should bear the costs of measures decided by public authorities to ensure that the environment was in an acceptable state."[56]

The EC further argued that the border adjustment was not necessary

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52. GATT, *supra* note 3, art. XX (b) & (g), 55 U.N.T.S. at 262. Article XX more specifically states that:

> nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

53. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Superfund Excise Taxes [adopted June 17, 1987], B.I.S.D., 34th Supp. (Geneva: GATT, June 1988), *reprinted in* 27 I.L.M. 1596 (1988) [hereinafter Superfund Tax]. Disputes are normally resolved through panels. For an in depth discussion of GATT dispute settlement procedures see Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOKLYN J. INT'L L. 32, 52-65 (1992), and Horlick, *The US-Canada FTA and GATT Disputes Settlement Procedures*, 26 J. OF WORLD TRADE 5 (1992).

54. Superfund Tax, *supra* note 53, at 1597. This provision states in part that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

55. *Id.* at 1596.

56. *Id.* at 1607 (emphasis added).

to offset any unfair advantage of the foreign producer, because, in accordance with the Polluter-Pays Principle, the producer probably would have paid pollution charges or taxes in the producing country.[57] Therefore, the border adjustment actually places the foreign producer at a disadvantage because the producer must pay pollution charges twice. The EC charged that "[w]hat the United States was in fact doing under the label of border tax adjustments was to ask foreign producers to help defray the costs of cleaning up the environment for the United States industries."[58]

The United States, on the other hand, argued "that the Polluter-Pays Principle had not been adopted by the Contracting Parties and it was on the GATT provisions and not on OECD recommendations that the Panel had to base its conclusion."[59] The United States, however, noted that "[e]nvironmental policy principles related to trade could conceivably be incorporated into the GATT legal system, but such a far-reaching step required the cooperation of all contracting parties and could be taken only after considerable study and discussion."[60]

The Panel, after considering all the arguments, recognized that GATT disputes must be resolved "in light of relevant GATT provisions,"[61] and held that GATT had not adopted the Polluter-Pays Principle. The panel did not examine the consistency of the revenue provisions in the Superfund Act with the environmental objectives of that Act or with the Polluter-Pays Principle. Instead, it found "that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served."[62]

2. The Tuna Import Restrictions Dispute[63]

More recently, another GATT panel was given the opportunity to examine the effect of environmental regulations on trade. The United States imposed an embargo on the importation of Mexican tuna because it was harvested with the purse-seine method in the Eastern Tropical Pacific Ocean (ETP) in violation of the United States Marine Mammal Protection Act.[64] Mexico objected to the embargo and after consultations

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1614.
62. *Id.*
63. *GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991) [hereinafter *Mexican Tuna Panel*]. As of this date, the panel report has not been adopted by the Council. Mexico and the United States are in the process of working out the disagreement.
64. Pub. L. No. 92-522, 86 Stat. 1027 (1972), as amended, notably by Pub. L. No. 100-711, 102 Stat. 4755 (1988) and most recently by Pub. L. No. 101-627, 104 Stat. 4467 (1990) codified in part at 16 U.S.C. 1361(f). The Act contains some specific requirements regarding the taking of other marine mammals while harvesting yellowfin tuna in a specific region of

with the United States failed, asked for the establishment of a GATT panel to hear the dispute. A panel was established and approximately twenty other nations reserved the right to be heard.[65]

Both parties and the intervenors presented extensive arguments. Mexico primarily argued that the embargo violated Article XIII, quantitative restrictions, and that none of the measures taken by the United States were in compliance with GATT provisions. It asked that the CONTRACTING PARTIES recommend the United States bring its statutory requirements under the MMPA "into conformity with its obligations under the General Agreement.[66]

The United States, on the other hand, asked the Panel to make the following findings:

> (a) The measures imposed under the MMPA with respect to certain domestic yellowfin tuna from Mexico were internal regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of tuna and tuna products consistent with Article III:4; and
> (b) even if these measures are not consistent with Article III, they were covered by the exceptions in Article XX(b) and XX(g);[67]

and to reject Mexico's claim.[68]

The Panel analyzed at length the exceptions under Article XX (b) and (g) and noted:

> "that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna."[69]

The Panel examined Article III:4, concluding that it "refers solely to laws, regulations and requirements affecting the internal sale, etc. of products . . . that are of the same nature as those applied to the domestic

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the Pacific Ocean called the ETP. They discovered that in that particular area, yellowfin tuna will always be in the same area with dolphins. As a result, if the purse-seine nets are used for harvesting tuna, dolphins will also be killed. To conserve dolphins, the MMPA sets standards for the taking of yellowfin tuna and dolphins, and permits an embargo on imported tuna taken in violation of these standards.

65. The nations that wanted to be heard were Australia, Canada, Chile, Colombia, Costa Rica, the European Communities, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, Singapore, Tanzania, Thailand, Tunisia and Venezuela. *See Mexican Tuna Panel, supra* note 63, at 1598.

66. *Id.* at 1601.

67. *Id.*

68. *Id.*

69. *Id.* at 1617.

products."[70] The Panel then noted that the MMPA applies to the harvesting of tuna in order to avoid the killing of dolphins, and as such does not directly regulate the tuna as a product. Therefore, the Panel concluded that the provisions of the MMPA relating to the harvesting of tuna are not covered by the Note Ad Article III, and thus violate GATT.

The Panel then examined the Article XX(b) and (g) exceptions. First it found the measures under the MMPA did not meet the test of "necessary" under Article XX(b), and that the measures taken under Article XX(g) cannot be applied extraterritorially.[71]

In its concluding comments, the Panel noted that GATT places few restrictions on the enforcement of domestic environmental regulations as long as they do not discriminate against like imported products. But, "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."[72] The panel noted that if such exceptions should be allowed under Article XX(b) and (g), GATT should be amended or a waiver should be granted. It recommended that "the CONTRACTING PARTIES request the United States to bring the above measure into conformity with its obligations under the General Agreement."[73]

In summary, these two panel decisions show that GATT interpretations, so far, do not consider the Polluter-Pays Principle in their analysis and outcome. The Superfund Tax panel clearly acknowledged that the Polluter-Pays Principle has not been adopted by GATT. The Mexican Tuna panel decision, however, implies that even if the Principle were recognized, it could not be applied if it resulted in restrictions on international trade. In other words, the United States cannot prohibit the importation of products which have been produced without the benefit of environmental regulation nor can it add a surcharge on such goods to equalize production costs,[74] a prerequisite for a successful application of the Polluter-Pays Principle.

B. *The Uruguay Round and the Polluter-Pays Principle*

These panel decisions reflect GATT rules currently in force. However, since the *Mexican Tuna* decision became public, much discussion has taken place regarding the interaction of environmental issues and trade. The attention is now focused on the Uruguay Round which is in its

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70. *Id.*

71. *Id.* at 1620-21.

72. *Id.* at 1622. As one author noted, the difference between product and production can by "analyzed as a conflict-of-laws rule intended to allocate jurisdiction between the United States and Mexico. Mexico is accorded exclusive jurisdiction over domestic production processes, while the United States is accorded jurisdiction over products physically brought to the United States." *See* Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142, 150-51 (1992).

73. *Mexican Tuna Panel, supra* note 63, at 1623.

74. *See* discussion *infra* parts III-B(3) and IV.

last stretch of negotiations. This Round started in 1986,[75] with a projected completion date of 1990. However, due to major differences in agricultural reforms in the areas of export subsidies, internal supports, and market access, the negotiations have stalled numerous times and have yet to be completed.[76]

On December 20, 1991, GATT Director-General Arthur Dunkel released, with the intent to move negotiations along, a very lengthy document called the Uruguay Round Final Act.[77] The text was originally labeled "take it or leave it," with an opportunity for comments by member negotiating nations.[78] However, since the release of this document, much criticism has been launched against many of its provisions. For example, a key U.S. labor advisory committee urged the United States to reject the draft because, in the committee's opinion, it would lead to higher unemployment, "undermine U.S. environmental regulations, limit the ability of U.S. lawmakers to promote economic growth, and place U.S. industry and workers at a competitive disadvantage."[79] Environmentalists, in particular, are concerned if the provisions are adopted "as is," since environmental laws will have to be rewritten to meet the lowest common denominator.[80]

1. Environmentalist's Look at *Final Act* Provisions

The environmental implications of various provisions in the Final Act have been analyzed by various groups. One such analysis was prepared by Lori Wallach, an environmental attorney for a health, consumer, and environmental advocate group called Public Citizen in Washington D.C.[81] She argues that two major sections of the Final Act - Sanitary and Phytosanitary Standards (SPS)[82] and Technical Barriers to Trade

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75. Bello & Holmer, *supra* note 36, at 724-25. One of the main U.S. objectives for this Round was to include services under the GATT umbrella. Two negotiating groups were formed. One was charged with negotiating an agreement on services to be included in GATT, since at the present time GATT provisions only cover goods. The second group handled the more traditional negotiating topics such as agricultural subsidies, tariff reductions, and the dispute settlement process.

76. *Id.* at 726.

77. The Dunkel document is G.A.T.T. Doc. MTN.TNC/W/FA, (Dec. 20, 1991) [hereinafter *Final Act*].

78. *Uruguay Round Talks to Last Until Spring as U.S., EC Voice Reservations on Draft*, 9 INT'L TRADE REP. (BNA) No.3 at 98 (Jan. 15, 1992). 108 nations are participating in these negotiations, and they were to report their comments by January 13, 1992.

79. *Key Labor Advisory Group Urges U.S. to Reject Dunkel's Draft GATT Agreement*, 9 INT'L TRADE REP. (BNA) No. 5 at 191 (Jan. 29, 1992). These comments were made in a letter to U.S. Trade Representative Carla A. Hills.

80. Wallach, *Analysis of the "Final Act"*, PUBLIC CITIZEN (Dec. 26, 1991).

81. *Id.* This group was started by consumer advocate, Ralph Nader.

82. *Final Act*, *supra* note 77, at L. 45, Annex A, ¶ 1. These standards are defined as any measure applied:

> - to protect animal or plant life or health *within the territory* of the contracting party from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms:

(TBT),[83] will have a negative effect on our environmental, health and consumer regulations because these provisions "promote downwards harmonization and mandate affirmative preemption."[84]

More specifically, the SPS measures fall under GATT Article XX exceptions which can only be applied to safeguard human, animal, and plant life from specific risks within the territory of the contracting party.[85] The measures include "laws, regulations, requirements and procedures" including "end product criteria, processing and production methods; testing, inspection, certification and approval procedures . . . statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."[86]

These measures cannot be more restrictive than the international standards accepted by GATT[87], which, in the opinion of some environmentalists, promotes "harmonization downward of national standards that are higher than international standards."[88] As pointed out by Ms.

- to protect human or animal life or health *within the territory* of the contracting party from risks arising from additives, contaminants, toxins or disease-causing organisms, in foods, beverages or feedstuffs;
- to protect human life or health *within the territory* of the contracting party from risks arising from diseases carried by animals, plants or products thereof or from the entry, establishment or spread of pests; or
- to prevent or limit other damage *within the territory* of the contracting party from the entry, establishment or spread of pests.

Id. (emphasis added).

83. *Final Act*, *supra* note 77 at G. 20, Annex 1, ¶ 1. A technical regulation is defined as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

A technical standard is defined as a

> document *approved by a recognized body*, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Id. para. 2 (emphasis added).

"For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents." *Id.* para. 2, Explanatory Note.

84. Wallach, *supra* note 80, at 2.

85. *Final Act*, *supra* note 77, at L. 36, ¶ 1 and L. 45, Annex A, ¶ 1. *See Final Act*, *supra* note 82 for the definition of SPS which cites examples of specific risks.

86. *Final Act*, *supra* note 77, at L. 45, Annex A, ¶ 1.

87. *Final Act*, *supra* note 77, at L. 46, Annex 1, ¶ 3. The standards for food safety are established by the Codex Alimentarius Commission; standards for animal health and zoonoses are developed by the International Office of Epizootics; standards for plant health are developed by the International Plant Protection Convention in co-operation with regional organizations; and for other areas standards developed by other relevant international organizations.

88. Wallach, *supra* note 80, at 14-15.

Wallach, many United States standards relating to food, pesticides, additives, and contaminants are more restrictive than these international standards. Therefore, these restrictive standards would constitute an unfair trade barrier under the Final Act.[89]

Furthermore, SPS measures are to be applied "only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained against available scientific evidence."[90] This provision shifts the burden of proof to the contracting party with the more restrictive law to justify its standard, rather than placing the burden upon the contracting party challenging that law.

Technical standards must also comply with GATT acceptable international standards,[91] unless they fit a very narrow exception.[92] These international standards "shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[93] If there are no international standards, then "technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[94] But most important, "technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a *less trade-restrictive manner*."[95]

Therefore, if a nation's existing laws are stricter than acceptable GATT standards, the Final Act mandates regulatory compliance.[96] If a

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89. *Id.* at 12-14.

90. *Final Act*, *supra* note 77, at L. 36, ¶ 6.

91. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.4. The provision specifically states that "where technical regulations are required and relevant international standards exist or their completion is imminent, Parties *shall use* them, or the relevant parts of them, as a basis for their technical regulations . . . ." (emphasis added).

92. *Id.* It states as follows: "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

93. *Final Act*, *supra* note 77, at G. 3, art. 2 ¶ 2.5.

94. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.2. Legitimate objectives are defined in this paragraph as: "national security requirements; the prevention of deceptive practices; protection of human health and safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products."

95. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.3. (emphasis added).

96. *Final Act*, *supra* note 77, at L. 43, ¶ 45. This provision states in pertinent part:

> Contracting parties shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this decision. . . . Contracting parties shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this decision.

Id.

Final Act, G.5, art. 3, ¶ 3.5 contains the same provision regarding technical regulations.

nation were to refuse and its standards were to be challenged, a GATT panel could declare the national law incorporating those standards "to be an unnecessary obstacle to trade."[97]

In summary, the provisions of the Final Act have carved out very narrow exceptions for Article XX. If an environmental law is more restrictive than the GATT accepted international standard, it will be extremely difficult for a nation to meet the requirements of "the extent necessary to protect . . ." and "against available scientific evidence." As a result, the nation must either harmonize "downward" its environmental regulations or be in violation of GATT.

2. GATT's Look at Environment and Trade

GATT, in an attempt to address some of these concerns, published a study[98] conducted by the secretariat dealing with the interaction of trade and the environment. The Study does not directly address the proposed provisions in the Final Act, but instead deals with policy issues in general. The Study points out that GATT provisions do not prevent nations from pursuing their own environmental policies, since GATT provides exemptions from its obligations if the international standards "are inappropriate for the Parties concerned, for *inter alia* such reasons as . . . protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors . . . ."[99]

But, these exemptions, as pointed out in The Study, are narrowly construed in order to prevent contracting parties from imposing "unwarranted, trade-inhibiting restrictions."[100] It argues strongly against the use of "trade policies to influence environmental measures in other countries."[101] As noted in The Study,

> [w]hen the environmental problem is due to production or consumption activities in another country, the GATT rules are more of a constraint, since they prohibit making market access dependent on changes in the domestic policies or practices of the exporting country. The rational for this is that to do otherwise would invite a flood of import restrictions as countries (especially those with large markets) either attempted to impose their own domestic environmental, eco-

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"Parties are fully responsible under this Agreement for the observance of all provisions of Article 2. Parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies." *Id.*

97. Wallach, *supra* note 80, at 22.

98. This report, titled *Trade and the Environment* is a study conducted by the secretariat of the GATT. 9 INT'L TRADE REP. No. 8 at (BNA) 310 (1992) [hereinafter The Study]. This study was released after the *Final Act* was presented to the negotiating countries. But even though there are no direct references to sections within the *Final Act*, one can only assume that the arguments were made keeping in mind the provisions of the Act.

99. *Id.* at 8. Article XX(b) and (g) are considered the environmental exceptions.

100. *Id.* at 9.

101. *Id.* at 1.

> nomic and social policies on other countries, or used such an attempt as a pretext for reducing competition from imports.[102]

The Study recognizes that different environmental standards have industry concerned about its competitiveness. The fear is that lower standards abroad will lead to "ecological dumping."[103] According to The Study, if countries engage in unilateral actions to "offset the competitiveness effects of different environmental standards, or . . . [to] attempt to force other countries to adopt domestically-favoured practices and policies, the trading system would start down a very slippery slope."[104]

Instead of imposing unilateral trade restrictions to enforce environmental policies,[105] The Study urges multilateral environmental agreements to resolve environmental policy issues. Should such agreements be impossible, then the parties should seek an amendment to GATT or obtain a GATT waiver.[106] After all, the purpose of GATT is to prevent discrimination between domestic and foreign products in order to facilitate trade, not to build protectionist walls to keep out trade.

Only in passing does The Study mention how liberalized trade will improve overall environmental quality. The argument is made that a reduction in agricultural subsidies will shift agricultural production to less developed nations which are inclined to use less chemical fertilizers and pesticides. Based on this assumption, The Study concludes that:

> Liberalizing protectionist agricultural policies in the high income countries is therefore likely to (i) cause the world's food to be produced with fewer chemicals, which in turn would reduce chemical residues in food in the natural environment; and (ii) have at most a very modest impact on the rate of deforestation. It would also increase the availability of land for recreational and aesthetic uses - including the replanting of forests - in several high income countries as marginal farm land was taken out of production. Thus, in all likelihood there would be a substantial increase in global environmental quality following agricultural trade liberalization, even if no new environmental

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102. *Id.* at 5.

103. Ecological dumping occurs when goods are produced without the benefit of sufficient environmental controls. The producer will be able to externalize some of his production costs which results in cheaper goods. These goods, if exported to a more environmentally restrictive environment, will be considered "dumped." For a more complete explanation, *see infra* part IV.

104. The Study, *supra* note 98, at 5. However, the article does not explain what is meant by "a very slippery slope."

105. The *Mexican Tuna* decision is an example. The MMPA contains a United States environmental policy on harvesting tuna in the ETP region, and to make sure that other nations comply with the U.S. policy, the Act permits an embargo against imported tuna harvested contrary to the method permitted by statute. Mexico's tuna harvesting methods did not comply, therefore the embargo was imposed.

106. In order to get a GATT waiver, the party needs the support of two-thirds of GATT's membership - or, at the present time, 69 nations out of 103. The Study makes the point that if an issue has wide support, then it should not be difficult to get a waiver. *Id.* at 6.

policies were introduced. . . .[107]

In summary, The Study supports the *Mexican Tuna* panel report by denouncing unilateral actions to enforce environmental policies and goals. It concludes by stating, "non-discriminatory domestic policies offer the most efficient approach to dealing with nearly all environmental problems. Interference with trade is seldom, if ever, the first-best way of achieving a particular domestic environmental objective."[108]

C. *The Conflict between GATT and the Polluter-Pays Principle*

A successful application of the Polluter-Pays Principle relies in part on harmonized environmental policies and standards. If harmonization is lacking, then the imbalance created by one nation permitting externalities in the production process can be offset by a countervailing duty.[109] This practice would serve a dual purpose, (1) eliminate the competitive advantage gained by the producer, and (2) encourage greater environmental harmonization.

This practice is, however, in direct conflict with GATT provisions. In The Study, the author lists three ways in which competitiveness can be regained. First, that the countries with lower environmental standards harmonize up to the higher standards in the importing country. Second, that the imports of foreign products, considered to be produced in "environmentally dirty ways," be subjected to special duties designed to offset the "unfair cost advantage" from the less strict standards.[110] The final suggestion provided that the domestic industries be given subsidies to cover the added costs of meeting the higher standards.[111]

The author is quick to point out that under GATT, only the first option would be acceptable. The other two options would be in conflict with existing GATT rules. A special duty imposed on an import from a country with less stringent environmental laws would, first of all, violate the Most Favored Nation Principle, and secondly, could only be imposed after an extensive re-negotiation process.[112] A subsidy also violates GATT, since subsidies in general are prohibited under rules of international trade.[113] Furthermore, the provisions of the Final Act incorporated the findings of the *Mexican Tuna* panel report, which prevent one nation from imposing its domestic laws on other contracting parties. Therefore, domestic laws which would prohibit the importation of goods produced in an environmentally unsound manner (i.e. *Mexican Tuna* case) could not

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107. *Id.* at 34.

108. *Id.* at 35.

109. *See infra* note 145 and accompanying text.

110. The Study, *supra* note 98, at 17. As the author of The Study points out, this is not a GATT acceptable method.

111. *Id.*

112. *Id.*

113. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250. Article XVI provides an exception for subsidies on agricultural and other primary products.

be enforced against contracting parties. As a result, the contracting party would have a competitive advantage because of the lower product price.

These GATT practices will result in more, not less, pollution because of the improper application of the Polluter-Pays Principle. Unless all polluters internalize the externalities, there will be a misallocation of resources, i.e. pollution, and distortion of trade. The success of the Polluter-Pays Principle depends on proper product pricing, and until GATT adopts the Principle as part of its international trade policy, its claim that trade liberalization will improve environmental quality will fail.

IV. HARMONIZING GATT AND THE POLLUTER-PAYS PRINCIPLE

The conflict between trade and environment has been caused in part by conflicting goals, promoting growth versus saving the environment. The balance between economic growth and environmental enhancement and protection was first addressed by the World Commission on Environment and Development[114] which called for "an historic transition to new modes of environmentally sound or 'sustainable' development."[115] This concept of 'sustainable' development was defined by the Commission as "meeting the needs and aspirations of the present and future generations without compromising the ability of future generations to meet their needs. It requires political reform, access to knowledge and resources, and a more just and equitable distribution of wealth within and between nations."[116]

In 1990, the United States Environmental Protection Agency sponsored a workshop on sustainable development in preparation for a conference on the Action for A Common Future.[117] The participants concluded that *all* assets must be preserved for future generations, and that our "current patterns of population and economic growth are not environmentally sustainable in the long run."[118] However, in order to achieve sustainable development,

> [f]ar-reaching changes in economic incentives are needed to ensure that both consumers and producers face the full environmental consequences of their daily choices. While information, education, and regulations are important, appropriate market signals are also necessary to bring about widespread structural adjustment. *The Polluter Pays Principle underlies correct market signals.*[119]

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114. Strong, *What Place Will the Environment Have in the Next Century - And At What Price?*, 2 INT'L ENVTL. AFF. 208, 209 (1990).

115. *Id.* at 214.

116. Gro Harlem Brundtland, *Global Change and Our Common Future*, *in* GLOBAL CHANGE AND OUR COMMON FUTURE 10, 12 (Ruth S. Defries & Thomas F. Malone eds., 1989).

117. ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES WORKSHOP ON THE ECONOMICS OF SUSTAINABLE DEVELOPMENT: REPORT TO THE 1990 BERGEN CONFERENCE (1990) [hereinafter SUSTAINABLE DEVELOPMENT]. This conference, which was held in Bergen, Norway, involved ECE members (Eastern and Western Europe, the United States, and Canada) only.

118. *Id.* at 3.

119. *Id.* at 4 (emphasis added).

Some of the changes recommended by the participants to achieve sustainable development include the following:[120]
1. Revise national income accounting systems to reflect the actual cost of conversion of natural resources.[121]
2. Eliminate subsidies because they are "typically fiscally burdensome, economically inefficient, and ecologically damaging."[122]
3. Shift the tax burden to activities that deplete natural resources and/or cause environmental harm.
4. Focus public expenditures on preventing environmental harm.[123]
5. Use economic instruments[124] to facilitate rational pricing of resources to shift the burden of paying for environmental protection to producers and consumers, thus eliminating a subsidy.[125]

The participants recognized that these changes not only involve national but also international changes in policy. They recommended the elimination of quantitative restrictions, tariffs, agricultural protectionism, and other trade barriers to avoid market distortions, and the harmonization of environmental regulations to avoid anticompetitive effects.[126] In other words, they recognized that, "the Polluter-Pays Principle must be uniformly implemented in order to achieve sustainable economic and environmental development in both developed and less-developed nations."[127]

The Study accepts the concept of sustainable development and recognizes that its implementation depends on at least two notions, 1) assign "values or prices to natural resources, with a view to identifying and valuing the environmental effects of economic activity,"[128] and 2) to preserve all assets for future generations.[129] However, the author notes that "neither aspect of sustainable development is intrinsically linked to inter-

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120. *Id.* at 5-9.

121. For example, the OECD found that current energy prices do not accurately reflect production costs because the "cost" of climatic change is not included in the price. As a result, the OECD asked that all nations expand their accounting systems to "fully reflect environmental and natural resource conditions and trends." Once the accounting systems reflect the proper price for all resources, a more consistent application of the Polluter-Pays Principle will be possible. *See OECD Urges "Phased Approach" in Introducing Technology to Cut Greenhouse Gas Emissions*, 14 INT'L ENVTL. REP. (BNA) 190 (Apr. 10, 1991).

122. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 6.

123. This can be accomplished by creating and enforcing environmental laws.

124. These economic instruments "include fees levied on emissions and environmentally damaging activities, marketable permit systems, deposit-refund systems, and non-compliance charges linked to emissions standards." SUSTAINABLE DEVELOPMENT, *supra* note 117, at 9.

125. The "subsidy" is created by having the government or society as a whole absorb the cost of pollution abatement and control instead of the producer and consumer. Once the product price reflects the full cost of production, the subsidy is gone.

126. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 16.

127. Kettlewell, *supra* note 1, at 460.

128. The Study, *supra* note 98, at 3.

129. *Id.*

national trade."[130]

The argument in The Study fails to see the link between sustainable development and international trade. In order for producers and consumers "to face the full environmental consequences of their daily choices,"[131] correct market signals, i.e. proper pricing, must be in place. This can only be accomplished through a uniform application of the Polluter-Pays Principle.[132] If product prices do not reflect all costs for pollution abatement and control, then market signals will be incorrect, leading to overproduction, misallocation of resources, i.e. pollution, and distortions of trade. Therefore, liberalized trade will only result in sustainable development, ensuring increased economic growth without environmental degradation, if GATT adopts the Polluter-Pays Principle. As pointed out by one author "whether liberalizing international trade is a means to support sustainable development is dependent on the degree to which degradation of the environment will be reflected in [world] prices."[133]

Incorporating the Polluter-Pays Principle into GATT provisions is not a difficult task. GATT Article VI and the Dumping and Subsidy Codes provide a mechanism for price adjustments, which could be used to insure a more uniform application of the Polluter-Pays Principle. Article VI and the International Dum Dumping Code of 1979[134] define dumping as introducing a product, "into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[135] If such dumping causes or threatens to cause a "material injury to an established domestic industry"[136] then GATT permits the country to impose a countervailing duty equal to the difference in price.[137] The rules for arriving at that difference are very complex,[138] but the Dumping Code provides flexibility to accommodate "differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."[139]

These provisions could easily be applied to environmental dumping, i.e. failing to include pollution abatement and control costs in the product

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130. *Id.*

131. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 4.

132. *Id.*

133. Peter A.G. Van Bergeijk, *International Trade and the Environmental Challenge*, 25 J. WORLD TRADE 105, 109 (1991).

134. *Agreement on the Implementation of Article VI of the General Agreement of Tariffs and Trade*, GATT, 26th Supp. BASIC INSTRUMENTS AND SELECTED DOCUMENTS 171 (1980) [hereinafter Dumping Code]. This Code interprets the provisions of Article VI and provides rules for their application.

135. *Id.* at Part I, art. 2.

136. GATT, *supra* note 3, art. VI(6), 55 U.N.T.S. at 212.

137. GATT, *supra* note 3, art. VI(3), 55 U.N.T.S. at 212.

138. Dumping Code, *supra* note 134, at 171.

139. *Id.*

price. In computing the price difference for environmental dumping, the export price should include:

> (1) the value of the environmental resources used in the production, (2) the cost of the damage caused to the environment by production of the product, and (3) in cases in which the exporter faces less costly environmental requirements, the cost that would have been incurred had the exporter been required to meet environmental requirements prevailing in the importing country.[140]

If the importing country imposes an anti-dumping duty equal to the amount "saved" by the exporter, the Polluter-Pays Principle will be more uniformly applied, leading to sustainable development.

Others have viewed lack of environmental protection as "trade-distorting because it operates as a 'subsidy.' "[141] Such an environmental subsidy could easily be addressed under GATT Article VI and the Subsidies Code.[142] These GATT provisions generally prohibit government subsidies on exported products,[143] and Article VI permits the imposition of a countervailing duty to offset the "bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export" of any merchandise which causes or threatens "material injury to an established domestic industry."[144] Therefore, the counterveiling duty assessed by the importing country would compensate for any financial gains resulting from the government subsidy.[145] This practice would offset the failure of nations to internalize environmental costs, and would lead to a more uniform application of the Polluter-Pays Principle and sustainable development.

However, these tariff barriers to imports are not the only methods

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140. Elize Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. (ENVT'L L. INST.) 10599, 10601-02 (Oct. 1991).

141. AMERICAN SOCIETY OF INTERNATIONAL LAW, ENVIRONMENT AND TRADE 48-49 (Seymour J. Rubin & Thomas R. Graham, eds., 1982). As pointed out by another author, "[t]he environmental burden that is carried by American workers and business is manifest in every single product that we produce." Ebba Dohlman, *The Trade Effects of Environmental Regulation*, OECD OBSERVER 28-29 (Feb.-Mar. 1990).

142. AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI, AND XXIII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE OF 1979, GATT, 26th Supp. BASIC INSTRUMENTS AND SELECTED DOCUMENTS 56 (1980).

143. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250. However, subsidies on agricultural and other primary products are exempt.

144. GATT, *supra* note 3, art. VI(3), 55 U.N.T.S. at 212.

145. The United States has introduced a law titled, "International Pollution Deterrence Act of 1991" which would impose a countervailing duty on goods produced under less stringent standards. The duty will equal the amount of money saved by reduced environmental compliance. S. 984, 102 Cong., 2d Sess. (1991). This bill is based on the assumptions that: "1) American industry pays an enormous cost in compliance with strict environmental laws; 2) to the extent that foreign competitors operate in countries with more lax standards, they are the beneficiaries of a 'significant and unfair subsidy'; and 3) American competitiveness suffers as a result." *See* Kyle E. McSlarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL. L. REP. (ENVTL L. INST.) 10589, 10592 (Oct. 1991).

available under GATT to incorporate the Polluter-Pays Principle into rules of international trade. Article XX exceptions could be expanded to include environmental protection as a legitimate domestic goal. This would permit the application of product and process standards to imported goods, thus nullifying the effect of the *Mexican Tuna* panel report.[146] This practice would subject domestic and foreign producers to the same standards, a pre-requisite for the uniform application of the Polluter-Pays Principle. Furthermore, this expansion of Article XX would permit the implementation of international agreements which utilize trade restrictions to accomplish their goals.[147]

In summary, the conflict between trade policies and environmental protection can be reduced through the use of the Polluter-Pays Principle. Proper product pricing will not only permit nations to reach their environmental goals, but will also help them achieve sustainable development without environmental harm.

V. CONCLUSION

To regard the Polluter-Pays Principle as the panacea to global pollution would be too simplistic. A uniform application of the Principle could reduce global pollution. However, there are so many obstacles to its uniform application, that the Principle, at best, can have only some effect on reducing global pollution. The degree of its effectiveness depends on the accurate reflection of costs in the product price.

Harmonization of standards, enforcement, and liability for resulting harm are all unresolved issues which affect the uniform application of the Principle. GATT can play a unique role in providing a mechanism for harmonization and enforcement of standards. One hundred eight nations are currently negotiating the final provisions for the Uruguay Round. If they carefully consider the role of the Polluter-Pays Principle in achieving sustainable development, and provide for its complete implementation, then trade liberalization will result in greater environmental quality for all mankind.

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146. For example, in the *Mexican Tuna* case, Mexican tuna producers benefitted by harvesting tuna with less expensive methods. If such tuna is banned by the U.S. because of more restrictive U.S. laws, then Mexico has to harvest its tuna using the same method as American producers. This will provide a "level playing field" for the American producer by equalizing production costs.

147. International agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

LEONARD v.B. SUTTON AWARD PAPER

Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States

BRAD SWENSON*

> Only one thing is impossible to God, to find any sense in any copyright law on this planet.[1]

I. INTRODUCTION

Copyright laws lie at the root of a nation's culture and intellectual climate.[2] By conferring rights on expressive forms of information, copyright laws protect authors in a broad range of literary, artistic, and scientific works.[3] These protections induce authors to create and disseminate the works which shape modern society.[4] Without copyright protection, authors have little incentive to pursue their time-consuming research and development.[5] Without copyright protection, society has little chance of

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1. SAMUEL CLEMENS, MARK TWAIN'S NOTEBOOK 381 (1935 ed.)

2. *See* Barbara A. Ringer, *The Role of The United States in International Copyright — Past, Present, and Future*, 56 GEO. L. J. 1050 (1968) [hereinafter Ringer].

3. The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1988), seeks "to stimulate [the creation of useful works] for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

4. *See generally* Gary M. Ropski & Michael J. Kline, *A Primer on Intellectual Property Rights: The Basics of Patents, Trademarks, Copyrights, Trade Secrets, and Related Rights*, 50 ALB. L. REV. 405 (1986) (providing a complete overview of intellectual property law).

5. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429, *reh'g denied*, 465 U.S. 1112 (1984) (discussing how reward motivates the creative activity of authors and "serves to induce release to the public of the products of his creative genius") [hereinafter *Sony*].

benefiting from the innovative ideas of its creative minds.[6]

In this information-based world, intellectual property has become a fundamental business asset in the global marketplace.[7] Increasing computer and database technologies have made access to copyrighted materials effortless. The transfer of copyrighted works across national boundaries is limited only by the capacity of modern communication systems.[8] As a result, the international dimension of copyright law grows every day.

As developing nations become increasingly reliant on information-based technology they also become increasingly vulnerable to the inadequacies of copyright protections abroad.[9] Technological advancements have made the reproduction and expropriation of copyrighted materials, in most cases, simple. Because the free and protected flow of information is imperative to global economies, a unified international copyright code is of unequaled importance.[10]

The Berne Convention for the Protection of Literary and Artistic Works[11] has emerged as the premier international convention for the protection of intellectual property. By setting minimum standards for the protection of copyrighted materials,[12] the Berne fosters cultural exchange, economic advancement, and the development of indigenous creativity.[13] The Berne Convention provides a framework by which an international exchange of copyrighted materials may confidently occur.[14]

To a great extent, the effectiveness of the Berne's international standards are limited only by those nations who refuse to participate.[15] With

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6. *Id.* at 429.

7. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 274 (1991) [hereinafter Leaffer]. *See generally* EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (1980) [hereinafter EDWARD W. PLOMAN & L. CLARK HAMILTON].

8. *See* Ringer, *supra* note 2, at 1050.

9. *Compare* Leaffer, *supra* note 7, at 274 (discussing the United States increasing vulnerability as it moves to an information based economy).

10. *See* Note, *Berne-ing the Soviet Copyright Codes: Will the U.S.S.R. Alter Its Copyright Laws to Comply with the Berne Convention?* 8 DICK. J. INT'L L. 395 (1990) [hereinafter *Berne-ing the Soviet Copyright Codes*].

11. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 12 Martens Nouveau Recueil (ser. 12) 173, Additional Act and Declaration of Paris, May 4, 1896, 24 Martens Nouveau Recueil (ser. 12) 758, Berlin Revision, Nov. 13, 1908, 1 L.N.T.S. 217, Additional Protocol of Berne, Mar. 20, 1914, 1 L.N.T.S. 243, Rome Revision, June 2, 1928, 123 L.N.T.S. 233, Brussels Revision, June 26, 1948, 331 U.N.T.S 217, Stockholm Revision, July 14, 1967, 828 U.N.T.S. 221, Paris Revision, July 24, 1971, *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 27 (1978) [hereinafter Berne Convention].

12. Minimum standards are not imposed by the Union of member nations. Minimum standards are imposed by each member state, through its own domestic laws. Berne Convention, *supra* note 11, at art. 36.

13. *See* Ringer, *supra* note 2; Natalio Chediak, *The Progressive Development of World Copyright Law*, 42 AM. J. INT'L L. 797 (1948).

14. *See* Ringer, *supra* note 2.

15. *See e.g.*, Roger Boyes, *Warsaw Pirates Plunder West's Glitzy Goodies*, THE TIMES, Nov. 22, 1991, § Overseas News (discussing the smuggling of pirated materials from Poland

the exception of the Soviet Union and the Peoples Republic of China, all major economic powers have acceded to the Convention.[16]

Recent changes in the Soviet Union have sparked questions regarding the opening of vast new commercial markets.[17] The recent emergence of the new Commonwealth of Independent States poses interesting problems for the international community.[18] It remains unclear whether the Commonwealth States' fledgling market economies will follow the copyright pirating traditions of its Soviet predecessor.[19] Faced with critical developmental needs, the new Commonwealth States may be forced to rely on the immediate and tangible benefits piracy may afford.[20]

Attention of the global marketplace will soon focus on the protections the new Commonwealth of Independent States can ensure for the world's copyrighted materials. Without strong protective assurances, the States of the new Commonwealth will, undoubtedly, face limited access to the western technology necessary to their transition to free-market economies.[21]

Part I of this Article examines the basic provisions and development of Soviet copyright law. In particular, it examines the Soviet perspective on international protection for copyrighted materials. Specific emphasis is placed on the conditions surrounding Soviet accession to the Universal Copyright Convention (U.C.C.).

Part II of this Article will focus on recent developments in Soviet copyright law. Specifically, it examines the intent and actions taken by the Soviet government to accede to the Berne Convention. This Article also reflects upon recent political developments and the present status of Soviet copyright law as followed by the new Commonwealth of Independent States.

Part III of this Article will discuss the new Commonwealth of Inde-

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into the Soviet Union).

16. For a complete list of nations participating in the Berne Convention *see* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Berne Copyright Union, item H-2 (1987-88 Supp.).

17. These markets take on special meaning since United States copyright industries have grown more dependant on exports for their commercial success. *See* Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J. COPR. SOC'Y 123 (1991) [hereinafter Schwartz].

According to recent studies, copyright industries represent 5.8% of the United States' gross national product. *See* Schwartz, *supra*, at 125 *citing* Stephen E. Siwek & Harold W. Furchtgott-Roth, *Copyright Industries in the U.S. Economy*, p. vii (Nov. 1990). Mr. Siwek's study was prepared for the International Intellectual Property Alliance.

18. *See* Michael McGuire, *U.S.S.R is Dead, 3 Republics Say Russia, Ukraine, Byelorussia form New Union Slavic Leaders Vow to Ban Nuclear Arms*, CHI. TRIB., Dec. 9, 1991, § News, at 1, zone C, [hereinafter *U.S.S.R. is Dead*].

19. *See* Leonard A. Radlauer, *The U.S.S.R. Joins the Universal Copyright Convention*, 23 J. COPR. SOC'Y, 1, 29 (1973) [hereinafter Radlauer]; *see also*, N.Y. TIMES, May 24, 1959, §2, at 3, col. 1 (citing the U.S.S.R. as one of the world's foremost pirating entities).

20. *See generally* Leaffer, *supra* note 7, at 280.

21. *Id.*

pendent States' necessary adherence to the Berne Convention. Particular emphasis will be paid to the growing problem of international piracy and the negative effects countries with weak copyright protections suffer. The Article will conclude with a discussion of the benefits the new Commonwealth of Independent States can derive from joining the Berne Convention for the Protection of Literary and Artistic Works.

II. SOVIET COPYRIGHT LAW

A. *Domestic Developments in Soviet Copyright Law*

The first embodiment of Soviet copyright law was the 1925 "Bases of Copyright Legislation."[22] The Bases of Copyright Legislation established the Soviet's first comprehensive intellectual property code.[23] The Bases designated the protection of intellectual works by territory and not nationality.[24] Consequently, works of Soviet authors published abroad received no protection unless a treaty for reciprocal copyright protection existed between the U.S.S.R. and the affected foreign government.

The 1925 Bases of Copyright Legislation were revised and re-issued in 1928. This revision represented the state of Soviet copyright law for over three decades.[25] It was not until December 8, 1961 when Soviet intellectual law was again substantially modified. On that date, the Supreme Soviet of the U.S.S.R. promulgated the Fundamentals of Civil Legislation of the Soviet Union and the Union Republics.[26] On May 1, 1962 the Fundamentals of Civil Legislation came into force.[27] The 1961 Fundamentals, for the first time, integrated copyright law into the Soviet civil code.[28]

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22. *See* Yuri Matveev, *Copyright Protection in the U.S.S.R. — The Eleventh Annual Jean Geiringer Memorial Lecture on International Copyright Law*, 20 BULL. COPR. SOC'Y 219, 221 (1973) [hereinafter Matveev]. For an in-depth review of early Soviet copyright law see ALOIS BOHMER, COPYRIGHT IN THE U.S.S.R. AND OTHER EUROPEAN COUNTRIES OR TERRITORIES UNDER COMMUNIST GOVERNMENT, SELECTIVE BIBLIOGRAPHY WITH DIGEST AND PREFACE (1960).

23. MICHAEL A. NEWCITY, COPYRIGHT LAW IN THE SOVIET UNION 20-21 (1978) [hereinafter NEWCITY].

24. Section 1 of the Copyright Act of 1925 states in pertinent part: "Copyright to a work published on the territory of the U.S.S.R. . . . or extant there as a manuscript, sketch or in any other material form, shall belong to the author or his successor in law, regardless of their nationality."

U.S.S.R. Copyright Act of 1925, §1, *as quoted in* Radlauer, *supra* note 19, at 11.

25. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 121-22.

26. Decree of the Presidium of the U.S.S.R. Supreme Soviet, *On Approval of the Fundamentals of Civil Legislation of the Soviet Union and the Union Republics*, 50 Vedomosti SSSR, item 525 (Dec. 8, 1961).

27. *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics, reprinted in* SOVIET CIVIL LEGISLATION AND PROCEDURE 102 (Y. Sdobnikov trans. 1964) [hereinafter *1961 Fundamentals*].

28. *Id.* arts. 96-106.

B. *Basic Provisions of Soviet Copyright Law*

The Soviet Constitution granted authority to protect copyrighted materials in Article 47:

> Citizens of the U.S.S.R., in accordance with the aims of building communism, are guaranteed freedom of scientific, technical, and artistic work. This freedom is ensured by broadening scientific research, encouraging invention and innovation, and developing literature and the arts . . . The rights of authors, inventors and innovators are protected by the state.[29]

Soviet copyright law was divided into two categories, personal and property rights. The personal rights of a Soviet creator were comprised of five essential entitlements:[30] (1) the right to be acknowledged as the author of the works; (2) the right to publish; (3) the right to reproduce and distribute; (4) the right to have the work protected against improper alterations or adaptations by others; and (5) the right to royalties for its use under the system of compensation provided by copyright law. Ownership of a copyright vested with the creator of the work.[31]

Property rights, in the traditional sense, differ from Soviet use of the term. Under Soviet copyright law, an author's right in his work is not the equivalent of private property.[32] Consequently, an author's right is not a primary means of ensuring a fair return on his labors. Rather, the right is created with the primary goal of enhancing education and cultural dissemination.[33] Public interest, in most cases, is paramount to the rights of the author.[34]

One particularly problematic provision to the Soviet Union's participation in an international copyright union was the 1961 Fundamentals', article 102:[35] "Any published work may be translated into another language without consent of the author, but must be brought to his knowledge to insure respect for the integrity and spirit of the work . . . ."[36]

The presence of several languages and dialects within the Soviet

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29. Konst. SSSR, art. 47 (1977), *reprinted in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, U.S.S.R., Item 1, (1987 Supp.).

30. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 122. *See also* Harold J. Berman, *Rights of Foreign Authors Under Soviet Law*, 7 BULL. COPR. SOC'Y 67, 74 (1959) [hereinafter Berman].

31. *1961 Fundamentals*, *supra* note 27, arts. 97-98.

32. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 123.

33. *Id.*

34. *Id.*

35. For a full discussion of the motivations surrounding codification of the "freedom of translation" *see* Serge L. Levitsky, *The New Soviet Copyright Law*, 9 BULL. COPR. SOC'Y 295, 303-304 (1961-62); *see also* Hiller B. Zobel, *Copyrights, Comrades, and Capitalists: An Inquiry into the Legal Rights of Soviet and American Authors*, 8 BULL. COPR. SOC'Y 210, 216-19 (1960-1961).

36. UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, U.S.S.R., (Supp. 1963); *see* Radlauer, *supra* note 19, at 12.

Union (approximately 89) demanded, as a matter of practicality, that a translation provision exist. Since few Soviet citizens could read works in foreign languages (even languages within their own country) foreign and domestic authors were subjected to the deleterious effects of article 102 which deemed translations not to be an infringement of copyright.[37]

C. *International Developments in Soviet Copyright Law*

After the October Revolution of 1917, the newly formed Soviet Government retreated into international isolationism with regard to its intellectual property attitudes.[38] International agreements for the protection of copyrighted materials were deemed capitalistic instruments used to exploit individual authors.[39] As a result, the Soviet Government withdrew from all international agreements protecting copyrighted materials created during pre-soviet history.[40] This isolationistic attitude would pervade Soviet copyright and intellectual property law for the next 50 years.

In the early 1960's the Soviet Government began to experience a sensitivity to the immense growth of Western technology.[41] The desire to keep pace with the West slowly began to find its way into Soviet foreign policy. Rather then engage in costly domestic development, however, the Soviets decided to pursue licenses to Western technology.[42] It quickly became evident, however, that Western nations would be reluctant to exchange new innovations without assurances of adequate intellectual property protections.[43]

Pressure from the international community and their desire to maintain competitiveness with the West, precipitated the Soviet's adherence to the Paris Convention for the Protection of Industrial Property in 1965.[44] The Paris Convention provided the Soviets with the procedures to secure licenses to Western technology.[45] Adherence to the Paris Conven-

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37. 1925 Bases of Copyright Legislation, §4, *as cited in* Radlauer, *supra* note 19, at 11. Between 1917-1960 approximately 1 billion copies of books protected by foreign copyright were published in the U.S.S.R. Berman, *supra* note 30, at 80-81.

38. NEWCITY, *supra* note 23, at 17-31.

39. MARK MOSIEEVICH BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERATURE AND SCIENTIFIC WORKS 64 (1979) [hereinafter BOGUSLAVSKY].

40. *Id.*; *see also* NEWCITY, *supra* note 23, at 1-16.

41. *See* NEWCITY, *supra* note 23, at 38-39.

42. *Id.*

43. *See generally* Leaffer, *supra* note 7, at 280.

44. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, *as revised by* Act of Brussels, Dec. 14, 1900, 32 Stat. 1936, T.S. No. 411; Act of Washington, June 2, 1911, 38 Stat. 1645, T.S. No. 579; Act of the Hague, Nov. 6, 1925, 47 Stat. 1789, T.S. No. 834; Act of London, June 2, 1934, 53 Stat. 1748, T.S. No. 941; Act of Lisbon, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931; Act of Stockholm, July 14, 1967, 21 U.S.T. 1629, T.I.A.S. 1583.

45. For a discussion regarding the protections afforded by the Paris Convention for the Protection of Industrial Property, *see* Pierre Maugue, *The International Protection of Industrial Designs Under the International Conventions*, 19 U. BALT. L. REV. 395 (1989).

tion marked the first time the Soviet Government had willingly joined an international agreement for the protection of intellectual property.[46]

Two years following their accession to the Paris Convention, on November 17, 1967, the Soviets entered into a bilateral treaty with the Hungarian People's Republic.[47] Coming into force on January 1, 1968, this agreement provided for the reciprocal protection of copyrights between the two nations.[48] Each nation was required to afford citizens of the other nation the same copyright protections it would afford to its own citizens. The agreement protected only the rights of authors who are U.S.S.R. or Hungary citizens and have their permanent residences in those countries.[49]

The Soviets continued to test the waters of international copyright protections. On December 14, 1970 the Soviets signed an agreement with Poland concerning cultural and scientific cooperation.[50] The agreement called for the two nations to work toward the establishment of a system for the protection of copyrights.[51] The agreement, however, never reached formal treaty status.

The tenor of U.S.-Soviet relations also reflected the slow change of Soviet attitudes toward international copyright protections. Traveling under a U.S.-U.S.S.R. Cultural Exchange Agreement, a delegation of U.S. book publishers[52] visited the Soviet Union in September 1962[53] and again in October 1970.[54] The objectives of the visits were to study the Soviet publishing system and to encourage the commercial exchange of literary, artistic, and scientific publications.[55] Attempting to achieve the productive exchange of intellectual property between the nations, U.S. delegates raised the issue of international copyright protections on several occa-

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46. *See* NEWCITY, *supra* note 23, at 39.

47. U.S.S.R.-Hungarian Convention on the Reciprocal Protection of Copyright, 30 SP SSSR, art. 213 (1967), *reprinted in* A CALENDAR OF SOVIET TREATIES 1958-1973, (Robert M. Slusser & George Ginsburgs eds., 1981).

48. For a detailed discussion of the U.S.S.R.-Hungary copyright treaty *see* Vaksberg, *La protection des droits en Union Sovietique*, 67 REVUE INTERNATIONALE DU DROIT D'AUTER 141, 167-75 (1971).

49. *See* NEWCITY, *supra* note 23, at 40.

50. *Id.*

51. *Id.*

52. The delegation included: Curtis G. Benjamin — Chairman of the Board of McGraw Hill Book Company and representative of the American Book Publishers Council (ABPC) & American Test Book Institute (ATPI); Kurt Enoch — President of the New American Library; Storer B. Hunt — Chairman of the Board W. W. Norton & the Reading Development Committee for the ABPC; M. R. Robinson — President Scholastic Book Services & the ATPI; W.B. Wiley — President of John Wiley, Inc. and Chairman of the Joint Committee on International Trade of the ABPC and ATPI; Robert W. Frase — Director of the Joint Washington Office of the ABPC and ATPI.

53. Martin B. Levin, *Soviet International Copyright: Dream or Nightmare?*, 31 J. COPR. SOC'Y 127, 134 (1983) [hereinafter Levin].

54. *Id.*

55. REPORTS OF DELEGATIONS OF U.S. BOOK PUBLISHERS VISITING THE U.S.S.R. AUGUST 20 — SEPTEMBER 17, 1962, 65 (1977) [hereinafter BOOK PUBLISHING IN THE U.S.S.R.].

sions.[56] A concerted effort was made to demonstrate the disadvantages of the Soviet's isolationistic position as a non-signatory to either the U.C.C. or the Berne Convention.[57]

During their 1970 visit, the U.S. delegation again encountered an impasse on the issue of Soviet accession to an international copyright convention.[58] Yet, developments in Soviet international copyright policy sent a positive message that productive future negotiations on the issue were possible.[59] General Secretary Brezhnev's formal statement to the 24th Party Congress in April 1971, however, made clear that any Soviet role in the international copyright arena would develop at a careful, Soviet controlled pace: "[W]orkers in literature and art are in one of the crucial sectors of the ideological struggle. The Party and the people have not tolerated, and will not tolerate, attempts — no matter what their origin — to blunt our ideological weapons, to stain our banner."[60]

In early 1972, Soviet international copyright policy continued its

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56. *See* Levin, *supra* note 53, at 131.

57. *Id.* Some of the U.S. delegations arguments in favor of Soviet participation in an international copyright convention were as follows:

> (1) Soviet books, articles, music, opera, and plays are or would be popular in the U.S. Because of high prices charged for books and other forms of entertainment in the U.S., the royalty rate when applied to these high prices would generate a large dollar income for the Soviet publisher. Consequently, the balance of payments in hard currency would be in the Soviet's.
>
> (2) The Soviet Union would not have to pay back royalties because the UCC does not require retroactive royalty payments.
>
> (3) Dissemination of Soviet works in the English language will reach more markets than is presently available to Soviet authors.
>
> (4) It is unfair to deny payment to authors for translation rights and publication in a foreign country.
>
> (5) The U.S.S.R. is the only major power not a member of either the Berne Convention or the UCC.

Some of the Soviet's responses to the U.S. Delegation's arguments were as follows:

> (1) The outflow of currency would be unbearable if the Soviets had to pay royalties retroactively.
>
> (2) High royalty rates would be required by the United States publishers, thus increasing the retail price of books sold in the Soviet Union.
>
> (3) The Soviet Union as a matter of policy makes its books available without royalty payments to sister socialist republics and to the poorer underdeveloped nations of the world. The UCC would require the Soviet Union to charge the high capitalist rate of royalty.
>
> (4) Significant changes would be needed in the Soviet domestic copyright laws.
>
> (5) The U.S. had not provided international copyright protection during its formative years.

BOOK PUBLISHING IN THE U.S.S.R., *supra* note 55, at 172-75, *reprinted in* Levin, *supra* note 53, at 131-32.

58. *See* NEWCITY, *supra* note 23, at 41, *relying on* BOOK PUBLISHING IN THE U.S.S.R., *supra* note 55, at 35-38.

59. *Id.*

60. Leonhard, *The Domestic Politics of The New Soviet Foreign Policy*, 52 FOREIGN. AFF. 61, 64 (Oct. 1973).

growth. At that time, a reciprocal copyright protection agreement with the People's Republic of Bulgaria was consummated.[61] Much like the U.S.S.R.-Hungary agreement of 1967, this agreement also provided for the reciprocal protection of copyrights between the two nations. By late 1972, a change in Soviet attitudes toward international copyright protections had unquestionably occurred. Soviet accession to the Universal Copyright Convention appeared to be a forthcoming and natural consequence of literary and scientific development within the country.[62]

D. *Soviet Accession to the Universal Copyright Convention*

Although accession to Universal Copyright Convention was a matter of lengthy deliberation for the Soviets, the decision to accede came quickly and to the surprise of many. On February 14, 1973, the Soviets announced that, effective May 27, 1973, they would adhere to the provisions of the Universal Copyright Convention.[63] Foreign Minister Andrei Gromyko deposited the formal documents of adherence[64] at UNESCO headquarters in Paris on February 27, 1973.[65]

On February 28, 1973, a decree of the President of the Supreme Soviet amended and revised the 1961 Fundamentals to bring Soviet domestic copyright law in conformance with U.C.C. requirements.[66] The Soviets, however, unwilling to accept the 1971 Paris revisions' explicit provisions on broadcast and performing rights,[67] ruled that their accession to the U.C.C. would exclude adherence to the 1971 revisions.[68]

Adherence to the U.C.C. marked the end of nearly sixty years of Soviet isolationism from international copyright relations.[69] In acceding to

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61. U.S.S.R-Bulgaria Agreement on the Reciprocal Protection of Copyright, 1972, 855 U.N.T.S. 235.

62. *See* Matveev, *supra* note 22, at 219.

63. *See* Radlauer, *supra* note 19, at 1.

64. Official announcement of Soviet adherence to the Universal Copyright Convention, *reprinted in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, U.S.S.R., Item 3A, (1987 & 1973 Supp.). *See also* Announcement, *U.S.S.R. Joins Universal Copyright Convention*, 20 BULL. COPR. SOC'Y, 1 (1973).

65. *See* NEWCITY, *supra* note 23, at 44.

66. Decree of the Presidium of the U.S.S.R. Supreme Soviet, *On Making Changes in and Additions to the Principles of Civil Legislation of the U.S.S.R. and the Union Republics*, 9 Vedomosti SSSR, item 138 (Feb. 3 1973) [hereinafter 1973 Decree of the Presidium]. For an in-depth analysis of the changes made in Soviet law, see JON BAUMGARTEN, U.S.-U.S.S.R. COPYRIGHT RELATIONS UNDER THE UNIVERSAL COPYRIGHT CONVENTION (1973) [hereinafter BAUMGARTEN].

67. *See* BAUMGARTEN, *supra* note 66.

68. 203 PUB. WKLY. 32, Mar. 12, 1973.

69. By 1989 the Soviets had acceded to eight additional bilateral agreements for the protection of copyright. The Soviet Union concluded bilateral treaties with Bulgaria, 855 U.N.T.S. 235, Czechoslovakia, 161 L.T.S. 309, GDR, 1973 NEUES DEUTSCHLAND 2211, Hungary, THE CALENDAR OF SOVIET TREATIES 1981, Poland, Austria, Cuba, and Sweden. *See* 4 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1981-1983).

Additionally, President Ford and Chairman Brezhnev signed the Helsinki Final Act on August 1, 1975. The agreement stated that signatory nations would agree to: "the wider use

the U.C.C., the Soviets established copyright relations with over seventy nations.[70] Soviet accession facilitated the exchange of its copyrighted materials and opened a previously closed window to the international marketplace of ideas.[71] The Soviets exclaimed the hope that accession would unlock new perspectives in the development of international cultural and scientific relationships.[72]

The events leading to Soviet accession, however, do not reflect an entirely idealistic endeavor on the part of the Soviet Union.[73] Arguably, a major factor in the Soviet's accession to the U.C.C. was an exchange of commercial advantages provided by a bilateral tax convention signed on June 20, 1973 by U.S. Secretary of the Treasury, George P. Shultz, and Soviet Minister of Foreign Trade, Nikolai S. Patolichev.[74]

The tax convention excluded from taxable income, among other things, royalties for the use of copyrights.[75] The U.S. sought the protections afforded by the U.C.C. for its copyrighted materials in the Soviet Union.[76] The Soviets sought concessions in the patent area and favorable tax treatments.[77] Following the Soviet's accession to the U.C.C., each nation got what it bargained for.

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of commercial channels and activities for applied scientific and technological research for the transfer of achievements obtained in this field while providing information on the protection of intellectual and individual property rights."

Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 73 DEP'T ST. BULL 323 (1975) *reprinted in* 14 ILM 1292 (1975).

70. *See* BAUMGARTEN, *supra* note 66, at 5.

71. *See* Levin, *supra* note 53, at 129.

72. *See* Matveev, *supra* note 22, at 219.

73. *See* Levin, *supra* note 53, at 140.

74. *See id.*

75. Convention on Matters of Taxation with Related Letters, June 20, 1973, U.S.-U.S.S.R, art. III, T.I.A.S. No. 8225, at 1. Article III provides in pertinent part:

> 1. The following categories of income derived from sources within one contracting state by a resident of other contracting state shall be subject to tax only in that other contracting state:
>
> (a) rentals, royalties or other amounts paid as consideration for the use of or right to use literary, artistic, and scientific works, or for the use of copyrights of such works, as well as the rights to inventions (patents, author's certificates), industrial designs, processes or formulae, computer programs, trademarks, service marks, and other similar property or rights, or for industrial, commercial or scientific equipment, or for knowledge, experience, or skill (know-how).
>
> (b) gains derived from sale or exchange of any such rights or property, whether or not the amounts realized on sale or exchange are contingent in whole or in part, on the extent and nature of use or disposition of such rights or property.

76. *See* Levin, *supra* note 53, at 140.

77. *Id.*

1. Basic Provisions of the Universal Copyright Convention

The preamble to the Universal Copyright Convention[78] expresses the hope that an international union for the protection of copyrights would stimulate the creation, development, and exchange of intellectual properties amongst signatory nations.

> [A] system of copyright protection appropriate to all nations of the world and expressed in a universal convention . . . will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts . . . [and] will facilitate a wider dissemination of works of the human mind and increase international understanding . . . .[79]

The U.C.C. has its foundations in the national treatment of foreign authors. Consequently, member states must afford foreign works the same protection afforded to domestic creations.[80] Signatory nations must also modify domestic copyright laws to conform with five minimum standards.[81] First, each member state must provide for the "adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific, and artistic works . . . ."[82]

Second, foreign works will satisfy all formalities (notice, registration, manufacture),

> if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol (c) accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.[83]

Third, member states must grant a minimum copyright term of twenty-five years or the life of the author plus twenty-five years.[84]

Fourth, member states must grant exclusive publication and translation rights to the creator.[85] After a term of seven years, however, a member state in which a translation has not been published may obtain a "non-exclusive license from the competent authority thereof to translate

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78. Universal Copyright Convention, Sept. 6, 1952, preamble, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 (effective Sept. 16, 1955) (Geneva Act) *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178 (effective July 10, 1974) (Paris Act) [hereinafter UCC]; *see also* 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 24 (Geneva text) and app. 25 (Paris text) (1986).

79. UCC, *supra* note 78, at preamble.

80. *Id.* art. 2(1).

81. Although the U.C.C. calls for several requirements of signatory nations, the five described herein are most important for the purposes of this Article.

82. UCC, *supra* note 78, art. 1.

83. *Id.* art. 3(1).

84. *Id.* art. 4(1) and art. 4(2).

85. *Id.* art. 5(1).

the work into that language and publish the work so translated."[86]

Finally, the U.C.C. contains a "Berne" conflict clause. This clause restricts Berne Convention signatories from ignoring Berne provisions and relying on the U.C.C. in its copyright relations with another Berne Union member.[87] The U.C.C. is administered by the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

2. Impact of Soviet Accession to Universal Copyright Convention

The February 3, 1973 Decree of the Supreme Soviet[88] amended the 1961 Fundamentals[89] to provide for minimum copyright protections required by the U.C.C. This amendment worked four basic changes into Soviet intellectual property law.[90] First, and perhaps most significantly, the "freedom of translation" provision, article 102, was eliminated from Soviet copyright law.[91] The U.C.C. extends authors broad rights over translations of their works.[92] Arguably, the most problematic hurdle to Soviet participation in an international copyright union had finally been eliminated.

Second, Soviet copyright law was amended to provide for the payment of royalties for any reproduction of a foreign author's work. Article 101 of the 1961 Fundamentals states that "use of an author's work by other persons is not permitted except on the basis of a contract with the author or his assignees, except in cases stipulated in the law."[93]

Third, in compliance with article four of the U.C.C., the 1961 Fundamentals were amended to provide for copyright duration to extend for the life of the author plus twenty-five years.[94]

Finally, in compliance with the U.C.C.'s established assignment rights, the 1961 Fundamentals were amended to allow an author's assignees to rightfully exercise rights under the author's copyright.[95]

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86. *Id.* art. 5(2)(a).

87. *Id.* art. 17(1).

88. 1973 Decree of the Presidium, *supra* note 66.

89. *1961 Fundamentals, supra* note 27.

90. *See* Michael A. Newcity, *The Universal Copyright Convention as an Instrument of Repression: The Soviet Experiment*, 24 J. COPR. SOC'Y 1, 9-15 (1980).

91. Article 102 as amended reads:

> The translation of a work into a different language for the purpose of publication is permitted only with the consent of the author or his assignees. Competent U.S.S.R. agencies can, according to a procedure established by U.S.S.R. legislation, authorize the translation of a work into a different language and the publication of this translation, with the observance, where appropriate, of the terms of international treaties or international agreements to which the U.S.S.R. is a party.

92. UCC, *supra* note 78, art. 5.

93. *1961 Fundamentals, supra* note 27, art. 101 (as amended 1973).

94. *Id.* art. 105 (as amended 1973).

95. *Id.* art. 97 (as amended 1973).

3. Limitations of the Universal Copyright Convention

Soviet accession to the U.C.C. was a major step forward for the international protection of copyrighted materials. By stimulating multinational trade, Soviet accession to the U.C.C. opened the way for an international exchange of information and culture.[96] The U.C.C., however, is limited in its protective capacities.

In seeking the lowest common standards so as to attract the most members, the control or effect of the U.C.C. is limited. Further, as aptly demonstrated by the Soviets during the 1970's,[97] few nations will allow their domestic law to become subservient to a supranational body. The U.C.C. only provides a general obligation of national treatment,[98] and its minimum protections are insufficient to establish a controlling document for the international protection of copyrighted materials. When operating under the U.C.C. one is forced to continually ask the question: Will the target countries' laws protect my intellectual properties from the ravages of piracy, expropriation, and infringement?

III. RECENT DEVELOPMENTS IN THE SOCIET UNION

A. *Basic Provisions of the Berne Convention*

Until recently neither the United States[99] nor the Soviet Union had sought adherence to the Berne Convention. Yet, this Convention has arguably played the single most important role in the development of international copyright protection.[100] In early 1886, ten signatory states[101] began a new era in international copyright protection. An era had begun

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96. *See* Levin, *supra* note 53, at 161.

97. On December 28, 1973, prior to VAAP's assumption of exclusive jurisdiction over Soviet works, Nobel prize-winning author, Alexander Solzhenitsyn, published the book "The Gulag Archipelago." Published by the YMCA press, Solzhenitsyn's work was granted an international copyright.

The Soviet response was quick, decisive and defiant. Relying on the power of their own domestic copyright law, the Soviets arrested Solzhenitsyn, stripped his citizenship, and expelled him from the country. Significantly, the Soviets action was taken without any reliance on newly founded U.C.C. international copyright protections.

98. U.C.C., *supra* note 78, art. 2.

99. On Oct. 20, 1988 the United States Congress ratified accession to the Berne Convention for the Protection of Literary and Artistic Works. *See* 134 CONG. REC. S16939 (daily ed. Oct. 20, 1988). Eleven days later President Reagan signed the Berne Convention Implementation Act of 1988 into law. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). For an interesting comparison of Soviet and U.S. copyright law prior to the United States acession to the Berne Convention see Adolf Dietz, *United States and Soviet Copyright Systems: An Essay in Comparison*, 12 I.C.C., 153 (1981).

100. For a full and detailed discussion of the development of the Berne Convention and the implication of U.S. adherence, see Comment, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 HOUS. J. INT'L L. 149 (1990) [hereinafter *Development of the Berne*].

101. Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom.

where individual nations were prepared to relinquish individual interests for the good of international order.[102]

The Berne Convention contains thirty-eight articles which discuss the substantive requirements of Convention members and the administrative structure of the Convention itself. The Convention charges member nations with providing international copyright protection through domestic laws.[103] Of vital importance to this Article are the substantive requirements discussed in articles one through twenty of the Convention. Among these rights are duration of the copyright, right of translation, reproduction, public performance, broadcasting, adaptation, and arrangement.[104]

The Berne Convention, unlike the U.C.C., sets forth specific minimum conditions to which each signatory must adhere.[105] As a general matter these conditions may be broken into five categories:[106] Primacy, Coverage, Activation of Coverage, Exclusive Rights, and Term of Protection.

PRIMACY — Each member nation is required to accord foreign authors the same level of copyright protection it provides to its own citizens.[107] Signatory nations must grant protection at a level equal to or above the minimum standards espoused by the Convention.[108] Unless otherwise provided in a given article, national discretion to rely on its own domestic law[109] is not permitted. Convention provisions maintain primacy over national legislation.[110]

COVERAGE — Coverage under the Convention extends to a broad variety of subject matters. Coverage extends to "every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression . . . ."[111] Expressly excluded, however, is "news of the day or . . . miscellaneous facts having the character of mere items of press information."[112] Coverage also extends to an author's unpublished

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102. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 25.

103. *Development of the Berne*, *supra* note 100, at 157.

104. *See* Berne Convention, *supra* note 11, art. VII (duration), art. VIII (right of translation), art. IX (right of reproduction), at art. XI (right of public performance), art. XIbis (right of broadcasting), art. XII (right of adaptation, arrangement, and other alteration).

105. For an excellent comparison of Berne and U.C.C. Convention characteristics, *see* Note, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential*, 4 CARDOZO ARTS & ENT. L. J. 203, 216-26 (1985) (including text of speech made by Lewis Flacks, Policy Planning Advisor for the U.S. Register of Copyright).

106. *See generally Berne-ing the Soviet Copyright Codes*, *supra* note 10, at 398 (discussing method of five category breakdown of Berne Convention's substantive articles).

107. Berne Convention, *supra* note 11, art. 5(3).

108. *Id.* art. 5(2) and art. 6(1).

109. *Id.* art. 19 and art. 20.

110. *Id.* art. 2(4); art. 2(7); art. 2bis(1-2); art. 7(4); art. 10(2); art. 10bis; art. 14bis(3); art. 14ter(2); art. 16(3).

111. *Id.* art. 2(1).

112. *Id.* art. 2(8).

works.[113]

ACTIVATION OF COVERAGE — The Berne Convention excludes all formalities that precondition the existence, scope and duration of copyright protection. Once created, a work's entitlement to protection under the Convention is not premised on any administrative formality.[114] Exercise of rights under the Convention is immediately available and independent of any exercise of protection in the work's country of origin.[115]

EXCLUSIVE RIGHTS — The Berne Convention protects an author's personal rights and the right created in his works. The Convention seeks to maintain minimum protective standards which signatories deem essential to the success of international copyright.[116] Among these rights are the right of translation, reproduction, public performance, broadcasting, adaptation, and arrangement.[117] Any reproduction of an author's work made in violation of any Convention exclusive right is subject to seizure.[118]

TERM OF COVERAGE — The Berne Convention establishes a minimum term of copyright protection for life plus fifty years or an alternative term of fifty years from the date of first publication.[119]

B. *Recent Developments in Soviet International Copyright Law*

On April 19, 1989, Vladimir F. Petrovsky, the Soviet Deputy Foreign Minister, announced the Soviet Union's intention to join the Berne Convention for the Protection of Literary and Artistic Works,[120] "[I] can inform you that our country is finalizing the necessary preparatory work which will soon enable us to accede to the Berne Copyright Convention."[121]

On June 1, 1990, the Soviets made significant Berne preparations as Soviet President Gorbachev signed an historic trade agreement[122] with

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113. *Id.* art. 3(1) and 3(3).

114. *Id.* art. 5(2).

115. *Id.*

116. *Development of the Berne*, *supra* note 100, at 159.

117. *See* Berne Convention, *supra* note 11, art. VIII (right of translation), art. IX (right of reproduction, art. XI (right of public performance), art. XIbis (right of broadcasting), art. XII (right of adaptation, arrangement, and other alteration).

118. Berne Convention, *supra* note 11, art. 16(1).

119. *Id.* art. 7(1-3).

120. Berne Convention, *supra* note 11; *Soviet Union to Join Berne Convention*, REUTERS, Apr. 19, 1989; *Soviets Will Join Berne Convention*, L.A. TIMES, Apr. 19, 1989, Part A, pg. 3, col. 1; *The U.S.S.R to Join Berne Convention, Agency Chief Says*, TASS, August 30, 1989.

121. Clyde H. Farnsworth, CHINA CALLED TOP COPYRIGHT PIRATES, N.Y. TIMES, Apr. 20, 1989, at D7, col. 4. Mr. Petrovsky's announcement was made at the London Information Forum of the Conference on Security and Cooperation in Europe.

122. *Bush and Gorbachev Sign Trade Pact with Intellectual Property Provisions*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 984, at 128 (June 7, 1990); For text of the U.S.-U.S.S.R. Trade Agreement relating to copyright provisions and accompanying Side Letter,

the U.S., committing the two nations to provide for substantial intellectual property protections. The agreement also bound the Soviet Union to implement legislation necessary to carry out their commitment.[123] The

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see *Intellectual Property Provisions of U.S. - Soviet Trade Agreement*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 984, at 144 (June 7, 1990); *see* Schwartz, *supra* note 17, at 213-218.

123. The agreement states the bilateral commitment of each nation to submit "to their respective legislative bodies, the draft laws necessary to carry out the obligations of this Article and to exert their best efforts to enact and implement these laws" to:

(1) Adhere to the Berne Convention (Paris Act, 1971);

(2) Provide copyright protection for computer programs and data bases as literary works;

(3) Provide sound recording protection including—

(a) national treatment (immediately after both parties, i.e., the Soviets, have enacted domestic sound recording protection) for sound recordings first fixed by their respective nationals or first published in their national territory; and

(b) at a minimum, rights in producers of sound recordings shall include: a right of reproduction, public distribution and importation, and exclusive commercial rental and lending rights;

(4) After both are members of the Berne Union, "the protection of works in existence prior to that date [of Berne relations] shall be determined in accordance with Article 18 of the 1971 Paris Act of the Berne Convention."; and

(5) To constitute a working group on intellectual property matters in accordance with the Agreement and side letter.

The agreement also states that the legislative proposals of the parties shall be in accordance with the principles enumerated in the side letter. The contents of the side letter may be summarized as follows:

(1) The Soviet Government agreed that in keeping with the Resolution of the Supreme Soviet of March 6, 1990, the "Law on Property in the U.S.S.R." the Supreme Soviet had charged the Council of Ministers to introduce legislation in 1990 to amend the copyright law in order to adhere to the Berne Convention; and

(2) "The Government of the U.S.S.R. will introduce in 1991 the draft laws necessary to fulfill the obligations contained in Article VIII of the Agreement and will undertake all possible measures to enact these laws during 1991. The Government of the U.S.S.R. will seek prompt implementation of these laws."

(3) The Government of the U.S.S.R. will incorporate the following principles in their legislative proposals:

(a) For computer software protection: to extend protection under copyright for computer programs, at the level and for the same duration as literary works and any limitations on rights would be compatible to those applicable to literary works under Berne—and to incorporate limitations on copying allowing for a single back-up copy under conditions similar to those provided under United States copyright law;

(b) For sound recordings: to consider a term of protection for fifty years from the date of first publication and to consider adherence to the Geneva Phonograms Convention immediately upon enactment of sound recording protection in the U.S.S.R.

(4) The Government of the U.S.S.R. in cooperation with the United States government will create a working group on intellectual property matters to exchange information and discuss the implementation of intellectual property protection in the respective countries.

See Schwartz, *supra* note 17, at 158-59. The author of this paper extends full credit to Mr.

U.S.-U.S.S.R. agreement included commitments to: (1) adhere to the Berne Convention, (2) protect computer programs and data bases, (3) protect sound recordings, (4) product and process patent protections for 20 years from application date or at least 17 years from grant, and (5) comprehensive trade secret protection.[124]

Since the signing of the U.S.-U.S.S.R. Trade Agreement, Soviet lawmakers have formulated draft legislation that would amend Chapter IV of the 1961 Fundamentals of Civil Legislation and bring Soviet copyright law into conformity with the Berne Convention's minimum standards.[125] On May 31, 1991, in a special commission of the Supreme Soviet of the U.S.S.R., amendments to the 1961 Fundamentals of Civil Legislation were adopted. Anatoly Lukyanov, Chairman of the Supreme Soviet and highest ranking official in the Soviet Government's legislative branch, stated, "We understand that the protection of intellectual property rights is extremely important . . . I am strongly personally committed to this. The law will fully conform to the Berne Convention and all established international standards. It is not only important for you, it is equally important for us."[126]

Shortly after adoption, the amended Fundamentals of Civil Legislation appeared in the June 26 issue of *Izvestia*. The Fundamentals, as amended, contained 10 copyright law provisions, which were integrated into the Soviet's Civil Code, Chapter IV. Among these provisions were the following:[127]

> (1) The list of copyrighted items includes literary works such as fiction, textbooks, etc., dramatic works, musical works, audiovisual works such as cinema or television, radio productions, photography, etc. Computer programs are listed separately but are not included as literary works, as provided in the Trade Agreement.[128]
> (2) Registration of a work, or compliance with any other formalities, is not required for copyright protection.
> (3) The term of protection is the life of the author plus 50 years, counting from the first day of the year following the author's death.[129]
> (4) Authors will have exclusive rights to their works, including the rights to authorship and integrity of the work, the rights to publish and to use the work,[130] and the right to remuneration.[131]

Schwartz for his excellent summaries of the U.S.-U.S.S.R. Trade Agreement and accompanying Side Letter. Mr. Schwartz's summaries, with limited alterations, were utilized in full.

124. *Treaties, Soviet Union*, 42 PAT. TRADEMARK & COPYRIGHT J. No. 1044, at 405 (August 22, 1991).

125. *See* Schwartz, *supra* note 17, at 149.

126. *Chairman of the Supreme Soviet Pledges Commitment to Copyright Protection*, BUSINESS WIRE, July 15, 1991, Int'l desk.

127. The summaries of the new amendments as provided in Izvestia were taken from *New Copyright Law Enacted, But U.S. Groups are Skeptical*, INT'L BUS. DAILY (BNA), Aug. 28, 1991 [hereinafter *New Copyright Law*].

128. *Id.* art. 134.

129. *Id.* art. 137.

130. *Id.* art. 135(2).

Significantly, the 1991 amendments to the Fundamentals of Civil Legislation also added provisions to protect computer programs and data bases under copyright law[132] and established a right of public performance. The 1991 amendments were set to take effect on January 1, 1992.[133]

Many of the revisions were made in anticipation of Soviet adherence to the Berne Convention. It remains a question of debate whether the Soviet amendments do, in fact, bring it into conformity with Berne Convention.[134]

C. *Political Changes and the New Commonwealth of Independent States*

On December 8, 1991 one of the century's most dramatic events occurred in the Soviet Union. The Presidents of Russia, Ukraine and Byelorussia declared an end to the Soviet Union and the creation of a new Commonwealth of Independent States.[135] The preamble to the Commonwealth Agreement stated: "We, as the founding states of the U.S.S.R. and the co-signatories of the 1922 Union Treaty . . . state that the U.S.S.R. is ceasing its existence as a subject of international law and a geo-political reality."[136]

New Commonwealth leaders immediately extended an open invitation to all states interested in joining the Commonwealth.[137] Prior Soviet ties, however, were not made a prerequisite to enrollment.

In their initial meeting, Commonwealth leaders, Boris Yeltsin, Leonid Krawczuk, and Stanislav Shushkevitch, agreed to "conduct coordinated radical economic reforms aimed at the creation of full-blooded market mechanisms, the transformation of attitudes to property, [and] guarantees for freedom of enterprise."[138] Resolutions were also passed to create an inter-bank agreement, establish a coordinated budget policy, institute liberalized price standards, and abstain from acts harmful to mu-

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131. *Id.* art. 135.

132. *Id.* art. 134(2) provides that "computer programs" are in the subject matter of works protected under copyright.

Irina V. Savelyeva, Professor of Law, Moscow State University and deputy director of Steptoe & Johnson Lex International in Moscow predicted that enactment of the computer related provisions would allow the Soviet Union to join the Berne Convention and would bring the Soviet law more closely in tune with Western protections. *European Unification is Focus of AIPLA Mid-Winter Meeting*, 41 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 1018, at 333 (Feb. 14 1991).

133. Fundamentals of Civil Legislation of the U.S.S.R., Chap. IV, Fundamentals of Copyright Law of 1961 (as amended May 31, 1991).

134. *See* Schwartz, *supra* note 17, at 157. For a list of complaints developed by the International Intellectual Property Alliance (IIPA) *see New Copyright Law*, *supra* note 127.

135. Mark Trevelyan, *Focus-Slav Republics Declare Soviet Union Dead*, REUTERS, Dec. 9, 1991, § Money Report [hereinafter Trevelyan].

136. *U.S.S.R. is Dead*, *supra* note 18.

137. *Id.*

138. *See* Trevelyan, *supra* note 135.

tual economic interests.[139]

From a legal perspective, Soviet domestic law faced extinction. New Commonwealth leaders openly declared all Soviet law null and void on their territory and Soviet organs obsolete.[140] Independent State legislation is to replace years of Soviet legal domination.[141] Commonwealth leaders noted, however, that international treaty obligations signed by the U.S.S.R. would continue to be honored.[142]

The disintegration of the Soviet Union may have fatalistically interfered with recent advancements in the international protection of copyrighted materials. In Commonwealth territories, the January 1, 1992 enactment of the May 31, 1991 amendments to Soviet copyright legislation will have no effect.[143] As a result, Soviet copyright law will not come into conformity with international copyright standards and Soviet intents of accession to the Berne Convention will not reach fruition. The Commonwealth's commitment to Soviet international treaty obligations inauspiciously reveals that Soviet Commonwealth membership in the Berne Convention was missed by only a few weeks.

IV. ADHERENCE TO THE BERNE CONVENTION BY THE NEW COMMONWEALTH OF INDEPENDENT STATES

A. *A Matter of Survival for a Birthing Market Economy*

Commonwealth States face a difficult period as they move toward free-market economies. Critical economic conditions in each of the post-Soviet States are pressuring new leadership to make the transition as quickly and smoothly as possible. The expediency and ease of these transitions, however, are conditioned upon each State's ability to exist and function in the global marketplace.

Today's global free-market economies are dependent upon information-based technology and innovations.[144] Computer-integrated-manufacturing systems control and monitor the production of materials.[145] Advanced telecommunication and electronic-data-interchange systems link

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139. *Id.*

140. *New Commonwealth May Create Favorable Environment for Legal Framework*, 2 SOVIET BUS. L. REPT. No. 11, Dec. 13, 1991; Trevelyan, *supra* note 134. *Compare Soviet Union Still Alive, Constitutional Committee Says*, TASS, Dec. 11, 1991 (positing that Soviet Law still remains in order to preserve even minimum human rights and freedoms).

141. Trevor Fishlock, *Balts Forced to Pay Heavy Price for New Freedom*, THE DAILY TELEGRAPH, January 12, 1992, § Int'l, at 15.

142. *U.S.S.R. is Dead*, *supra* note 18.

143. *See* Trevelyan, *supra* note 135.

144. *See generally* James E. Meadows, *Software Protection in Transactions with the Soviet Union*, 12 RUTGERS COMPUTER & TECH. L. J. 133 (1986).

145. *See* Tom Peters, *The Destruction of HIERARCHY: The Information Revolution is Killing Traditional Corporate Hierarchy. When You Can No Longer Hoard Information, Your Old Basis for Power is Gone*, INDUSTRY WEEK, Aug. 15, 1988, § Features, at 33 [hereinafter Peters].

suppliers, distributors and purchasers on a global scale.[146] Information of all types can be transmitted, exchanged, updated, or monitored from points around the globe in milliseconds.[147] These advanced systems as well as the information that is transmitted through them are the subject of careful protections under available international copyright codes.

A Commonwealth State's transition from state-owned to free-market economy, therefore, will depend immensely on its ability to obtain established Western information-based technologies, stimulate comparable indigenous technological developments, and integrate these technologies into its economic system.[148] In light of existing critical economic conditions in the Commonwealth States, Commonwealth leaders must seek to attain the highest degree of access to these intellectual goods that the international marketplace will allow.

Direct foreign investment is imperative to the integration of state-of-the-art technology into the developing Commonwealth economies.[149] Foreign nations, however, will be reluctant to engage in any form of direct technological investment or exchange without assurances that its intellectual goods will be adequately protected.[150] Moreover, domestic development will progress equally as slow where copyright protections do not exist as an incentive to indigenous scientists, authors, and engineers.[151]

Lack of Berne Convention membership will work a significant disadvantage on each Commonwealth State's attempt to obtain information-based technologies from foreign trade partners.[152] As the premier union for the international protection of copyrights, the Berne Convention defines "adequate" minimum standards of copyright protection. Fledgling economies which are reluctant to assure these adequate protections will not be readily trusted in the global marketplace.[153]

Transition to and maintenance of a free-market economy depends on the free and protected flow of information. Broad access to Western, information-based technology must be a matter of utmost concern for Commonwealth leaders. Accession to the Berne Convention is a necessary precursor to any such access.

B. *The Necessities of Adherence*

1. The Ravages of Piracy

The term "piracy" has no settled meaning in international law. In its

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146. *See id.*

147. *See id.*

148. *See* Edward C. Runte, *Transborder Data Flow—Planning for the Future*, Sept. 21, 1982, § Int'l Data Networks, at 11 [hereinafter Runte].

149. *See* Leaffer, *supra* note 7, at 279-281.

150. *See id.*

151. *See* Sony, *supra* note 5, at 429.

152. *See generally* Leaffer, *supra* note 7, at 279-281.

153. *See id.*

broadest sense, piracy is the systematic and intentional reproduction or use of someone else's copyrighted materials.[154] Pirates of copyrighted materials enjoy low production costs and occupy the opportune locations to satisfy the demands of developing economies.[155] As a result, piracy has become an attractive short-term solution to the technological inadequacies of developing nations.

In this age of technology, reports of the computer industry demonstrate well the staggering impacts of piracy on domestic and international economic conditions.[156] Between 1981 and 1984 the U.S. software industry lost 1.3 billion dollars.[157] Studies indicate that 1985 losses alone exceeded one billion dollars.[158] The increasing reliance of modern society on computers lends to a breeding ground of software piracy.

Recent commercial and technological developments in the field of information-systems (compact disks, optical scanners, computer networks and advanced software) will cause the piracy of information and information-based technology to become even more acute. Strict adherence to domestic and international copyright protections is the foremost means of combating the illegal pirating of an another's works. Countries employing inadequate domestic and international copyright protections will attract these damaging pirating activities.

2. Impact of Domestic Economy

The damage piracy can cause to domestic economies is far reaching. The losses of the copyright owner are three-fold. Copyright owners lose, monies acquired by pirators, royalties potentially paid by pirating organizations, and a product's goodwill where pirated imitations are of inferior quality.[159] Consumers of pirated products are also victimized by poor quality goods that threaten the public health and welfare. Furthermore, losses create a disincentive to disseminate works. Authors will selectively begin releasing their works in an attempt to avoid the unfair competition from cheaper, pirated works.[160]

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154. For a thorough discussion of the term, *see* J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 770-80 (1989).

155. *See* Leaffer, *supra* note 7, at 280.

156. For an extensive review of the economic impact on U.S. trade as a result of piracy in the specific areas of: motion pictures, records and tapes, books, and computer software, *see* Jon A. Baumgarten, *International Matters*, 222 PRAC. L. INST. 25, 47-51 (Apr. 17, 1986) [hereinafter *International Matters*].

157. Frank Emmert, *Intellectual Property in the Uruguay Round — Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1326-27 (1990) [hereinafter Emmert], *relying on* 3 BUSINESS SOFTWARE PIRACY: REPORT ON FEDERAL DATA SYSTEMS 4 (1985).

158. *See id.* at 1331-33.

159. *Id.* at 1321-21.

160. *International Matters*, *supra* note 156, at 25. Conservative estimates indicate that 2.2 million, or 2.2% of the U.S. civilian labor force were involved in copyright industries

A State's disregard for intellectual property rights also inhibits the development of indigenous technological and scientific advancements. Scientists, authors, and engineers are reluctant to expend the labor of creation when uncontrolled pirating, counterfeiting, and infringing will impede a fair return on their labors.[161] The failure to protect domestic incentives may actually result in the exodus of important minds to countries were strong copyright protections are happily afforded.[162]

Indirect effects on the economy may also be felt. Where piracy is widespread, research and development will be less profitable and consequently decrease.[163] Decreases in creative development will impact the number of jobs available in the affected industries.[164] Reduced creative development will also affect those industries that supply the raw materials or services involved in the manufacture, transportation or distribution of the creative works.[165] At the governmental level, reduced industrial activity will mean smaller tax resources for domestic governmental tasks.[166]

Much like a chemical dependence, a country with little regard for the protection of intellectual property will develop an unhealthy technological dependance on foreign economies.[167] As domestic creative elements are eliminated, pirated products will become the countries sole window to Western and advanced technology goods.

3. Impact on International Trade Relations

By operating without adequate copyright protections, a country demonstrates its lack of regard for the international community of ideas.[168] Although this disregard for copyright protections may yield positive short-term results, it will likely harm a country's development in the long-term.[169]

Nations with strong copyright protections may forbid the importation of pirated, counterfeit, and infringing products.[170] Nations may restrict trade with a country that has a record of violating even minimum

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during 1984.

161. *See* Sony, *supra* note 5.

162. J. Davidson Frame, *National Commitment to Intellectual Property Protection: An Empirical Investigation*, 2 J.L. & TECH. 209, 211 (1987) [hereinafter Frame].

163. *See* Emmert, *supra* note 157, at 1321-22.

164. *Id.* A 1982 estimate found 131,000 jobs in five industry sectors were lost due to foreign product counterfeiting. *See* United States International Trade Commission, Pub. No. 1479, *XVII Effects of Foreign Product Counterfeiting on U.S. Industry* 4-13 (1984).

165. *See International Matters*, *supra* note 156, at 25.

166. *See* Emmert, *supra* note 157, at 1321-22.

167. *See* Frame, *supra* note 162, at 211.

168. *See International Matters*, *supra* note 160, at 30.

169. *See* Frame, *supra* note 162, at 211.

170. Greeley, *The United States Customs Service and Protection of Intellectual Property Rights*, 83 PAT. & TRADEMARK REV. 5, 6 (1985) (discussing U.S. Customs Service practice of screening imports for counterfeit, pirated or patent-infringing goods).

protective standards.[171] Fearing the loss of control over ground-breaking developments, nations may grow reluctant to license new technologies.[172]

Production of intellectual property has become increasingly expensive. As a result, research and development efforts demand large international markets and firm copyright protections to maintain adequate returns.[173] In light of these rising costs, nations can ill afford to eliminate any possibility of fully operating in the international marketplace.

C. *The Benefits of Berne Convention Membership*

By joining the Berne Convention, Commonwealth States would receive international copyright protection in more than eighty nations.[174] Commonwealth authors would enjoy copyright protection in several countries, not members to the U.C.C. More significantly, new Commonwealth authors would enjoy the protection of the highest international copyright standards available today.

International copyright protection is imperative to ensure access to the world's technology, and to ward off the ravages of piracy. Membership in the Berne Convention will provide these protections and facilitate the Commonwealth State's move into world markets.[175]

1. Increased Domestic Creativity and Development

Most developing countries have an infrastructure supporting a certain level of research and development.[176] The full potential and growth of that infrastructure can not be realized without adequate copyright protections.[177] As a foundation, strong copyright laws will ensure that indige-

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171. *See* Frame, *supra* note 162, at 211, 226; *see* Moscowitz, *Law Moves to Protect Ideas, Not Just Goods, from Piracy*, WASH. POST, Oct. 29, 1984, (Business Supp.), at 29, col. 1 (noting use of Generalized System of Preferences (GSP) to protect U.S. goods from piracy).

For example, the GSP is being used by the United States Government to pressure countries with little regard for intellectual property rights to develop stronger intellectual property laws. The degree of intellectual property protection a country offers affects the level and type of GSP benefits it may receive. Consequently, countries with limited intellectual property protections may receive GSP benefits (duty free tariffs).

Additionally, Section 301 of the Trade Act of 1974 (as amended in 1984), is another weapon the United States government has come to rely on as a means of prompting nations to adopt stronger intellectual property laws. Under this approach the inadequacy of a nation's intellectual property laws is addressed as an unfair trade practice.

172. *See* Frame, *supra* note 162, at 211; *see* J. Davidson Frame, *Political Risk in International Technology Transfer*, 10 J. TECH. TRANSFER 1 (1986).

173. *See* GILLES Y. BERTIN & SALLY WYATT, MULTINATIONALS AND INDUSTRIAL PROPERTY: THE CONTROL OF THE WORLD'S TECHNOLOGY 127 (1988).

174. The United States became the eighty-first member-nation to the Berne Convention. *See* N.Y. TIMES, Apr. 20, 1989, at D7, col. 4.

175. *See generally* BOGUSLAVSKY, *supra* note 39, at 216.

176. *See* Emmert, *supra* note 157, at 1349.

177. *See id.*

nous creators remain at home.[178] Once a State's creators are content, creative activity can flourish in a collected and confident environment.

The protection of copyrighted materials is the primary means by which creators are ensured a fair return on their labor.[179] Strong copyright protections will provide authors with the incentive to continue in their creative endeavors.[180] The full and free dissemination of information, methodologies, and innovations among indigenous scientists and engineers raises the level of scientific consciousness.[181] As a result, incremental and steady advances in technology enhance the standard of living within domestic society.[182]

Authors in Commonwealth States will benefit from a large, previously unavailable, paying market.[183] Increased trade relations between foreign nations and Commonwealth States will foster interest in the customs and lifestyles of people in the Commonwealth States.[184] Commonwealth citizens, scientists, teachers, and officials, will experience the rich heritage of foreign cultures and the true international marketplace of ideas.[185]

2. Enhanced Position in the Global-Marketplace

Universal or international copyright protections help ensure that a creator's innovations will bring a profit in the global marketplace.[186] Western economic models demonstrate that global creativity and development increases when additional nations protect intellectual property and thus make innovation more profitable.[187] The Commonwealth States will serve important national interests of economic stability and technological growth by becoming Berne Convention members.[188] Membership will provide Commonwealth States with a credible presence in the fast growing, information-based, global economy. Membership will also establish negotiation mechanisms with many influential trade partners.[189]

Membership guarantees participation in the formulation and management of international copyright policy.[190] It will enhance the plausibil-

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178. *See id.*

179. *See Sony, supra* note 5.

180. *See id.*

181. Dennis S. Karjala, *United States Adherence to the Berne Convention and Copyright Protection of Information-Based Technologies*, 28 JURIMETRICS J. 147, 148 (1988).

182. *Id.*

183. *See* Radlauer, *supra* note 19, at 20.

184. *Id.*

185. *See* Levin, *supra* note 54, at 161.

186. *Compare* Carlos J. Moorhead, *H.R. 2962. The Berne Convention Implementation Act of 1987*, 3 J.L. & TECH. 187 (1988) [hereinafter Moorhead].

187. Emmert, *supra* note 157, at 1351.

188. *See* Moorhead, *supra* note 186.

189. *Id.* Berne members include nearly all free market countries. 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 22 (1988).

190. "[T]he maintenance and development of the Union and the implementation of

ity of a Commonwealth State's trade positions,[191] and provide the necessary show of good-faith to cautious trade partners. Membership will evidence that the Commonwealth State intends to hold the same respect for intellectual property protections as the other economically and technologically advanced nations of the world.

3. Improved Access to Cutting-Edge Technology

Adequate protection of copyrighted materials is becoming increasingly important to the decisions of foreign investors.[192] Where a work may be the subject of piracy, counterfeiting or infringement, inventors are understandably eager to seek out all available protections. Trade secrecy and limited dissemination provide such potential protections.

Facing the potential of losing control over new innovations, copyright owners tend to be reluctant in disclosing their innovations where copyright protections are inadequate.[193] When the purchasing nation offers inadequate protections, inventors are content to send outdated and non-competitive technology to these "dangerous" markets and maintain the competitive integrity of their cutting edge technology.[194] Membership in the Berne Convention would provide cautious trade partners with the protective assurances they desire.

V. CONCLUSION

A major step in the development of the new Commonwealth of Independent States would be their immediate adherence to the Berne Convention. Unquestionably, the Commonwealth's prospect for future development is closely tied to its ability to acquire and nurture strong technological capabilities. The doorway to these capabilities lies in each State's indigenous creative resources and its ability to deal in the global market for the acquisition of innovative technologies.

By necessity the Commonwealth States must begin at home, nurturing indigenous technological advancements. Internal growth and a clear regard for copyright protections will expand the much needed technological base of these developing countries. Countries that are economically, scientifically, and technologically successful (U.S., Sweden, France, Germany, United Kingdom) have carefully maintained the protection of in-

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this Convention" shall be governed by an Assembly comprised of one member from each of the Governments that are a party to the Convention. Berne Convention, *supra* note 11, at art. 22.

191. Important trade partners, (U.S., United Kingdom, Sweden, Japan) will not easily forget the billions of dollars lost through copyright infringements in the past. Adherence to the Berne Convention indicates a willingness and commitment to reform and correct years of unacceptable piracy within the Soviet Union.

192. *See generally* Emmert, *supra* note 157, at 1351.

193. *See id.* at 1352.

194. *See* Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989).

tellectual property rights as part of their economic development strategies.[195] To this end, Commonwealth States must strive to protect their indigenous intellectual property in an attempt to encourage the development of domestic creative capacities.

To follow the Soviet's historical disregard and animosity for international copyright protections will only drive these budding nations into technological isolationism and an unhealthy dependence on the piracy of other nation's goods. Any disregard for international intellectual property protections will only weaken domestic technological capacities and limit foreign investment opportunities.

The new Commonwealth States, upon entering the international trade markets, will have to abide by the rules of the medium. Intellectual property rights must be respected. At this critical time, these States cannot afford to have indigenous work force scientists and engineers leaving the country in search of better protections or remaining at home with no incentive to create.

Although Soviet Law has, arguably, been voided in Commonwealth territories, new Commonwealth leaders must be cognizant of the impact former Soviet positions on copyright protection may have on present policy decisions. Western distrust of Soviet copyright protections as a result of extensive piracy and slow international legal development must be factored into initial Commonwealth trade decisions.

Commonwealth leaders, therefore, must move to develop strong international copyright protections thus demonstrating their goodwill and protective intents. The development of domestic legislation which establishes firm standards in keeping with Berne Convention requirements will take time. However, without this goodwill firmly established, the door to Western technology will slowly open — a phenomenon which Commonwealth States cannot survive.

The Commonwealth States face an interesting alternative to the slow development of domestic copyright legislation. Commonwealth leaders must recognize that Soviet Law was poised for accession the Berne Convention. In light of the time needed to create new domestic copyright legislation, Commonwealth leaders must consider the possibility of relying on Soviet law and adhering to the Berne on its foundations. Reliance on Soviet law need only serve as a transitory body until conforming domestic legislation can be constructed.

In either case, reliance on Soviet copyright law or new legislation, it is important for the new State to begin its march into the global free-market economy and international free marketplace of ideas with the goodwill and protective tools necessary to deal with other Nations. Survival cannot be accomplished with short-term patch work solutions.

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195. *See* Frame, *supra* note 162, at 217.

INTERNATIONAL CAPITAL MARKETS SECTION

Securities Regulation in Central Europe: Hungary and Czechoslovakia

SAMUEL WOLFF*
PAUL THOMPSON**
DANIEL NELSON***

§1. Introduction

The securities markets of Europe are in a state of significant transition. The European Community (EEC or Community), essentially a Western Europe institution at present,[1] has already passed significant legislation designed to reduce regulatory barriers to the free flow of capital across national boundaries. When fully implemented, EEC directives will allow companies to make stock offerings throughout the Community on the basis of a single prospectus approved by the home state and banks and brokerage firms to provide financial services throughout the Community on the basis of a single license issued by the home state. The countries of Central Europe are undergoing an even greater transformation in their conversion from centrally planned to free market economies, privatization of state-owned enterprises and establishment of new securities markets and systems of securities regulation. The Budapest Stock Ex-

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1. The full members of the EEC are Belgium, Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain and Portugal. West Germany was a founding member of the Community; East Germany became a member not by accession but by reunifying with West Germany.

change, closed by the communists in 1948, re-opened for trading in June 1990 with a mission "to facilitate efficient capital flows." In 1990 the Republic of Hungary (Hungary) enacted legislation designed to regulate the stock exchange and other aspects of the new securities market. Czechoslovakia, or more precisely, the Czech and Slovak Federated Republic (Czechoslovakia), enacted stock exchange legislation in April 1992 and constituted stock exchanges in Prague and Bratislava although they are not yet operational. This article is a case study of the securities markets and regulation of Hungary and Czechoslovakia, but it should be noted that similar changes are also occurring in Poland.[2]

Central European securities markets may best be understood in context of the political and economic environment in which they exist. As discussed more fully below, Hungary is politically stable and the regional leader in the implementation of free market economic reforms. About 5,000 companies with some measure of foreign ownership were established in Hungary in 1991.[3] Czechoslovakia is in the process of splitting into two independent republics, the Czech Republic and the Slovak Republic, although negotiations are still underway concerning details of the Federal dissolution. Each Republic will establish its own central bank and distinct national currency and is in the process of forming ministries that will assume responsibilities once reserved for Federal authorities. The division of Czechoslovakia is likely to increase the pace of economic reform in the Czech Republic and decrease it in the Slovak Republic. Approximately 4,500 companies with some degree of foreign ownership had been registered in Czechoslovakia by the beginning of 1992,[4] but presumably foreign investment may moderate temporarily due to political uncertainties facing the nation.

A study of the securities markets and laws of Central Europe is instructive from a number of points of view. First, U.S. and other foreign investors purchasing interests in companies or engaging in joint ventures in this region should be familiar with securities laws which may complement commercial, joint venture, foreign investment or privatization laws applicable to their investment. Second, portfolio managers, institutional investors and others investing globally for purposes of geographic or risk diversification or for other reasons should also be aware of securities laws that may directly apply to their purchases and subsequent resales. Indeed, all investors should have a general understanding of the nature of the securities markets that may provide liquidity for their investment.

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2. Hungary, Czechoslovakia and Poland are commonly associated as "Central European" rather than Eastern European countries. Poland enacted the Act on Public Trading in Securities and Trust Funds and the Act on the Establishment of the Warsaw Stock Exchange in 1991, re-opening the Stock Exchange 52 years after its closure in 1939.

3. COOPERS & LYBRAND, CENTRAL & EASTERN EUROPE: HUNGARY 14 (1992) [hereinafter HUNGARY INVESTMENT GUIDE]. "Total foreign investment over the past two years has exceeded US $2.5bn, of which 50 percent came from European companies." *Id.*

4. COOPERS & LYBRAND, CENTRAL & EASTERN EUROPEAN GUIDE: CZECHOSLOVAKIA 20 (1992)[hereinafter CZECHOSLOVAKIA INVESTMENT GUIDE].

Third, foreign companies setting up operations and concomitantly selling securities in the region obviously must be aware of applicable laws, although market participants should, of course, consult with counsel in the case of actual transactions.

From a more academic perspective, the emerging systems of securities regulation in Central Europe provide a useful vehicle for examining many of the contemporary themes in the field of international securities regulation: capital adequacy, universal banking, foreign stock exchange membership, "transparency" (disclosure of trade information), off-exchange trading and direct bank access to stock exchanges. These issues, currently under consideration by, among others, the Community and the International Organization of Securities Commissions (IOSCO), are among the most important issues of the day in the field of international securities regulation. They have arisen in Hungary and Czechoslovakia as elsewhere but clearly transcend national boundaries due to the internationalization of the securities markets which proceeds apace.

Hungary and Czechoslovakia (as well as Poland) have entered into association agreements with the EEC[5] which, in the words of EC Commission President Jacques Delors, mark " 'the reconciliation of Europe with itself.' "[6] These agreements have an unlimited duration, ten-year transition period and "may lead to future accession to the European Community."[7] The parties obligate themselves to take actions necessary progressively to liberalize restrictions against the rendering of of cross-border services.[8] The EEC, Hungary, Poland and Czechoslovakia also entered into interim agreements designed to facilitate on a more immediate basis the objectives of the association agreements.[9] Hungary and Czechoslovakia are clearly contemplating full EC membership in the not too distant future and their securities laws bear an indelible European mark. They will be able to integrate themselves into the EEC system, at least as far as their securities laws go, although both countries and especially Hungary will clearly be required to amend their laws to bring them into full compliance with EEC directives upon accession to the Treaty of Rome.

A brief comparison of the laws of Hungary, Czechoslovakia and the EEC as they apply to several of the salient issues mentioned above provides a useful overview of Central European securities laws and their relation to the EEC system of regulation. The analysis begins with financial

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5. *EC and Eastern European States Conclude Association Agreements*, 1 Doing Bus. in E. Eur. (CCH) 1 (January 1992).

6. *EC Agreements With Eastern Nations Seen as First Step to EC Membership*, 1 E. Eur. Rep. (BNA) 226 (Dec. 23, 1991).

7. *EC and Eastern European States Conclude Association Agreements*, *supra* note 5, at 2.

8. *See id.*

9. *EC-Eastern Europe Interim Agreements Approved in European Parliament*, 2 Doing Bus. in Eur. (CCH) 28 (February 1992).

services. One of the most important contemporary issues in the international market for financial services involves the question of universal banking — the rendering of both commercial and investment banking services by the same institution, prohibited at least in theory in the United States by the Glass-Steagall Act. EEC law will allow banks to provide both commercial and investment banking services throughout the European Community on the basis of a single license issued by the home state, provided the license authorizes both types of activities. Czechoslovakia, like the EEC, permits universal banking[10] but Hungary only allows banks to engage in securities activities through subsidiaries.[11]

Capital adequacy for securities firms is another controversial issue worldwide having recently been resolved, however, at least in principle, by the EEC.[12] Under Hungarian legislation, an underwriter or dealer must have at least Ft 50 million (about US $650,000) in capital while an ordinary broker must have either Ft 10 million (about US $130,000) or Ft 5 million (about US $70,000) depending upon whether it is organized as a limited liability company or joint stock company, respectively.[13] These requirements compare to capital adequacy requirements in the European Community of ECU 730,000 (about US $970,000) for all firms that do not fall within one of the following two categories; ECU 125,000 (about US $170,000) for firms that hold client funds but do not trade for their own account; and ECU 50,000 (about US $70,000) for firms that do not hold customer funds or trade for their own account.[14] Legislation that would establish capital requirements for brokers operating in Czechoslovakia has not yet been enacted, but minimum bank capitalization requirements in Czechoslovakia are Kes 300 million[15] (US $11 million) compared to Ft 2 billion (US $25 million) in Hungary[16] and ECU 5 million[17] (US $6.7 million) in the EEC.

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10. *New Law Allows Foreign Branches, Sets Rules for New Banks, Subsidiaries*, 2 E. Eur. Rep. (BNA) 164 (March 2, 1992).

11. *Parliament Adopts Statute Establishing Western Standards*, 1 E. Eur. Rep. (BNA) 110 (Nov. 25, 1991).

12. *Progress on EC Capital Adequacy and Investment Services Directives*, Int'l Sec. Reg. Rep. (Buraff) (Aug. 10, 1992).

13. *See infra* notes 202-211 and accompanying text.

14. *EC Finance Ministers Reach Agreement on Investment Services, Capital Directives*, Int'l Sec. Reg. Rep. (Buraff) (July 14, 1992). The standards reflect a recent compromise reached by the Council of Ministers and and are subject to final approval within the EEC decision-making structure. *Id. See also* Fox, *EC Faces "Messy" Capital Adjustment - UK Sources*, Reuters (June 24, 1992); *Progress on EC Capital Adequacy and Investment Services Directives*, *supra* note 12.

15. *New Law Allows Foreign Branches, Sets Rules for New Banks, Subsidiaries*, *supra* note 10, at 165.

16. HUNGARY INVESTMENT GUIDE, *supra* note 3, at 12. Lesser capitalization requirements apply in the case of certain types of specialized banking institutions.

17. Council Directive 89/646/EEC of 15 December 1989 On the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780, 1989 O.J. (L 386) 1, art. 4.

Hungary[18] and Czechoslovakia[19] allow foreign ownership of domestic banks, with some restrictions, Czechoslovakia allows foreign banch branking[20] and the EEC allows ownership, branch banking and direct provision of services by foreign banks from member countries and from outside the EEC in certain cases.[21] An important issue recently resolved in the EEC involves bank access to stock exchanges.[22] The European Community recently decided to permit direct bank access subject to transition rules,[23] Czechoslovakia followed suit but Hungary resisted the measure, stating " '[n]aturally all these EC rules cannot be introduced immediately.' "[24]

Issues concerning listing and trading securities on national stock exchanges and trading securities off the exchanges have been the subject of vigorous international debate. British and German exchanges permit off-exchange trading while France, Italy and Spain prohibit it,[25] such disparate treatment contributing heavily to a year-long impasse over the EEC's Investment Services Directive.[26] The EEC recently reached a compromise pursuant to which member states may but are not obligated to require

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18. *New Banking Law Expected to Encourage Foreign Investment*, 1 E. Eur. Rep. (BNA) 152 (Dec. 9, 1991)("[f]oreign and domestic investors. . .will be limited to 25 percent of a bank's equity under the law").

19. *New Law Allows Foreign Branches, Sets Rules for New Banks, Subsidiaries*, *supra* note 10, at 164 (foreigners may open branch banks, bank subsidiaries or new banks subject to regulatory approval).

20. *Id.*

21. *See* Samuel Wolff, *Securities Regulation in the European Community*, 20 DENV. J. OF INT'L L. & POL. 99, 120-125 (Fall 1991).

22. Some EC member states, such as Germany, permit direct bank access to stock exchanges, while others, including France, Italy and Spain disallow it. Roberta S. Karmel, *The Stalled Investment Services Directive*, N.Y.L.J. 3 (June 18, 1992), *citing* Huang & Stoll, MAJOR WORLD EQUITY MARKETS: CURRENT STRUCTURE AND PROSPECTS FOR CHANGE 30 (1991).

23. *Progress on EC Capital Adequacy and Investment Services Directives*, *supra* note 12.

24. *New Banking Law Expected to Encourage Foreign Investment*, *supra* note 18, at 152. In the United States, banks may become stock exchange members but "the Glass-Steagall Act continues to make this freedom of access a nugatory right." Karmel, *supra* note 22.

25. Karmel, *supra* note 22.

26. *See id.*; *Finance Ministers Deadlocked On Off-Exchange Trading Regulations*, Int'l Sec. Reg. Rep. (BNA) 6 (Dec. 1990); *Off-Exchange Trade Compromise Unlikely to Succeed*, 4 Int'l Sec. Reg. Rep. (BNA) 4 (January 14, 1991). Professor Karmel summarized the EC debate as follows:

> [French proposals concerning off-exchange trading, transparency and bank access to stock exchanges] led to a North-South split, with the United Kingdom, Germany and the Netherlands arguing for latitude in the publication of trade information (to suit SEAQ International market makers); permission to engage in off-exchange trading (urged by the London Stock Exchange and the universal banks), and bank access to stock exchanges (of great importance to German banks). France, Italy and Spain, more interested in protecting their national brokers and retail investors, fought for prompt public reporting of trade information, the prohibition of off-exchange trading and the restrictioin of stock exchange membership to securities firms (which could be bank subsidiaries).

supra note 22.

that trading occur on the exchange or other regulated market unless the customer instructs otherwise.[27] In Hungary listed securities may not be traded off the Exchange[28] and, while Czechoslovakia's Stock Exchange Act permits listed securities to be traded off the exchange to the extent allowed by the stock exchanges,[29] the Bratislava Stock Exchange has determined to disallow the practice.[30] Czechoslovakia and Hungary thus have followed the French model in prohibiting off-exchange trading. Czechoslovakia and Hungary both permit foreign persons to become shareholders of domestic stock exchanges, subject to certain limitations.[31] A subsidiary of Credit Suisse First Boston based in Prague is one of twenty shareholders of the Prague Stock Exchange and several other applications from foreigners are pending,[32] while subsidiaries of both Citibank and Credit Suisse First Boston are shareholders of the Budapest Stock Exchange. Foreign securities may be traded on the Budapest Stock Exchange if they are issued in accordance with foreign law and otherwise meet applicable listing requirements.[33] Legislation in Czechoslovakia permits listing of foreign shares only if accepted by the stock exchange, and Bratislava has stated that at present foreign securities will not be listed.

§2. HUNGARY

§2.01 Overview

Hungary has, for the time being, avoided the political paralysis hindering the process of economic reform that characterizes the political climates of Poland and Czechoslovakia. Hungary should be regarded as the most stable of the three nations as well as a leader in the implementation of free market economic reforms. Hungary's success has much to do with the presence of a functioning government that has been able to pursue its objectives consistently since the parliamentary elections held in the spring of 1990. There can be, however, no absolute assurance that the process of reform will continue in light of the fragile political equilibrium that currently exists, although the prospects for reform appear to be much brighter than in any of the other former Council of Mutual Economic Assistance (CMEA) nations.

Following the parliamentary elections in 1990, a coalition government led by Jozsef Antall and dominated by the Hungarian Democratic Forum was established.[34] This coalition, somewhat weak to begin with, became

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27. *Progress on EC Capital Adequacy and Investment Services Directive*, *supra* note 12.

28. *See infra* note 66.

29. *See infra* note 234 and accompanying text.

30. *See infra* note 237 and accompanying text.

31. *See infra* notes 43, 234 and accompanying text.

32. *See infra* note 285 and accompanying text.

33. *Id.*

34. Barnabas Racz, *The Hungarian Parliament's Rise and Challenges*, RFE-RL RESEARCH REPORT, Feb. 14, 1992, at 22-23.

increasingly ineffective as economic benefits from the reforms failed to meet public expectations.[35] Progress on economic reform slowed as parliamentary activity became highly politicized and threatened to halt the transitional steps completely.[36]

The coalition government did not disintegrate, however, and continued gradual progress has been made toward necessary market reforms. The mere preservation of a fairly effective parliamentary process stands in marked contrast to the situations in Czechoslovakia and Poland.[37] As long as an effective government with a coherent program can be maintained, economic development and reform will likely press forward.

There is reason for a certain degree of optimism in this regard. The Hungarian economy, although still in transition, is by no means in as critical condition as the economies of Czechoslovakia and Poland. The 1991 inflation rate in Hungary was 35.2 percent, as compared to 46 percent in Czechoslovakia and 70 percent in Poland.[38] Hungary has compensated for the fall of the Soviet Union and the resulting loss of trade among former CMEA nations by focusing on expanding trade with western industrialized nations, especially the members of the Community.[39] Furthermore, Hungary signed an association agreement with the EEC in December of 1991, demonstrating its commitment to continue the process of economic reform in order to meet the criteria for EEC membership after an association period of ten years.[40]

A faltering of the current coalition government is a distinct possibility. Public opinion has been trending negatively toward the government and in the highly politicized environment of parliament, unpredictable events could fragment the current structure and slow or halt economic reform. Both internal and external pressures are at work; for example, pressures from a discontented citizenry displeased with a lack of benefits anticipated from the economic reforms may increase and disputes between Hungary and its neighbors concerning the fate of Hungarian minorities in Romania and Slovakia may arise.[41] In May and June, 1992

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35. *Id.*

36. *Id.*

37. *Id.* at 24. Despite the fragile foundations of the coalition government, it was able to pass 104 major legislative acts in 1990, which demonstrates the degree to which the Hungarian situation, however shaky, surpasses the deadlocked parliaments in Czechoslovakia and Poland. *Id.*

38. Karoly Okolicsanyi, *Hungarian Foreign Trade Turns From East to West*, RFE-RL RESEARCH REPORT, April 10, 1992, at 35 [hereinafter *Foreign Trade*]; Jan B. de Weydenthal, *Czechoslovakia, Hungary and Poland Gain Associate Membership in the EC*, RFE-RL RESEARCH REPORT, Feb. 7, 1992, at 26 [hereinafter *Associate Membership*].

39. *Foreign Trade*, *supra* note 38, at 34-36. Trade with western industrialized nations accounted for 70 percent of Hungarian trade in 1991, including a 48 percent increase in the amount of trade with the EEC. *See id.*

40. *Associate Membership*, *supra* note 38, at 24.

41. Interview with Professor Grzegorz Ekiert, Center for European Studies, Harvard University (Sept. 1992).

elections, voters expressed their dissatisfaction by voting for candidates of the main opposition party to the Hungarian Democratic Forum, the Free Democrats.[42]

Despite these obstacles Hungary has established a system of securities regulation and reestablished its stock exchange. The Act on Securities and the Stock Exchange (the Securities Act)[43] was adopted in January 1990 and is the principal law in Hungary concerning the issuance and trading of securities and establishment of the stock exchange. This law is interpreted and supplemented by the Hungarian State Securities Supervisory Board (the SSB)[44] and is soon to be amended.[45] Some of those amendments have been foreshadowed by amendments to certain rules of the Budapest Stock Exchange (the Exchange). In addition, the Hungarian Parliament in November 1991 adopted a law regulating investment funds.[46]

Hungary moved swiftly to reestablish the Exchange and after a forty-two year hiatus, the Exchange officially reopened on June 21, 1990.[47] In adopting the Securities Act, the government stated that a stock exchange was necessary in order "to facilitate efficient capital flows, asset valuations and to share risks inherent in fluctuations of quotations."[48]

Performance on the Exchange has been mixed. At the end of 1991, there were securities of twenty five issuers trading (six of which were listed) on the Exchange[49] and a total of about 14,500 transactions were executed in 1991.[50] In 1991, there were 19 new issues with a par value of

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42. HUNGARY INVESTMENT GUIDE, *supra* note 3, at 2 (Sept. 24, 1992).

43. Act VI of 1990 on the Public Issue of and Trade in Securities as well as on the Stock Exchange, *official translation as* Act on Securities and the Stock Exchange, Public Finance in Hungary, vol. 64 (Ministry of Finance, 1990)[hereinafter Securities Act]. The Securities Act is translated in the above source and also at 8 HUNGARIAN RULES OF LAW IN FORCE 447 (1990). The Ministry of Finance translation is relied upon here; however, the authors have also considered the other translation for purposes of interpretation. The Hungarian text of the Securities Act should be consulted in the case of actual transactions.

44. *See infra* text accompanying notes 50-59.

45. *See Likely Amendments to Securities Law*, MTI ECONEWS, Aug. 6, 1992 [hereinafter *Likely Amendments*].

46. Act LXIII of 1991 on Investment Funds, *unofficial translation*, 1991 U.S. Dep't. of Commerce - NTIS Central & Eastern Europe Legal Texts (Nov. 4, 1991) (LEXIS, Europe Library, EELEG file).

47. Reuter Textline, *Hungary: The Budapest Stock Exchange Re-Opens on June 21*, DIE PRESSE, June 19, 1990 (LEXIS, NEXIS library, Reuter File). *See also* DAVID E.BIRENBAUM & DIMITRI P. RACKLIN, 1 BUSINESS VENTURES IN EASTERN EUROPE AND THE SOVIET UNION: THE EMERGING LEGAL FRAMEWORK FOR FOREIGN INVESTMENT, ch. 3, n.54 (1990) [hereinafter *Business Ventures*] (describes the beginning of the Exchange in 1864, its closure in 1948 and the rebuilding of Hungarian securities markets started in 1983).

48. Securities Act, *supra* note 43, § 42(1).

49. HUNGARIAN INVESTMENT GUIDE, *supra* note 3, at 3 (Sept. 24, 1992).

50. Memorandum from Júlia Romhányi, Public Relations, Budapest Stock Exchange, to Daniel Nelson, Holme Roberts & Owen (Sept. 21, 1992) (regarding salient figures on the performance of the Budapest Stock Exchange in 1991).

approximately Ft 12.1 billion (about US $150 million).[51] Average daily trading volume was about Ft 40 million (about US $500,000) in 1991.[52] For the first six months of 1992, there were a total of about 5,700 transactions executed, four new issues with a par value of approximately Ft 165 million (about US $2 million) and an average daily trading volume of approximately Ft 111 million (about US $1.4 million).[53]

§2.02 Regulatory Authorities

As is the case in the United States and throughout Europe, regulation of securities markets is accomplished both by governmental and self-regulatory authorities.

[1] *State Securities Supervisory Board*

The SSB has the responsibility of administering, interpreting and enforcing the Securities Act and supervising the operations of the Exchange.[54] The SSB is a governmental agency that operates under the supervision of the Hungarian Ministry of Finance.[55] The head of the SSB is appointed by the Hungarian Council of Ministers[56] and the structure and operations of the SSB are set by the Ministry of Finance.[57] The principal offices of the SSB are located in Budapest.

The SSB has broad rule-making authority enabling it to determine those transactions subject to the Securities Act[58] and to expand the disclosure requirements for prospectuses.[59] In this capacity it is subject to applicable administrative procedure rules[60] and the oversight of the Ministry of Finance. The oversight authority of the Ministry of Finance, however, is limited in that it can neither annul nor revise rules adopted by the SSB.[61] Nevertheless, the final determinations of the SSB generally are subject to judicial review.[62] The exception to this general rule concerns decisions by the SSB to suspend the trading of securities on the

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51. *Id.*

52. *Id.*

53. Memorandum from Júlia Romhányi, Public Relations, Budapest Stock Exchange, to Daniel Nelson, Holme Roberts & Owen (Sept. 21, 1992) (regarding salient figures on the performance of the Budapest Stock Exchange in the first half-year of 1992).

54. Securities Act, *supra* note 43, § 4(2)-(3). The scope of the SSB's authority may be expanded to include the "Commodity Exchange." *Likely Amendments*, *supra* note 45.

55. Securities Act, *supra* note 43, §§ 4(1) and 6(1).

56. Currently the SSB is headed by Zoltan Pacsi. *Likely Amendments*, *supra* note 45.

57. Securities Act, *supra* note 43, § 6(2).

58. *Id.* § 4(3).

59. *Id.* § 8(4); *id.* at pmbl. § 8. The SSB has broadened the prospectus disclosure requirements with regard to securities traded on the Exchange. *See* Listing Rules, *infra* note 66.

60. Securities Act, *supra* note 43, § 4(4).

61. *Id.* § 4(5).

62. *Id.* § 4(6). Determinations of the SSB may not be appealed within the public administration system. *Id.* pmbl.to § 4.

Exchange.[63]

[2] *Budapest Stock Exchange*

The Budapest Stock Exchange is a self-governing and self-regulatory authority whose legal existence is authorized under the Securities Act.[64] Its activities, organization and functions are determined by its Charter[65] and Rules.[66] General parameters for the Charter and Rules of the Exchange are included under the Securities Act.[67] The Exchange's governing instruments must provide for, *inter alia*, a procedure for accepting, suspending, excluding, terminating and disciplining members[68] and a system of administering and applying sanctions.[69] Listing and quotation requirements must also be included.[70]

The highest governing body of the Exchange is the General Meeting of members of the Exchange, which meets at least annually.[71] Only the General Meeting may amend the Charter, elect and remove officers of the Exchange, approve the budget and approve extraordinary matters such as liquidation, reorganization or combination involving the Exchange.[72] Each member is entitled to one vote;[73] however, a member may be denied its vote if it fails to meet certain trading performance criteria.[74]

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63. *See* Securities Act, *supra* note 43, §§ 4(6), 69-71.

64. *Id.* § 42. It should be noted that the Securities Act does not prohibit the creation of more than one stock exchange in Hungary; rather, the Securities Act sets forth certain conditions that must be met for founding an exchange. *Id.* pmbl. to § 42. To date, the only stock exchange existing in Hungary is the Budapest Stock Exchange.

65. Charter of the Budapest Stock Exchange (June 19, 1990) (as amended Nov. 16, 1990) [hereinafter Charter].

66. The rules of the Exchange include, *inter alia*, Rules Regarding the Transactions to be Carried Out on the Stock Exchange and Trading on the Floor of the Stock Exchange (Oct. 5, 1990) (as amended May 9, 1991, Sept. 6, 1991, Dec. 6, 1991) [hereinafter General Rules]; Rules Regarding the Requirements of the Listing and Trading of Securities on the Stock Exchange (Jan. 10, 1992) [hereinafter Listing Rules]; Rules of Settlement (May 24, 1991); Rules Regarding the Depository of the Budapest Stock Exchange (July 30, 1992) [hereinafter, collectively, Rules]. The General Rules have been amended since December 6, 1991; however, they are not currently available in English translation. Letter from The Budapest Stock Exchange to Holme Roberts & Owen (Oct. 6, 1992). The Securities Act requires that the Charter and Rules of the Exchange and foundation of the Exchange be approved by the Council of Ministers upon motion of the Ministry of Finance. Securities Act, *supra* note 43, § 43(2)-(3). Approval of the Rules has been delegated to the SSB.

67. Securities Act, *supra* note 43, § 44.

68. *Id.* § 44(1).

69. *Id.* § 44(1). Although the Securities Act is not explicit on this point, presumably such rules must provide a fair procedure. *Cf.* U.S. Securities Exchange Act of 1934, §§ 6(b)(6) and (7), as amended by Pub. L. No. 94-29 § 4 (1975, § 15A(b)(6), as amended by Pub. L. No. 94-29 § 12(2) (1975), 15 U.S.C. §§ 78f(b)(5) and (i)0o(b)(6).

70. Securities Act, *supra* note 43, § 44(2).

71. Charter of the Budapest Stock Exchange, *supra* note 65, § VII (A)(13).

72. *Id.* § VII(A)(2).

73. Securities Act, *supra* note 43, § 52(2); Charter, *supra* note 71, § VII(A)(13).

74. Charter, *supra* note 65, § VII(A)(14) (stating a member "who had traded less than 10 percent of the average trading volume or number of transactions per Member during the

The Stock Exchange Council is the chief managing body of the Exchange, the members of which are elected by the General Meeting.[75] Members of the Stock Exchange Council represent many distinct constituencies, including the members of the Exchange, issuers of listed securities, investors and stock exchange dealers.[76] The Stock Exchange Council is responsible for, *inter alia*, determining the Rules of the Exchange, admitting new members, supervising Exchange activities and suspending trading on the Exchange.[77]

The Exchange also has several other bodies within its organizational structure. The Charter establishes a Supervisory Committee to oversee the finances and operations of the Exchange.[78] It establishes an Ethics Committee to promote fairness in trading on the Exchange[79] and a Securities Trading Committee responsible for trading operations, information collection and dissemination and registration procedures, among other things.[80]

§2.03 Securities Markets

The distribution market is the market in which companies first issue securities to the public.[81] The distribution or primary market is distinct from the trading or secondary market in that special selling efforts, for example, by the issuer or a licensed underwriter are made. Conditions for sale in the distribution market under the Securities Act are discussed below together with the requirements for becoming a licensed underwriter.[82]

Securities traded in the secondary market on the Exchange may be either listed or unlisted, but in either case must meet certain basic criteria. The main distinction between listed and unlisted securities in this regard is that the former must meet certain requirements over and above the minimum ones.

The Listing Rules set forth several basic criteria for admission of securities (listed or unlisted) to the Exchange, including: (1) the securities must be issued in accordance with Hungarian law,[83] (2) the issuer must

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one year preceding the General Meeting, is not entitled to vote").

75. *Id.* § VII(B)(3.1). The number of its members may range from five to thirteen. *Id.* § VII(B)(4).

76. *Id.* § VII(B)(3.1)-(3.3). The representative for issuers is nominated by the Hungarian Chamber of Commerce and the SSB nominates the representative for investors. *Id.* § VII(B)(3.3).

77. *Id.* § VII(B)(2).

78. *Id.* § VII(C)(1).

79. *Id.* § VII(D)(1). The Securities Act contains provisions applicable to the Exchange in order to promote fair trade in securities and prevent manipulative acts and practices. *See* Securities Act, *supra* note 43, pmbl. to §45.

80. Charter, *supra* note 65, § VII(E).

81. Technically, the distribution market also includes "secondary distributions," *i.e.*, public offerings by selling shareholders.

82. *See infra* notes 202-211.

83. Listing Rules, *supra* note 66, II(1.1)(a). Foreign securities may be traded on the

apply to the Exchange for admission,[84] (3) the issuer must meet the prospectus delivery[85] and periodic reporting requirements under the Listing Rules,[86] (4) the issuer must not have been subject to a bankruptcy or insolvency proceeding within two years before listing,[87] (5) the issuer must hold a public offering permit from the SSB,[88] (6) the admission must be sponsored by a member of the Exchange whose role as a sponsor must be indicated in the issuer's prospectus which such member must sign and the member must act as a market maker in the securities for a specified period[89] and (7) certain technical provisions must be satisfied.[90]

In addition to the basic criteria, securities traded on the Exchange, but not listed, must meet the following requirements: (1) the par value of the issue must exceed Ft 100 million,[91] (2) at least ten percent of the issue or at least Ft 200 million in value (based on the market price of the securities) must be publicly owned,[92] (3) there must be at least twenty five owners of the issue,[93] (4) the issuer or its predecessor must have at least one year end balance sheet audited by an auditor registered with the Exchange[94] and (5) such securities may not be traded other than on the Exchange.[95]

The stricter requirements for listing on the Exchange include the basic criteria and those requirements for securities traded on the Exchange specified above, plus: (1) the total value of the issue must be at least Ft 200 million,[96] (2) at least twenty percent of the issue or at least Ft 500

Exchange as well if such securities are issued in accordance with the law of the foreign jurisdiction. *Id.*

84. *Id.* § I(6). In the case of bonds issued by investment funds, the fund manager must apply for admission. *Id.* t § II(1.1)(a).

85. In the case of an application for listing by an issuer of a traded but unlisted security, a supplementary prospectus must be delivered to the Exchange. *See id.* § III(4).

86. *Id.* § II(1.1)(c) *See infra* notes 170-83 and accompanying text.

87. Listing Rules, *supra* note 66, § II(1.1)(d).

88. *Id.* § II(1.1)(f).

89. *Id.* § II(1.1)(g). If the security admitted to the Exchange is a new issue, the member-sponsor must act as a market maker in the security during the first 15 days of trading on the Exchange. During that period the member must offer to purchase or sell at least Ft 300,000 (at market value) of the securities each day. *Id.*

90. *See id.* § II(1.2) (specifies that denominations and float should be set to facilitate trading, among other things).

91. *Id.* § II(1.3)(a).

92. *Id.* § II(1.3)(b). For purposes of the Listing Rules, securities held by less than five percent holders and those owned by public investment funds and securities in foreign custody are counted for determining the amount of securities publicly owned. Listing Rules I(5). In addition, for an issuer relying on the 10 percent standard to meet the trading requirements, the value of the securities publicly held must be at least Ft 50 million. *See id.* § II(2.2).

93. *Id.* § II(1.3)(c).

94. *Id.* § II(1.3)(d). The Listing Rules specify only that a balance sheet be audited and do not expressly require any other financial statements. *Id.*

95. *Id.* § II(1.3)(e). *Cf. infra* note 100. *See also supra* note 3, 25-31 and accompanying text for a discussion of off-exchange trading.

96. Listing Rules II(1.4)(a). This requirement probably relates to the par value al-

million in value (based on the market price of the securities) must be publicly owned,[97] (3) there must be at least fifty owners of the issue,[98] (4) the issuer or its predecessor must have been in business for at least three years and the financial statements for such years must have been audited by an auditor registered with the Exchange[99] and (5) such securities may not be traded other than on the Exchange.[100] If the issuer fails to meet these requirements after becoming listed, after a six month period during which the issuer may remedy any default, the Stock Exchange Council may de-list the security but continue to allow it to trade on the Exchange.[101]

Generally certain fees must be paid for all securities upon admission to the Exchange. For an unlisted security to be traded an admission fee of Ft 400,000 (Ft 200,000 in the case of investment bonds) is required.[102] For an unlisted or other security to be listed, a Ft 200,000 listing fee in the case of investment bonds and Ft 400,000 listing fee in the case of other securities must be paid to the Exchange.[103] In addition, a continuous trading fee must be paid annually for securities whether listed or not.[104] The primary exception to this general rule is for Hungarian government securities which are not subject to any admission or listing fee.[105]

§2.04 "Security" Defined

The Securities Act does not set forth a general definition of "securities" nor does it define what "transactions" are covered. Those provisions are left to the general provisions of the Civil Code[106] and interpretations of the SSB.[107] Thus, Section 2 of the Securities Act provides:

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though the translation does not expressly so state.

97. *Id.* § II(1.4)(a). In addition, for an issuer relying on the 20 percent standard to meet the listing requirements, the value of the securities publicly held must be at least Ft 200 million. *See id.* § II(2.3).

98. *Id.* § II(1.4)(c).

99. *Id.* § II(1.4)(d).

100. *Id.* § II(1.4)(e) The requirement as to compulsory trading of listed securities on the Exchange differs from that concerning unlisted but traded securities in that the latter may apparently be traded off the Exchange under certain defined circumstances. *See id.* §§ II(1.3)(e) and (1.4)(e).

101. *See id.* § III(1.4)(c). The issuer, on its motion, may also request that its securities be de-listed. *Id.* § III(4)(d). Once de-listed, the security may not be listed again for one year from the date of the Stock Exchange Council's de-listing resolution and the issuer forfeits any listing fee. *Id.* §§ III(4)(e)-(f). There are also several conditions on which listing may be canceled. *See id.* § IV.

102. *Id.* § V(2.1).

103. *Id.*

104. *Id.* § V(2.2). Bonds and investment fund securities are entitled to a 20 percent and 50 percent discount, respectively, from the otherwise applicable continuous trading fees. *Id.*

105. *Id.* at § II(4.1). Government securities are exempt from the listing requirements otherwise applicable to other securities. But certain data is required in the application for admission. *Id.* at II(4.2).

106. Securities Act, *supra* note 43, pmbl. pt.a.

107. The Listing Rules of the Exchange specify investment bonds issued by closed-end

> The public issue of, and the trading in the following securities are governed by this Act:
> a. bonds (unless transferability is constrained either by law or the issuer),
> b. shares, and
> c. all other types of securities representing transferable rights and obligations arising from a legal relationship (lending or membership) between the issuer and the securities holder, issued in large series in accordance with the provisions of Act IV:1959 on the Civil Code in ways and forms as defined therein.[108]

Under the Civil Code, securities include debt instruments such as bonds[109] and shares representing interests in companies.[110] Certain instruments that would otherwise fall within the definition of securities for purposes of the Civil Code, however, are excluded from the purview of the Securities Act. Thus, checks, deposit savings instruments, certificates of deposits, credit notes, target credit notes of and business stakes in cooperatives, and bills of exchange are excluded.[111]

§2.05 Public Offerings of Securities

[1] *Prospectus Filing and Approval*

If securities are publicly offered by an issuer in Hungary, the offering will generally require the filing of a prospectus with and approval of the prospectus by the SSB.[112] This filing and approval process has as its objectives to create "a transparent and well-informed securities market" and to provide investor protection.[113] SSB approval does not amount to approval or endorsement of the issuer or the offered securities, but "only

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investment funds, government securities and compensation notes (form of security issued by the National Compensation Office) in addition to those specified in the Securities Act. *See* Listing Rules, *supra* note 66, at §§ II(3)-(4).

108. Securities Act, *supra* note 43, § 2(1). The Securities Act defines "bonds" as a credit relationship "in which the issuer (the debtor) acknowledges receipt of a certain amount of money and binds himself to repay the amount received (principal) as well as the interest or any other yield (hereinafter interest) calculated in a predetermined manner for interest-bearing securities and to render other services to the securities holders (creditors)." *Id.* § 3a. "Shares" are defined as a security "in which the issuer acknowledg[es] the receipt for possession or use of a certain amount of money or other property, whose value has been determined in terms of money and binds himself to assign certain proprietary or other rights to the holders of such securities." *Id.* § 3b.

109. *See* Civil Code, ch. XXVIII/A, § 338/A(2) ("A document possessing the requisites determined by statute and issue (drawing) of which is allowed by statute shall be considered a security"). Shares, bonds, exchequers' bills, deposit savings bonds, property certificates, bills of exchange and checks are referenced. Securities Act, *supra* note 43, § 2(2)(a).

110. *See* Civil Code, ch. XXVIII/A, § 338/C ("A security may be drawn - according to separate legal rule - on ownership or another right concerning a thing or on an entitlement originating from membership as well").

111. Securities Act, *supra* note 43, § 2(2)(b).

112. The term "prospectus" is not defined in the Securities Act.

113. Securities Act, *supra* note 43, pmbl. to §23.

implies that the [p]rospectus includes the data and analyses as required by the provisions of the [Securities] Act."[114]

In Hungary, the issuer may publicly offer its securities directly or enlist a licensed underwriter to act in its stead.[115] If the issuer enlists an underwriter, the underwriter rather than the issuer must secure approval of the SSB under the Securities Act; otherwise the issuer must obtain such approval.[116] In either case, the prospectus must be approved before its publication, which approval becomes stale thirty days from the date upon which approval was granted.[117] The issuer or the underwriter as the case may be is required to make "post-effective" amendments to the prospectus after approval by the SSB but before the closing of the offering.[118] Such amendments, however, need only be made with respect to "essential facts or circumstances."[119] Post-effective amendments may be ordered by the SSB on its own motion.[120] Failure to obtain approval of a prospectus by the SSB makes the issuance and sale of securities on the basis of such prospectus null and void.[121]

[2] *Issuer-Specific Public Offering Preconditions*

In addition to the prospectus approval requirements, the Securities Act contains several conditions to the public issuance of securities. For bonds and debentures, the issuer must have at least a twelve-month operating history.[122] Apparently an issuer may tack the operating history of its predecessor to meet the operating history requirement. The purpose of the operating history requirement is to provide potential investors with historical information enabling them to appraise the investment risk associated with the offered securities and the issuer's past results and performance.[123] Public offerings of bonds and debentures generally must be accomplished through a licensed underwriter.[124] The Securities Act exempts issuers of shares in an initial public offering from the operating

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114. *Id.* pmbl. to §8.

115. In the case of a public offering of bonds or debentures, the issuer generally must enlist a licensed underwriter. *Id. See infra* note 124 and accompanying text.

116. Securities Act, *supra* note 43, § 8(2).

117. *Id.* §§ 8(1) and (5). It should be noted, however, that at the issuer's request, the SSB may extend by sixty days the subscription period and presumably extend the date upon which the prospectus becomes stale. In such event the SSB may require the issuer to update the prospectus. *Id.* § 32(1).

118. *Id.* § 9(2). The term "post-effective" is used by analogy from the concept of a registration statement being declared effective under the U.S. securities laws. There is no procedure under the Hungarian Securities Act for the SSB to declare a prospectus effective.

119. *Id.*

120. *Id.* § 9(3).

121. *Id.* § 24(a).

122. *Id.* § 23(1)(a). This requirement does not apply with respect to securities issued by the Hungarian government. *Id.*

123. Securities Act, *supra* note 43, pmbl. to § 23.

124. Securities Act, *supra* note 43, § 23(1)(c). and pmbl. to § 23. This rule does not apply to financial institutions that issue their own bonds. Securities Act § 23(1)(c).

history requirement; however, where the public offering of shares would increase the issuer's registered capital, the operating history requirement applies.[125] This exemption seems aimed at facilitating access to capital markets by newly established issuers.[126]

[3] *Contents of the Prospectus*

The contents of the prospectus are prescribed by the Securities Act the requirements of which may be supplemented by the SSB.[127] More complete disclosure guidelines have been adopted with respect to securities that are admitted to trade on the Exchange.[128] The Securities Act requires that a prospectus include: (1) a description of the issuer[129] and its business,[130] (2) current certified financial information,[131] (3) use of proceeds disclosure,[132] (4) a description of the share capital of the issuer and the securities to be issued,[133] (5) other information about the offering,[134]

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125. Securities Act, *supra* note 43, §§ 23(2) and (3). It is unclear under what circumstances a public offering would not increase registered capital; thus, this exception appears inconsequential. Increases in registered capital are discussed in Act VI of 1988 on Economic Associations, §§ 301-309. *See also* Securities Act § 27 (discussing use of prospective information in the prospectus).

126. Securities Act, *supra* note 43, pmbl. to § 23.

127. *See supra* note 59 and accompanying text. The disclosure required by the Securities Act should be compared to that required under Regulation S-K in the U.S. Some items of disclosure are similar, although Regulation S-K is much more detailed. Nevertheless, the drafters of the Securities Act seemed to have contemplated that capital markets would work to cause issuers to follow international practice in preparing their prospectuses. Securities Act, *supra* note 43, pmbl. to § 26. It was announced recently, however, that the SSB has begun work on amendments to the Securities Act that will include more thorough disclosure guidelines applicable to Prospectuses. *See Likely Amendments*, *supra* note 45.

128. *See infra* notes 129-131, 136-137.

129. Such description must include the name of the issuer, its address, date of foundation, the scope of its activities, its duration (*i.e.*, whether perpetual or limited), the amount of its registered capital, number of employees and information concerning the experience and qualifications of its senior management and directors. Securities Act, *supra* note 43, § 26a. The Listing Rules require that the prospectus specify the following additional information about the issuer: (1) a breakdown of registered capital at formation and at the time of drafting the prospectus, (2) the date of the issuer's contract of association, (3) its fiscal year and (4) place where the issuer publishes announcements. Listing Rules, *supra* note 66, § II(6.2.1). As to employees, the issuer also must disclose the average incomes of employees comparing such current amounts with those applicable to prior years. *Id.* § II(6.2.10).

130. The issuer's business must be described in depth and include "information about production, sales, [research and development] and investments." Securities Act, *supra* note 43, § 26(b). *Cf.* Listing Rules, *supra* note 66, § II(6.2.6).

131. Securities Act, *supra* note 43, §§ 25(2) and 26(c). The Listing Rules require both summary and more detailed financial information. Listing Rules, *supra* note 66, §§ II(6.2.3) and II(6.2.8). Some consolidation of financial information concerning the issuer's subsidiaries may be required. *See id.* § II(6.2.8).

132. Securities Act, *supra* note 43, § 26(d)(2).

133. *Id.* §§ 26(d)(3) and (4).

134. The Securities Act enumerates the following: (1) the governing body of issuer deciding to make the offering and the date of that body's decision, (2) the amount of funds to be raised, (3) the number of the series and serial numbers of securities to be offered, (4) the

(6) a description of the procedures that will be followed in the event of over- or under-subscription,[135] (7) a discussion of the history of prior offerings of the issuer's securities,[136] (8) disclosure as to the security holdings of the issuer's senior management,[137] (9) disclosure of major risk factors concerning the issuer's business,[138] (10) a statement that the issuer and underwriters, if any, are jointly and severally liable for any damage incurred by the holder of securities as a result of misleading information in the offering materials[139] and (11) a statement of the role of the public prosecutor and the SSB in protecting investors.[140]

If bonds or debentures are offered, the prospectus must include, in addition to the disclosure described above, a description of the bonds or debentures including their maturity, terms and conditions and any financial guarantees underlying such instruments.[141] In the event that a legal entity is a guarantor of such instruments, information about such guarantor must be included.[142]

The Listing Rules contain special rules with respect to disclosure for investment fund securities. No such rules are included in the Securities Act. Those rules require, *inter alia*, (1) the disclosure of the fund's investment and dividend policies, (2) a description of the fund's portfolio, (3) the method of calculating the sales price of investment bonds, (4) a description of fees, (5) rules regarding distribution or reinvestment of the fund's assets, (6) a description of the fund manager and (7) risk factor disclosure.[143]

[4] *Delivery and Publication Requirements*

The Securities Act contains no specific prospectus delivery require-

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opening and closing date of the subscription and the place of subscription, (5) the opening and closing date of the sale and place of sale, (6) a description of preemptive rights, (7) the expected price at issuance and (8) the identity of the underwriter. *Id.* § 26(d).

135. *Id.* § 26.d.13. *Cf.* Act VI of 1988 on Economic Associations §§ 255 (describing over-subscription in the case of the initial foundation of a joint-stock company) and 256 (describing under-subscription procedures).

136. Securities Act, *supra* note 43, § 26(e). The amount of funds raised in previous offerings must be described. The Listing Rules require special emphasis on public offerings within one year prior to admission on the Exchange and contain a detailed list of items that must be covered in such disclosure. *See* Listing Rules, *supra* note 66, § II(6.2.5).

137. Securities Act, *supra* note 43, § 26(f). The Listing Rules require a list of the "major" owners of the issuer and their share ownership. Listing Rules, *supra* note 66, § II(6.2.2) ("major" is not defined).

138. Securities Act, *supra* note 43, § 29(3). The drafters of the Securities Act contemplate highlighting the risk factors by printing them in red or other colors that differ from the rest of the print used in the prospectus and using a prominent typeface. *Id.* pmbl. to §29.

139. *Id.* §§ 29(4) and 83.

140. *Id.* §§ 29(4) and 84.

141. *Id.* § 28.

142. *Id.* § 29(2). *See also* Listing Rules, *supra* note 66, § II(6.2.4).

143. Listing Rules, *supra* note 66, §§ II(6.3)(a)- (d).

ment. An offer can be made by advertisement[144] but only after such advertisement and the prospectus are approved by the SSB.[145] The advertisement must include a statement about the fact of the public offering, the SSB approval number and the location, time and method of inspecting the prospectus.[146] The advertisement must "be published in two national daily newspapers as well as the official gazette of the [Exchange] at least seven days before subscription."[147]

The Securities Act does not deal specifically with the release of information about an issuer after the issuer's determination to make a public offering of its securities but before the prospectus is approved by the SSB. As discussed above, however, clearly it would be impermissible for an issuer to advertise the fact of a proposed public offering before such approval. Moreover, any issuance or sale of securities will be null and void if such issuance or sale precedes an approved prospectus.[148] In addition, the Securities Act provides that subscriptions may be accepted only during the subscription period.[149] What is lacking then are the parameters of what may be released by an issuer that may be tantamount to "conditioning the market" for the proposed public offering. Clearly, the Hungarian government and the SSB will have to consider clarifying or adding rules applicable to "gun-jumping" by issuers and underwriters.

The Securities Act's treatment of issues such as the timing of subscription and the issuance and sale of securities is unclear. The Securities Act defines "subscription" as "the process whereby customers, intent upon purchasing securities as a result of the public offering, sign the subscription-sheet, undertaking in accordance with the said sheet to make either a cash payment or pledge non-cash assets to be made available to the issuer via" the underwriter.[150] By operation of Section 30 of the Securities Act, which contains the seven-day, pre-subscription advertisement requirement, Section 23(4), which requires SSB approval prior to advertisement, Section 8(5), which sets forth a thirty-day period after which the prospectus becomes stale and Section 32(1), which contains the sixty-day subscription period extension rule, it appears that the subscription period may begin no earlier than seven days after SSB approval and will close within thirty days after SSB approval unless extended for an additional sixty-day period. The closing date for the offering, however, may occur before the designated closing date if the offering is fully subscribed and the option to have a sooner closing date was disclosed in the prospectus.[151]

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144. Securities Act, *supra* note 43, § 30.
145. *Id.* § 23(4).
146. *Id.* § 30.
147. *Id.*
148. *Id.* § 24.
149. *Id.* § 32(4).
150. *Id.* § 3(m).
151. *Id.* § 32(2). The results of the offering must be reported to the SSB within seven days following the closing of the subscription period. *Id.* § 32(3).

How the foregoing will work in the context of a managing underwriter assembling an underwriting syndicate for a firm commitment underwriting is unclear. In that context it is standard practice in the U.S., for example, for a managing underwriter to assemble an underwriting syndicate after the filing of a registration statement but before the registration statement is declared effective. The commitments of the underwriting and selected dealers groups then are memorialized in underwriting and selected dealer agreements that generally set the number of shares agreed to be purchased, the public offering price, the underwriters' discount and dealers' commissions. Presumably such activities by the underwriters and selected dealers will not be deemed a part of the subscription; otherwise the Securities Act would unnecessarily frustrate these important selling efforts.

[5] *Filings Required by the Exchange*

For a security that will be traded on the Exchange, in addition to the advertisement required in the Exchange's official gazette,[152] the Listing Rules of the Exchange require a prospectus to be delivered[153] and compliance with certain periodic reporting requirements.[154] The Listing Rules specify the same type of information be included in a prospectus delivered to the Exchange as that prepared under the Securities Act; however, the Listing Rules are more detailed than the Securities Act and in some cases provide for disclosure necessary to analyze whether the issuer meets the requirements for trading on the Exchange. The prospectus disclosure requirements are discussed above.[155] The periodic reporting requirements under the Listing Rules of the Exchange are much more detailed and more extensive than those specified under the Securities Act.[156] An issuer must publish a quarterly report and submit it to the Exchange for each quarter including year end.[157] The annual report of the issuer prepared under Law XVIII of 1991 on Accounting[158] (the Accounting Law) must be submitted to the Exchange.[159] The Listing Rules to some extent also track the Securities Act with regard to interim reporting of certain events.[160] Matters that must be included in such periodic reports are dis-

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152. *See supra* text accompanying note 144.

153. Listing Rules, *supra* note 66, § II(6.1).

154. *Id.* §§ III(1)-(3).

155. *See infra* text accompanying notes 127-143.

156. *See* Listing Rules, *supra* note 66, § III and discussion *infra* § 2.07.

157. Listing Rules, *supra* note 66, § III(1.1). These reports are referred to as "quick" reports and are similar to the Form 10-Q reports required under the U.S. securities laws. Quick reports must contain financial information, changes in the issuer's structure, changes in share ownership and an assessment of the quarter plus a summary of all extraordinary interim reports. *Id.*

158. Law XVIII of 1991 on Accounting (May 14, 1991), *unofficial translation*, II/15 HUNGARIAN RULES OF LAW IN FORCE (Aug. 1, 1991).

159. Listing Rules, *supra* note 66, § III(1.2.1).

160. *Id.* § III(3) and discussion infra § 2.07.

cussed below.[161]

§2.06 Exempt Offerings

The Securities Act exempts from its coverage the non-public issue of securities.[162] This exemption is similar to that available under Section 4(2) of the U.S. Securities Act of 1933 for transactions not involving a public offering.[163] The "public issue" of securities is defined as the sale of securities by a public offering.[164] For there to be a "public offering" two conditions must be satisfied. First, a statement calling for the purchase of or subscription for securities must be published either in the press or in other media.[165] Second, the statement must be aimed at potential customers whose range has not been predetermined.[166]

Although private placements are likely to be a significant part of the Hungarian capital markets, the uncertainties regarding the scope of the Securities Act and its application to such transactions will be determined by practice over time. Obviously, the contours of a non-public offering are not well defined by the Securities Act and will be interpreted by the SSB and Hungarian courts and possibly future law. Until then one should, at a minimum, rely on international standards concerning private placements, *i.e.*, deal with only sophisticated investors, limit the size and scope of the offering, avoid anything which could be deemed a publication constituting a solicitation of offerees and the like.[167]

§2.07 Periodic Reporting Requirements

The Securities Act requires issuers of securities to report periodically to the SSB, the Exchange, security holders and the public.[168] As described above, the reporting requirements under the Listing Rules of the Exchange differ in certain respects from the requirements of the Securities Act.[169]

[1] *Annual Reports*

An issuer's annual report must be prepared according to the provisions of the Accounting Law, and include the issuer's financial statements and a report on the issuer's business.[170] Issuers must file with the SSB

161. *See* accompanying text *infra* notes 172-176, 178, 180-82.

162. Securities Act, *supra* note 43, § 2(2)(a).

163. 15 U.S.C. § 77d(2) (1988).

164. Securities Act, *supra* note 43, § 3(n).

165. *Id.* § 31.

166. *Id.*

167. An issuer or other person contemplating an actual private placement or other transaction in Hungary should consult with counsel prior to the transaction.

168. *See* Securities Act, *supra* note 43, §§ 33-4.

169. *See supra* text accompanying notes 154-160.

170. Listing Rules, *supra* note 66, § III(1.2.1). Under the Securities Act the annual report must include: (1) a summary of events of the issuer for the year covered by the annual

and deliver to security holders an annual report by May 31 following the end of the year for which the annual report is prepared.[171]

The annual report must include: (1) general information about the issuer;[172] (2) a description of its share capital, including, *inter alia*, classes of securities, their par values, their denominations (apparently for debt securities), rights attaching to such securities and changes in such rights during the past year;[173] (3) disclosure about the issuer's management and employees, such as share ownership of senior management, changes in senior management and information concerning the number of employees and wages;[174] (4) information about the business of the issuer and an analysis of its financial position, including the prospects and plans of the issuer for the current year and a "description of all. . .factors which are necessary for the assessment of the Company;"[175] and (5) an updated risk factor disclosure.[176]

[2] *Quarterly "Quick" Reports*

Issuers with securities listed on the Exchange, in addition to annual reports, must publish and file quarterly reports (referred to as "Quick" reports) with the Exchange.[177] Quick reports must be filed within 30 days after the end of each quarter, presumably the calendar quarter. A Quick report is required at the end of the year even though much of the information contained in that report will otherwise be included in the issuer's annual report.

Quick reports are required to include certain financial information about the issuer, changes in the issuer, its management and employees

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report, (2) certified financial statements for that year and an auditor's report, (3) material information regarding new issuances of the issuer's securities during the year and (4) a description of new senior management employed during the year. Securities Act, *supra* note 43, § 33(4). At the time of this writing, the SSB had begun work on amendments to the Securities Act that would provide for fuller disclosure guidelines applicable to annual reports. *See Likely Amendments*, *supra* note 45.

171. Securities Act, *supra* note 43, § 33(3). The annual report must also be delivered to the Exchange by such date. Listing Rules § III(1.2.1). Investment funds must prepare a biannual report in accordance with the Accounting Law and submit such report to the Exchange by August 29 of the applicable year. *Id.* § III(1.2.4). Investment funds must also prepare and submit annual reports within 120 days after the end of their business year. *Id.* § III(1.2.5).

172. Specifically, the general information must include, *inter alia*, the date of the issuer's foundation, the location of its headquarters, the date of its incorporation (or the equivalent), the amount of the issuer's initial capital and current capital, the activities for which it is registered to undertake, the identity of its auditors and a description of its ownership structure. Listing Rules, *supra* note 66, § III(1.2.3)(b).

173. *Id.* § III(1.2.3)(b).

174. *Id.* § III(1.2.3)(c).

175. *Id.* §§ III(1.2.3)(d)-(e). Apparently, the Listing Rules contemplate a discussion of "material" factors.

176. In particular, the Listing Rules require that "[a]ny changes in risk factors occurring in the course of the year" be disclosed. *Id.* § III (1.2.3)(f).

177. *Id.* § III(1.1).

and the share ownership of its management, changes in ownership affecting five percent or more of the issuer's share capital and an assessment of the issuer during the reporting period including a summary of any interim event reports issued during such period.[178]

[3] *Interim Reporting of Extraordinary and Certain Other Events*

Interim reporting is required with respect to certain extraordinary events. To the extent the issuer has published previously any untrue statement that may affect the value of the issuer's securities, the issuer has an obligation to publish corrective information.[179] Examples of reportable events include: (1) proposed or actual changes in the rights of security holders, (2) an issuance of new securities, (3) the declaration of dividends, (4) conclusion of an agreement that includes securities transfer restrictions, (5) a change in the issuer's business activities, (6) regulatory and other changes in law that may affect the issuer's performance, (7) changes in senior management and other key personnel, (8) a significant change in ownership of the issuer's share capital, (9) a merger, consolidation, reorganization or other substantial change to the issuer's organization,[180] (10) the loss of ten percent or more[181] of the issuer's capital assets, (11) material legal proceedings initiated against the issuer, (12) the loss of material subsidies, (13) a material debt undertaking or issuance of securities by the issuer and (14) the announcement of a General Meeting of security holders.[182]

At present the time for disclosure of such events differs under the Listing Rules and the Securities Act. Issuers must report such events to the Exchange within one business day and to the SSB and the public within two days from the date of such event, provided that the event was not previously referenced in the issuer's most recent periodic report.[183]

§2.08 Insider Trading

Part VI of the Securities Act contains the provisions directed at trad-

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178. *Id.* §§ III(1.1.a)-(d). There is no requirement that the financial information included in such report be audited.

179. Securities Act, *supra* note 43, § 34(3). The correction must be published within two working days. *Id.*; Listing Rules § III(2.4). The Securities Act and the Listing Rules, however, do not specify when the two-day publication requirement begins to run. The period probably commences from the date the issuer discovers the untrue statement, although arguably it could begin on the date the issuer should have discovered the untrue statement.

180. Stock splits are dealt with under separate regulation in the Listing Rules, however, such events are reportable as extraordinary events requiring interim reporting. *See* Listing Rules, *supra* note 66, § III(2.1).

181. The Listing Rules set forth a 15 percent criterion. *Id.* § III(2.1).

182. *See* Securities Act, *supra* note 43, § 33(2); Listing Rules, *supra* note 66, § III(2.1).

183. Securities Act, *supra* note 43, § 34(1); Listing Rules, *supra* note 66, § III(2.1). Section 34 of the Securities Act contains a two day notification requirement with respect to the Exchange, however, until amended, the rule, at least for issuers whose securities are admitted for trading on the Exchange, is one day.

ing on the basis of inside information.[184] The Securities Act prohibits the entering into and payment of commissions with respect to securities transactions if insiders are involved or if such transactions are based on inside information.[185] The trading of securities in such transactions is referred to as "insider trading."[186]

The Securities Act defines inside information and enumerates certain classes of persons that are insiders. Inside information includes certain non-public information that "may materially influence either the value or the quotation of the securities."[187] For purposes of the Securities Act, insiders include "senior staff members or senior managers of the issuer, traders in securities or the legal entity in which the issuer has a major stake, or which has a major stake in the issuer . . . as well as those of the bank keeping the accounts of the issuer;" relatives of such persons; ten percent holders and their relatives; and auditors, legal counsel and tax consultants who within six months prior to the suspect transaction were employed or had some other relationship with the issuer.[188] In addition a tippee may be an insider if he has been given inside information or could have had access to such information and was aware that the information acquired was inside information.[189]

Liability runs not only to the insider undertaking a transaction for his own benefit, but also vicariously for transactions undertaken for the benefit of third parties.[190] Insider trading is presumed in the event of a purchase and sale or a sale and purchase of securities by certain statutory insiders[191] within a three-month period.[192] However, unlike Section 16(b) liability under the U.S. Securities Exchange Act of 1934, which imposes strict liability for certain transactions by specified insiders within a six-month period, the Securities Act provides a defense in the event that the insider can prove he had no inside information available to him.[193] The insider's burden of proof in such circumstances will probably be extremely difficult to satisfy and, thus, the availability of this defense

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184. Securities Act, *supra* note 43, §§ 75-80.

185. *Id.* § 75(1).

186. *Id.*

187. *Id.* § 75(2). The Securities Act lists examples of the types of information that may be material, including "information concerning the financial, economic or legal status of the issuer, trader in securities, guarantor or the party providing surety or any change therein" and "data on new security issuers, significant business deals, organizational changes, economic rehabilitation or winding-up procedures." *Id.* The list is not exclusive. *See id.* pmbl. to § 75.

188. *Id.* § 76(1).

189. *Id.* § 76(2).

190. *Id.* § 77.

191. This provision applies only to transactions by senior staff members or senior managers of the issuer, traders in securities or the legal entity in which the issuer has a major stake, or which has a major stake in the issuer as well as those of the bank keeping the accounts of the issuer and relatives of such persons. *Id.* §§ 76(1)(a)-(b) and 78.

192. *Id.* § 78.

193. *Id.*

should be limited.

Certain transactions are specifically excluded from those considered insider trading. Thus, it is not insider trading if the insider "had to sell the securities as a liquidator in order to satisfy creditors" or "has transacted the deal with a person who also had the same insider information available to him."[194]

The SSB may exercise certain remedial action in the case of a violation of the insider trading provisions of the Securities Act. The SSB may "call upon the observation of the terms and conditions" under Section 75 of the Securities Act, suspend the quotation, sales or trade of an issuer's securities, constrain or suspend transactions within certain lines of activity, cause dismissal of senior management and staff, withdraw a previously granted license and investigate and initiate appropriate legal or administrative action against violators.[195] In addition, the public prosecutor or the SSB may initiate suit against an issuer, underwriter or insider to seek to make null and void the transaction conducted on the basis of inside information.[196]

The Securities Act also sets forth a reporting requirement for transactions conducted by insiders (but not tippees).[197] Thus, a transaction constituting insider trading must be reported to the SSB. A failure to report may result in liability imposed by the SSB.[198] The penalty may range from 200 to 500 percent of the market value of the securities traded in the insider transaction.[199]

Despite its insider trading provisions, the Securities Act does not explicitly make insider trading unlawful as a manipulative or deceptive practice.[200] It also does not require the insider trading information reported to the SSB be made publicly available.[201]

§2.09 Licensing of Broker-Dealers and Underwriters

A person must be licensed in order to "engage in the trading of securities."[202] This requirement parallels those in the U.S. and Europe. An underwriter, broker or dealer may be licensed to engage in certain securi-

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194. *Id.* § 79.

195. *Id.* § 17(1).

196. *Id.* § 84(1). The Municipal Court of Budapest has jurisdiction in such cases. *Id.* § 84(2).

197. *Id.* § 80.

198. *Id.* § 18(1)(e).

199. *Id.* § 19(2)(e). The Securities Act establishes a statute of limitations on the SSB's ability to fine a reporting violator. Thus, "[n]o penalty shall be imposed on anyone by the SS[B] after 6 months from the date it has first received information about the violation . . . or after two years from such violation." *Id.* § 18(3).

200. *See* 1 *Business Ventures*, *supra* note 47, ch.3, n. 56, (indicating that this omission has been criticized by Western commentators).

201. Beata Majer, *Investors Protected*, THE HUNGARIAN OBSERVER, June 1992.

202. Securities Act, *supra* note 43, § 10(1). The SSB is responsible for licensing broker-dealers and underwriters. *Id.*

ties transactions,[203] provided that criteria enumerated in the Securities Act are satisfied. The licensee must be organized in Hungary either as a limited liability company or a joint stock company.[204]

An underwriter or dealer must meet a higher standard for capitalization than a broker; otherwise the licensing criteria are the same. An underwriter or dealer must have at least Ft 50 million of issued and paid-up capital and a broker must have either Ft 5 million or Ft 10 million of issued and paid-up capital depending on whether the broker is organized as a limited liability company or joint stock company, respectively.[205] The standard licensing requirements that must be met regardless of whether the proposed licensee is an underwriter, dealer or broker are that: (1) its only business must be the underwriting of and trading in securities (if an underwriter or dealer) or brokerage activities (if a broker),[206] (2) it must demonstrate the capability of conducting the activities sanctioned under the license[207] and (3) it must have its governing documents (*i.e.*, articles of association) approved by the SSB.[208]

The Securities Act includes certain restrictions on licensed underwriters, dealers and brokers designed to, *inter alia*, minimize the potential for market manipulation and promote market transparency vis-a-vis the ownership structure of securities firms and their interests in issuers.[209] Thus, limits are imposed on the direct and indirect ownership by securities firms of shares of other securities firms.[210] In addition, securities firms are prohibited from trading in their own securities or the securities of an issuer in which they have a direct or indirect in excess of certain prescribed limits.[211]

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203. *Id.* § 11(1).

204. *Id.*

205. *Id.* §§ 11(1)(a) and 11(2)(a). In the event a license is granted to an underwriter (or dealer) that will also be licensed as a broker, the higher capitalization requirement under Section 11(1)(a) applies. *Id.* § 11(3).

206. *Id.* §§ 11(1)(b) and 11(2)(b). The Securities Act limits the application of these restrictions somewhat. Thus, a licensed underwriter, broker or dealer is not prohibited from engaging in "investment consultancy, securities deposit management and securities management," for example, and transactions not subject to the Securities Act. *Id.* §§ 11(4)(a)-(b).

207. In this regard, the applicant must show that it has "all the facilities and technical conditions required for such activities" and that it "employ[s] a specialist to manage the activity and the transactions - or a limited liability company has a member providing such ancillary services - who has a clean criminal record, at least two years of experience in securities transactions and has passed the examination required by the SS[B]." *Id.* §§ 11(1)(c)-(d).

208. *Id.* § 11(1)(e).

209. *See id.* pmbl. to §12. These conditions apply to applicants as well. *Id.* § 12.

210. Securities Act, *supra* note 43, §§ 12(1)-(3).

211. *Id.* § 12(4).

§3 CZECHOSLOVAKIA

§3.01 Overview

[1] *Political and Economic System*

The events leading to the separation of the Czech and Slovak Republics render the future of economic reforms uncertain. Paralysis at the federal level and rapid movement toward the creation of two sovereign states has signaled the demise of the Czechoslovak federation. The program developed for the transition to a market economy will meet with different responses in each of the two newly constituted republics and it is likely that reforms currently underway will be altered or reversed, especially by the Slovak Republic, once the separation has been accomplished.

The current political situation in Czechoslovakia is one of stalemate in the Federal Assembly juxtaposed with two republican parliaments having majority parties. As a result of parliamentary elections held June 5 and 6, 1992, the Civic Democratic Party gained control of the Czech National Council, while the Movement for a Democratic Slovakia attained a majority position in the Slovak National Council.[212] These two ruling parties "pursue widely disparate political and economic agendas"[213] that prevent them from arriving at a common policy which might provide for the continued existence of the Czechoslovak federation.

Vladimir Meciar, Slovak prime minister and head of the Movement for a Democratic Slovakia, and his Czech counterpart Vaclav Klaus, of the Civic Democratic Party, reached agreements on June 20, 1992, for the proposed course of federal dissolution.[214] Part of these agreements stipulate that the reform measures enacted by the Czechoslovak federation will remain effective until the separation is finalized,[215] but pragmatically this accord is questionable in light of Meciar's plans articulated before the elections to modify the course of Slovak economic reform. Specifically, Meciar proposed more state control of economic activity in the Slovak Republic,[216] contrary to the "shock therapy" policies initiated in 1991.[217] Such a drastic change in policy would entail "reversing or modifying the reform policies of the previous Slovak and federal governments."[218] Presumably, this would require the eventual passage of new

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212. *See* Jan Obrman, *The Czechoslovak Elections, RFE-RL Research Rep.*, June 26, 1992, at 12 [hereinafter *Elections*].

213. Jiri Pehe, *Scenarios for Disintegration, RFE-FL Research Rep.*, July 31, 1992, at 30, 32 [hereinafter *Scenarios*].

214. *Id.* at 30.

215. Jan Obrman, *Czechoslovakia: Stage Set for Disintegration? RFE-RL Research Rep.*, July 31, 1992, at 30 [hereinafter *Czechoslovakia*].

216. Jiri Pehe, *The New Slovak Government and Parliament, RFE-RL Research Rep.*, July 10, 1992, at 33 [hereinafter *New Slovak*].

217. Peter Martin, *Slovakia: Calculating the Cost of Independence, RFE-RL Research Rep.*, Mar. 20, 1992, at 33. *See also infra* note 221.

218. *New Slovak*, *supra* note 216, at 36.

legislation by the Slovak National Council to countermand the existing federal laws. Since Meciar's party has the majority necessary to enact such legislation, the continued applicability of federal economic reform policies in the Slovak Republic seems extremely doubtful in long-term perspective.

In the Czech Republic, the continuance of economic reform seems to be much more certain. Klaus, in his negotiations with Meciar, sought to postpone any changes in economic policy until after the separation of the two republics was complete in order to preserve the integrity of the reform program currently being implemented by the federal government.[219] It seems highly unlikely that the tenor of economic reform will change in the Czech Republic; in fact, the prospect of accelerating such reform is one of the principal reasons that Klaus and the Civic Democratic Party are unwilling to perpetuate a federal impasse.[220]

The principal reason for the differing attitudes toward reform held by the Civic Democratic Party and the Movement for a Democratic Slovakia involves the dissimilar economic situation of the two republics. The Slovak economy contains major components of heavy industry and armaments manufacture, whereas the Czech economic structure is more diversified. The transition pains caused by the "shock therapy" program affected the Slovak economy to a much greater extent than the Czech. As a result, Slovak public opinion is "more critical of the overall economic situation"[221] and is uncomfortable with the current pace of economic reform. This attitude, coupled with nationalist pressures, provides the main impetus for the departure from the current path of economic transition and the aversion to the federal structure.

Events subsequent to the June 1992 elections have demonstrated just how irreparable the split between the Czech and Slovak republics has become, underscoring the notion that Czechoslovakia actually "consists of two societies."[222] A government program based on the assumption that Czechoslovakia would dissolve was approved by the Czech National Council on July 13, 1992, followed closely by a declaration of sovereignty from the Slovak National Council on July 17.[223] Meciar and Klaus adopted a common position regarding the impending divorce and proposed the drafting of a constitutional law pursuant to which the Federal Assembly would divide Czechoslovakia into separate republics.[224] The Slovak National Council signed the new constitution for the Slovak Republic into law on September 3,[225] paving the way toward the establish-

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219. *Czechoslovakia*, *supra* note 215, at 30.

220. *Id.*

221. Kamil Janacek, *Survey of Major Trends in 1991*, *RFE-RL Research Rep.*, Mar. 20, 1992, at 32.

222. *Elections*, *supra* note 212, at 19.

223. *Scenarios*, *supra* note 213, at 30.

224. *Id.*

225. *Foreign Broadcast Information Service*, 92 *Daily Rep. E. Eur.* (BNA) No. 179-5,

ment of an autonomous republic on January 1, 1993.[226] As of this writing, negotiations were still underway concerning the details of the dissolution agreements and the formal procedures for the partitioning of Czechoslovakia.

The separation of the Czech and Slovak Republics will go beyond a division in form alone. Each republic will establish its own central bank and distinct national currency,[227]and each is in the process of forming ministries that will assume the tasks once reserved for federal bodies. For example, the newly formed Czech Finance Ministry has a mandate to supervise the development of the republic's capital markets.[228] These indications suggest that, while existing federal legislation and institutions will remain relevant for a time,[229] new legislation implementing the specific economic policies and institutions to be developed in the republics should be expected once the separation has been achieved.

The division of state assets and the future of the privatization program are two contentious issues that must be resolved in the separation process. The Movement for a Democratic Slovakia has drafted a constitutional law based on the Meciar and Klaus accords that would divide federal property between Czech and Slovak parties at a ratio of 2:1.[230] It is quite likely that this agreement will be subject to intense rounds of negotiations that may slow the divorce proceedings significantly. Furthermore, the second round of mass privatization may be halted due to Slovak resistance based on the widespread desire to curtail the ambitious reform program being pursued by the federal government. These issues will be considered top priority items by the respective National Councils.

The disintegration of Czechoslovakia is underway, but the exact timetable for the establishment of fully functioning Czech and Slovak republics is still uncertain. In general, the process of division will likely serve as an impetus to speed up economic reforms in the Czech Republic and curtail such reforms in the Slovak Republic.[231] The relevance of the current regime of economic reforms will remain until new programs are put forth by the respective National Councils. More significant changes in economic orientation should be expected from the Slovak Republic, while the Czech Republic will probably adopt a program quite similar to the one currently being followed by the federal government. No major changes are expected, however, until the two republics put their houses in

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Sept. 15, 1992, at 1.

226. Boris Gomez, *Common Currency-For Now*, PRAGUE POST, Sept. 1-7, 1992, at 1.

227. *World Wire*, WALL ST. J., Sept. 21, 1992, at A8.

228. Bill Hangley, Jr., *Czechs Lead Drive Toward Division*, PRAGUE POST, Aug. 11-17, 1992, at 1.

229. *See id.* and accompanying text.

230. *Foreign Broadcast Information Service*, *supra* note 225, at 11.

231. Ales Capek, The Past and the Future of Czecho-Slovak Economic Relations (March 1992) (on file with the Minda de Gunzburg Center for European Studies, Harvard University) (Program on Central and Eastern Europe, Working Paper Series #22).

order and address the central questions of legal and financial separation.

[2] *Securities Market and Regulation*

Against this backdrop it is evident that the development of a system of securities regulation is not Czechoslovakia's highest priority. The nation presently is consumed, first and foremost, with carrying out the plans for disintegration described above and is not likely, in the near term, to devote significant national resources to enacting and implementing comprehensive federal securities legislation. Secondly, even if securities regulation were a top item on the national agenda, the unsettled state of the country's law-making institutions undermines the status of new legislation. It is possible that the Federal Assembly will pass a new general securities statute by the end of 1992,[232] but the utility and effect of such legislation is unclear. Theoretically, upon finalization of a secession agreement Federal legislation might no longer have any legal effect, so that enactment of additional legislation at this time might be considered fruitless. On the other hand, the secession agreement may provide for the continuation of certain laws, or the independent republics may enact into their laws all or part of previously enacted federal laws, so that the enactment of new federal legislation, including securities legislation, during the transition period may not be pointless. Presumably, the republics eventually will enact their own securities laws, but no significant legislative efforts by the republics themselves in the securities area have been publicized to date. All laws enacted by the post-communist Czechoslovakian government, including the stock exchange legislation discussed below, will reportedly remain in effect until the finalization of the secession agreement between the Slovak and the Czech republics.[233] The secession treaty is "officially" expected in 1992, but progress has been slow and realistically is not anticipated until the first quarter of 1993. Understanding the relevant Federal laws that have been enacted (principally, the Stock Exchange Act)[234] is instructive not only due to the possibility that such laws will somehow survive the political transformation through provisions in the secession treaty or otherwise, but also because such laws serve as the best available indicator of the shape of securities laws that eventually may be enacted by the independent republics.

As mentioned, Czechoslovakia's Federal Assembly has passed the Stock Exchange Act pursuant to which stock exchanges in Prague and Bratislava will operate, but further securities legislation, including a gen-

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232. Letter from Mária Kuniková, asst. to the Chief Executive, the Bratislava Stock Exchange, to Holme Roberts & Owen (Sept. 18, 1992).

233. Telephone conference between Holme Roberts & Owen and the Czechoslovakian Embassy in Washington, D.C. (Sept. 23, 1992). *But see supra* note 215 and accompanying text (discussing possibility that Slovakia may, as a pragmatic matter, modify the course of Slovak economic reforms).

234. Legal Act of April 21, 1992, on Securities Stock Exchange [hereinafter *Stock Exchange Act*].

eral securities statute, has not yet been able to transcend the political impasse. Without a general securities law statute regulating public offerings, fraud and the like an atmosphere of *caveat emptor* generally prevails in the fledgling markets.[235] The stock exchanges in Prague and Bratislava, described below, have been constituted but are not yet operational although it is anticipated that the exchanges will commence operations by the end of 1992 or in early 1993.[236] Pending the commencement of trading on the exchanges, a small amount of secondary market activity is occurring privately among institutions.[237]

The privatization process, by creating a large supply of shares, will increase the need for securities market structures in Czechoslovakia. Although the supply of and demand for securities in Czechoslovakia are currently low, both are expected to increase as the privatization process unfolds. In the privatizations, Czech citizens will become shareholders *en masse*; approximately 8.5 million of them bought vouchers in a mass privatization program in 1992[238] which will allow their holders to purchase stock in companies being privatized[239] by participating in a multi-part bidding process. The bidding process, which began in May 1992, is expected to result in the transfer of over fifty percent of Czechoslovakia's state-owned enterprises to the public.[240] Stock exchanges are considered necessary to increase liquidity for the shares that are purchased in the mass privatization.

Czechoslovakia signed an Association Agreement with the European Community in December 1991 which calls for Czechoslovakia to implement a number of reforms as a prerequisite to membership in the Com-

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235. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 4 (Sept. 24, 1992)("a Securities Act governing the regulatory environment has still not been finalised, despite the critical importance of efficient securities markets to the privatisation programme"). *But see* Stock Exchange Act, *supra* note 234, § 28 (duties of stock brokers) and § 31 (sanctions against participants in trading and issuers of listed securities for violating provisions of Stock Exchange Act or stock exchange rules or purposefully disseminating false or misleading information that affects the rates of securities).

236. *See* Philip Crawford, *Equity Opportunities Multiply as Eastern Europe Goes to Market*, INT'L HERALD TRIB., Aug. 29, 1992 ("stock markets are already up and running in Budapest and Warsaw, and the inaugural bell of the Prague bourse should ring before the year's end").

237. IVAN SVITEK ET AL., CZECHOSLOVAK BUSINESS GUIDE: INVESTMENT 1992/93, 93 (1992) [hereinafter GUIDE] states that "[b]ecause the volume of traded securities is still small, the Czechoslovak State Bank in cooperation with other commercial banks has set up a provisional secondary securities market. The State Bank is responsible for technical and organizational aspects, accounting, rate setting, mediation, central evidence, and publishing information."

238. *Prague to Set Up New Stock Exchange*, PRIVATISATION INT'L, Apr. 1992.

239. *CSFR Plans Stock Exchanges*, PRIVATISATION INT'L May 1992; *see also Foreign Investors' Access to Stock Markets Could Be Limited*, FIN. E. EUR., May 8, 1992 (voucher privatization system will turn 8.5 million Czechs and Slovaks into shareholders by the end of 1992).

240. *Open For Business*, FIN. E. EUR., May 21, 1992.

munity.[241] Czechslovakia hopes to attain full membership by the year 2000, although it is unclear how this goal will be affected by the impending division. The objective of someday attaining EEC membership may have influenced the shape of Czechoslovakia's securities laws and policies. Indeed, the Czechoslovakian Stock Exchange Act seems to have been shaped more by European than U.S. traditions.

§3.02 Regulatory Authorities

As mentioned above, a general securities law governing public offerings of securities, fraud and related matters (*Zakon o Cennych Papiteh*) has been under consideration in Czechoslovakia but has not been enacted. Draft legislation reportedly would create independent regulatory authorities, the Securities Commission of the Czech Republic and the Securities Commission of the Slovak Republic.[242]

Securities exchanges in Czechoslovakia are presently supervised by the Ministry of Finance of the Czech Republic or the Ministry of Finance of the Slovak Republic,[243] depending upon where the exchange is located. The Ministries, in this regard, will act through a "Stock Exchange Commissioner" who is authorized, *inter alia*, to control trading and stock broker activities and countermand decisions of the stock exchange chamber (defined below).[244] Although the stock exchanges in Czechoslovakia are private legal entities organized as joint stock companies,[245] they will have certain supervisory responsibilities over market participants just as securities exchanges in the U.S. and most countries have self-regulatory responsibilities.

The Prague Stock Exchange (PSE) was constituted in Prague on July 9, 1992,[246] subject to approval by the Ministry of Finance.[247] It is anticipated that the Exchange may open for operations in the first quarter of 1993.[248] Rules of the Prague Stock Exchange are not available in

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241. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 4. *See also* James Doty, *Capital Market Developments in Central and Eastern Europe: The SEC Perspective*, *in* INTERNATIONAL SECURITIES MARKETS 37 (1991).

242. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 4. "Once the securities law is passed. . .the exchanges will be regulated by independent supervisory bodies, the Securities Commissions of the Czech and Slovak republics, which are to be set up under the act." *Id.* at 18 (Apr./May ed.)

243. *Stock Exchange Act*, *supra* note 234, § 32.

244. *Id.* (control stock exchange trading, "revise" stock broker activities, countermand decisions of the stock exchange chamber under certain circumstances, require reports from stock exchange governing bodies, persons involved in clearance and settlement, and stock brokers).

245. *Id.* § 1.

246. *BCPP Set Up*, EKONOMICKE ZPRAVODAJSTVI, July 9, 1992, at 8.

247. *Czechoslovakia: Securities Market to Become Independent Company*, HOSPODARSKE NOVINY, July 15, 1992. *See* Stock Exchange Act, *supra* note 234, § 2 (requiring approval of Czech Ministry of Finance for foundation of stock exchange based in Czech Republic).

248. *Cf. Czechoslovakia: Securities Market to Become Independent Company*, *supra* note 247.

English as of September 1992. The Bratislava Stock Exchange (BSE) formed on November 5, 1991,[249] has issued Rules on Listing Securities (BSE Listing Rules) and Rules on Trading on TBSE Floor and Types of Transactions (BSE Trading Rules), discussed below. The Bratislava International Commodities Exchange, created in November 1991,[250] reportedly trades bonds as well as commodities.[251]

The Czechoslovak State Bank, the country's central bank, supervises the country's banking system. Previously the State Bank functioned as both central bank and a commercial bank but as of the beginning of 1990 divested itself of its commercial banking activities.[252] The Commercial Bank in Prague and the General Credit Bank in Bratislava succeeded to the CSB's commercial banking activities,[253] while long-term financing has been taken over by the Investment Bank (*Investicni Banka*).[254]

Other peritnent regulatory authorities include the Federal Ministry of Finance, Federal Ministry of the Economy, Federal Agency for Foreign Investment, Czech Ministry of Finance, Czech Ministry for Economic Policy and Development, Czech Ministry of National Fund and Privatization, Slovak Ministry of Finance, Slovak Ministry of the Economy, and Agency for Foreign Investment of the Slovak Republic.[255]

§3.03 Securities Laws and Related Laws

As indicated above, the Federal Assembly of the Czech and Slovak Federative Republic passed the Stock Exchange Act in April 1992.[256] This statute governs, among other things, stock exchange authorization, membership, and governance; listing and trading securities on the stock exchange; insider trading; periodic disclosure; sanctions; and dispute resolution. Czechoslovakia has not yet enacted general securities legislation governing public offerings, fraud and the like[257] although additional legislation may be passed by the end of 1992.[258] The ultimate fate of the Stock Exchange Act is unclear in view of the country's impending split. The

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249. GUIDE, *supra* note 237, at 27.

250. *Id.* 94.

251. *Id.* 94. *See also Stock Exchanges in Czechoslovakia*, EKONOMICKE ZPRAVODAJSTVI, July 9, 1992, at 8.

252. *Czechoslovakia: Ambitious Plans are Underway to Create Capital, Money and Foreign Exchange Markets*, EUROWEEK March 23, 1990.

253. *Id.*

254. *Id.*

255. GUIDE, *supra* note 237, at 129-138.

256. Stock Exchange Act, *supra* note 234. The translation of the Stock Exchange Act relied upon herein was obtained from the Bratislava Stock Exchange. It is believed to constitute an official translation, although this is uncertain. Other translations exist and reflect some differences in the statutory language. The text of the original statute should obviously be consulted in the case of actual transactions.

257. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 4.

258. Letter from Bratislava Stock Exchange to Holme Roberts & Owen, *supra* note 232.

BSE has issued Listing Rules and Trading Rules[259] which are analyzed below. The PSE apparently has formulated rules but as of this writing are not available in English.

The Federal Assembly enacted an investment funds law (*Zakon O Investicnich Spolecnostech a Investicnich Fondech*) in April 1992 applicable to both open- and closed-end funds.[260] Among other things, the law provides that an investment fund cannot own more than twenty percent in any one company,[261] and regulates the amount of fees that may be charged to customers.[262]

Banking legislation was enacted on December 20, 1990. Foreign banks may engage in banking activities in Czechoslovakia through a representative office, subsidiary or joint venture.[263] According to one source, "[u]nder the Banking Law, foreign banks are now able to use the licenses granted in their home country to receive a license to operate in Czechoslovakia,"[264] although foreign banks still must obtain regulatory approval (from the Czechoslovak State Bank) to operate.[265] As is the case under European Community Directives,[266] the banking law permits universal banking.[267] Under a universal banking system, banks may engage in both commercial and investment banking activities.

The Commercial Code,[268] passed by the Federal Assembly in November 1991, regulates a wide range of commercial activities in Czechoslovakia.[269] "The Code constitutes a comprehensive system of law that applies to entrepreneurial activity in Czechoslovakia and replaces approximately 80 previous acts, decrees and regulations."[270] Under the Commercial

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259. The Bratislava Stock Exchange Board passed the Trading Rules on July 25, 1991 [hereinafter TBSE Trading Rules]. Zakon c. 17/1991 Sb. The Board approved the Listing Rules on July 25, 1991 [hereinafter TBSE Listing Rules]. Zakon c. 17/91 Sb., *amended by* Zakon c. 35/1991 Sb. The Trading Rules and the Listing Rules were issued in Slovak and English. "In case of any doubts [the] Slovak version controls." Zakon c. 17/1991 Sb.

260. *See Foreign Investors' Access to Stock Markets Could Be Limited*, *supra* note 239.

261. *Id.*

262. *CSFR Plans Stock Exchanges*, PRIVATISATION INT'L, May 1992.

263. GUIDE, *supra* note 237, at 90. "At the end of November 1991, 41 representative offices of foreign banks and 38 banks had been established. . ." *Id.*

264. *Id.*

265. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 235. Persons desiring to carry on the banking business in Czechoslovakia must apply to the State Bank, which acts on the application in consultation with the appropriate Ministry of Finance, depending upon the proposed location of the bank's headquarters. *Id.*

266. Council Directive 89/646, 1989 O.J. (L 386) 1 (allowing banks authorized in an EEC member state to provide commercial and investment banking services throughout the Community, provided such activities are covered by the home state authorization).

267. GUIDE, *supra* note 237, at 90.

268. Zakon c. 513/1991 Sb.

269. *See* GUIDE, *supra* note 237, at 37.

270. CZEHOSLOVAKIAN INVESTMENT GUIDE, *supra* note 4. "The law is influenced by German and Austrian legislation and reflects pre-1938 Czechoslovak civil and commercial law." *Id.*

Code, foreigners may acquire Czechoslovakian companies, form wholly owned local subsidiaries or establish joint ventures with Czechoslovak persons,[271] subject in some but not all cases to governmental approval.[272]

The so-called "Small Privatization Law" governs the transfer of small businesses from the state to private citizens.[273] The "Large Privatization Law"[274] was enacted on February 26, 1991 and became effective in April of that year. This law generally concerns the privatization of state-owned property other than small businesses.[275]

§3.04 Exchange Regulation

[1] *Characteristics and Authorization*

The Stock Exchange Act defines "Securities Stock Exchange" as a legal entity authorized to "organize" at a certain place and time "a demand for, and an offer of, securities."[276] Shares and other securities "bearing the rights of property and capital sharing in business, bonds, as well as, dividend and interest coupons (warrants), are traded [on] the exchange."[277] Thus both debt and equity securities are authorized to trade on regulated exchanges in Czechoslovakia. Permission to establish a stock exchange is requested by filing an application with the Czech or Slovak Ministry of Finance, depending upon the business residence of the exchange to be formed.[278] The decision regarding the establishment of the stock exchange must be made within sixty days of the filing date of the application.[279] A stock exchange may not be established by means of a public offering,[280] and shares of the exchange are transferable only with the consent of the exchange.[281]

[2] *Ownership; Foreign Ownership*

The Stock Exchange Act makes the following provision concerning foreign ownership of shares in a stock exchange governed by the Act:

> The foreign nationals[282] and the legal persons with foreign national's capital share exceeding 50 % of the basic assets, residing on the territory of the Czech and Slovak Federative Republic, can acquire the

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271. *Id.*
272. *Id.*
273. Law on Transfers of State Property with regard to Some Objects to Other Legal or Physical Persons, Oct. 25, 1990. BUSINESS VENTURES, *supra* note 47, at c-5.
274. Act on the Conditions of Transfer of State Property to Other Persons, February 26, 1991. *Id.* at c-4.
275. *Czechoslovakia's "Large Privatization" Law*, FIN. E. EUR., March 20, 1991.
276. *Stock Exchange Act*, *supra* note 234, § 1(1).
277. *Id.* § 1(2).
278. *Id.* § 3. The contents of the application are specified in § 3(1).
279. *Id.* § 3(5).
280. *Id.* § 1(5).
281. *Id.* § 4(1).
282. *Id.* § 4(3).

> stock exchange's shares, the total nominal value of which shall not exceed one third of the basic assets.[283]

Thus, foreign exchange ownership is permitted, but only to the extent such ownership does not exceed "one third of the basic assets;" presumably, legal entities with less than fifty percent foreign ownership are not counted against the one-third limitation. It is unclear exactly what is meant by basic assets in this context; presumably, the reference is to capital of the exchange (which must be formed as a joint stock company).[284] In order to become a shareholder of the exchange, a foreign national must be a resident of Czechoslovakia. A subsidiary of Credit Suisse First Boston based in Prague is one of twenty owners of the Prague Stock Exchange[285] and several other applications from foreigners are pending.[286] As indicated below, no owner of the exchange may vote more than twenty percent of the shares of the exchange.[287]

[3] *Governance*

Three internal bodies are involved in the governance of stock exchanges operating under the Stock Exchange Law: the General Assembly, the Chamber of the Stock Exchange ("Chamber") and the Supervisory Board.[288] The General Assembly comprises all of the shareholders of the exchange, each of whom votes according to the "nominal value" of his shares subject to the caveat that no one shareholder may vote more than twenty percent of the shares of the exchange.[289] The General Assembly, among other things, elects the members of the Chamber and the Supervisory Board, approves stock exchange rules (subject to further approval by the Chamber) and approves fees and commissions to be charged for the services offered by the exchange.[290] The Chamber acts as the exchange's chief administrative body with responsibility, *inter alia*, to supervise the exchange's compliance with applicable law; establish bookkeeping and computer systems; regulate exchange operations;[291] authorize transfers of exchange memberships; grant listing applications and trading licenses; and supervise stock brokers.[292] The Secretary-General of the stock ex-

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283. *Id.* § 4(3).

284. "The exchange is a joint stock company, regulated by provisions of the Code of Commercial Law [Zakon c. 513/1991 Sb.] with the exceptions specified in this Act." *Id.* § 1(3).

285. *Foreign Investors' Access to Stock Markets Could Be Limited*, *supra* note 239.

286. *Id.*

287. *Stock Exchange Act*, *supra* note 234, § 6(4). *Cf. supra* text accompanying n. 40 (describing the one vote per stock exchange member rule in Hungary).

288. *Id.* § 5.

289. *Id.* § 6(4). This provision does not prevent a shareholder from owning more than twenty percent of the shares of the exchange, but rather prevents the shareholder from voting more than such percentage.

290. *Id.* § 6.

291. The Stock Exchange Chamber "makes changes in the exchange's working days, interrupts, holds up, partially or entirely, the stock exchange operations." *Id.* § 8(f).

292. *Id.* The Stock Exchange Chamber "performs other functions of a Board of Direc-

change represents the Chamber. The BSE Trading Rules, discussed further below, denominate different exchange authorities that will be involved in supervising floor trading: the Commission for Trading, Commissioner, and Speaker.

§3.05 Listing Securities on the Stock Exchange

[1] *Stock Exchange Act*

In many countries, provisions concerning listing of securities on a stock exchange must generally be construed with regulations governing public offerings of securities because the two processes are inextricably linked. For example, "[i]f a company is able to meet the admission requirements of The Stock Exchange and a member firm is prepared to act as a sponsor and underwriter, the process of going public (or going to market) in the United Kingdom and the process of listing on the Exchange are intertwined and basically the same."[293] Czechoslovakia's Stock Exchange Act and the BSE Rules imply that Czechoslovakia will follow the European model whereby stock exchange listing is an integral part of the public offering process,[294] but this conclusion remains tentative in the absence of a statute regulating public offerings.

The Chamber or an authorized committee of an exchange make decisions on listing applications.[295] As is typical with most modern exchanges, the issuer must meet standards relating to operating history, assets, number of shareholders and float but the details of these matters are left to the rules of the exchange.[296] It is contemplated that the exchanges will have more than one market, as the Act vests the exchanges with the authority to decide whether the subject securities will trade "on primary or secondary securities market."[297] The Act provides as follows concerning the listing of foreign securities:

> Foreign securities are allowed for trading on the stock exchange, provided, they were issued in conformity with the legal regulations, valid in the state of the issuer and were accepted/listed, for trading on the

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tors of a joint stock company." *Id.* § 8(q).

293. HAROLD BLOOMENTHAL AND SAMUEL WOLFF, EMERGING TRENDS IN SECURITIES LAW 10-23 (1991). Although in the United States issuers often list on an exchange concurrently with offering their securities to the public, in many cases they instead arrange to have their securities quoted on non-exchange markets (e.g., NASDAQ) and even when their securities are listed the exchanges do not play as significant a role in the disclosure and review process as they do in many European countries.

294. *See, e.g., Stock Exchange Act, supra* note 234, § 22(3) (listing application must disclose "way of emission and place of sale of the securities"); TBSE Listing Rules, *supra* note 259, III § 10 (use of proceeds from issuing new securities, volume of securities to be offered to the public, plan of distribution).

295. *Stock Exchange Act, supra* note 234, § 21(1).

296. *Id.* § 21(3). Government bonds are listed on the stock exchange without an application and prospectus.

297. *Id.* § 21(4).

stock exchange, by the stock exchange chamber.[298]

In typical reciprocity provisions[299] the condition of listing in one state is listing in another. The provision of the Stock Exchange Act quoted above requires valid issuance in the home state and acceptance for listing in Czechoslovakia, as opposed to listing in the home state.[300] However, under the Stock Exchange Act even if the securities have been validly issued in the home country, they still must be accepted for trading by the Chamber.[301] Thus the Stock Exchange Act does not contain a true reciprocity provision. In any event, it is unlikely that large numbers of foreign issuers, at least U.S. issuers, will seek a listing on Czechoslovakian exchanges in the near future.

The listing process is commenced by the issuer filing a listing application with the exchange. "In the listing requirements the exchange chamber determines, when a prospectus, verified by a bank, is to be, necessarily attached to the application."[302] The disclosure requirements established by the Act are minimal, but are supplemented by stock exchange rules.[303] Under the Act, the disclosure document must contain data on the issuer's activities and on the issue of securities, specifically: a) the type of securities; b) the issuer's business prospects; c) the total volume of the issue and its "diversification by denominations;" and d) the "way of emission and place of sale of the securities."[304] When the disclosure document used in connection with a listing, which the EEC refers to as "listing particulars," the U.S. refers to as a "listing application" and Czechoslovakia refers to as a "prospectus," is required, it must be published in accordance with stock exchange rules.[305]

[2] *BSE Listing Rules*

Securities subject to preemptive rights or rights of first refusal may not be listed on the BSE.[306] The provision in the BSE Listing Rules applicable to foreign listings differs from that contained in the Stock Exchange Act: "[s]ecurities listed previously on another Stock Exchange shall be listed on the BSE as follows:" (1) a BSE member must certify that the security is listed on another exchange and provide a copy of the

298. *Id.* § 21(5).

299. Council Directive 87/345, 1987 O.J. (L 185) 81 (providing that when applications are made to list securities on two or more exchanges located in the EC, listing particulars prepared and approved in accordance with home state rules must be recognized by other member states without additional information or approval requirements).

300. *Cf. infra* note 104 and accompanying text.

301. Under EEC directives, a listing in the home state in accordance with specified requirements generally entitles the issuer to reciprocal listing privileges within the EEC as a matter of right.

302. *Stock Exchange Act, supra* note 234, § 22(1).

303. *See id.* § 22(3).

304. *Id.*

305. *Id.* § 22(5).

306. TBSE Listing Rules, *supra* note 259, I. § 2.

prospectus; (2) BSE will categorize the security as falling within the 1st, 2nd or 3rd market (described below); (3) "while listing a security [BSE] shall respect at that time valid Czech-Slovak regulations regarding trading with securities issued abroad."[307] The provision implies that securities listed on another "Stock Exchange," an undefined term, may be listed on the BSE as a matter of right, subject to existing Czechoslovakian regulations concerning "trading with securities issued abroad." This is similar to the EEC reciprocity provision, but goes beyond it in its seeming application to issuers listed on any stock exchange in any country.[308] The undefined term "Stock Exchange" is confusing and arguably refers only to other stock exchanges in Czechoslovakia. The BSE has stated informally that at present, foreign securities are not being accepted for listing on the BSE.[309]

The BSE is divided into three separate markets. In order to qualify for listing on the first market, the issuer must have "volume of the joint stock company capital stock" of 500 million crowns.[310] At least ten percent of the issuer's capital stock must be held by the public, and the issuer must have a three-year operating history information as to which must be presented in the "prospectus."[311] The total "nominal" value of the securities "to be listed, issued for selling to public" must be at least ten million crowns.[312] Different requirements apply to issuers listed on the second and third markets.[313] The BSE listing rules specify the information that must be disclosed in the "prospectus" at the time of listing. The "prospectus" must include, *inter alia*, information concerning the issuer's operating history, capital stock, number of employees, senior officers, managers and directors, business, and property; data concerning use of proceeds, size of the proposed issuance of securities, yield, plan of distribution; and audited financial information.[314] The procedural requirements for obtaining a listing are contained in paragraphs VI of the BSE Listing Rules.

§ 3.06 Trading Securities On and Off the Stock Exchange

[1] *Stock Exchange Act*

The Stock Exchange Act provides as follows:

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307. *Id.* I. § 5.

308. The corresponding EEC directive allows countries that are members of the EEC to restrict application of the reciprocity provision to issuers having their registered office in another member state.

309. Letter from BSE to Holme Roberts & Owen (Sept. 18, 1992)("[l]isting of foreign securities on [the BSE] is not being envisaged").

310. TBSE Listing Rules, *supra* note 259, II. § 6. This requirement appears to refer to float although the language is ambiguous.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* III.

> (1) Securities may be bought and sold on the stock exchange only by persons, authorized (licensed) for trading in securities, according to the specific legal act[315] and only by those, who are: (a) the stock exchange's shareholders or (b) the persons who, upon their request, were granted, by the stock exchange chamber, permission (licence) to buy and sell securities on the stock exchange market and who have paid the admission fee. (2) the Czechoslovak State Bank is authorized to trade in securities.[316]

A trading license may not be granted to a legal entity whose property is subject to "special bankruptcy and compounding proceedings"[317] or to a natural ("physical") person with "insufficient integrity."[318] A natural person "legally sentenced for any criminal act of material (property) nature, or for any other purposesful criminal act, is not considered a person with full integrity."[319] The BSE has stated informally that "[o]nly firms resident in CSFR may apply for a [BSE] broker's license at present,"[320] and that trading on the BSE "is limited to [BSE] members."[321]

A legal entity licensed to trade on the exchange designates one, "eventually, more," natural persons actually to conduct trades.[322] The legislation refers to such authorized natural person as a "stock broker" and requires the broker to possess "the necessary professional skills and personal integrity."[323] Unless applicable stock exchange rules provide otherwise, only stock brokers are authorized to act as intermediaries "in buying and selling securities between persons, licensed to buy and sell securities."[324] A "stock broker" thus is a natural person who acts as intermediary between persons who are licensed to buy and sell securities.

The Stock Exchange Act briefly addresses the question of the method by which prices are set on the exchange. The Act provides that the "[r]ate of a security, which is its market rate on an appropriate stock exchange's working day, is set by a stock broker."[325] The Act provides

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315. "For instance, § 1, section 3, of the Legal Act No. 21/1992 Sb., on Banks" (footnote in original).

316. *Stock Exchange Act, supra* note 234, § 14. The legislation provides that a person not authorized to trade on the exchange may trade through qualifying exchange members or licensed traders and "eventually" through the Czechoslovak State Bank. The reason for the delay in trading through CSB is not clear.

317. *See id.* § 14(3).

318. *Id.* § 14(3).

319. *Id.*

320. Letter from BSE, *supra* note 309.

321. *Id.*

322. *Stock Exchange Act, supra* note 234, § 15(1). "The legal entity, licensed to buy and sell securities, designates one, eventually, more physical persons, to buy and sell securities on its behalf. . ." *Id.* Elsewhere, however, the Act indicates that stock brokers are appointed by the Chamber on the basis of a public tender. *Id.* § 28(2).

323. *Id.* § 15(2).

324. *Id.* § 17.

325. *Id.* § 25(1). The term "price" would seem to have been more appropriate in this context than the term "rate."

further that "[i]f only an automated trading system is used by the stock exchange, the rate is computed in the above mentioned way."[326] This formulation is confusing in that it suggests that if an automated trading system is used, the rate of a security is set by a stock broker. The Act continues, however, with the provision that the "[w]ay of setting rates of securities is determined by the rules and regulations of the stock exchange."[327] "Rates" of securities are quoted in the "seat" of the exchange headquarters and at the end of a working day are to be published in the stock exchanges "rates list."[328] A person may file a "protest" against the quoted rates with the Chamber within three days following the day the rates were quoted,[329] and the Chamber will rule on such protest within another three days. BSE Trading Rules provide that "[m]arket rate is [the] price of a security agreed in [a] transaction between agents on TBSE Floor."[330]

A stock broker is not an employee of the exchange, but is appointed by the Chamber "on the basis of a public tender."[331] It is unclear exactly how this provision relates to Section 15(1), which provides that a legal entity licensed to buy and sell securities designates a stock broker to buy and sell securities on its behalf; presumably, a licensee appoints a stock broker subject to the approval of the Chamber. The broker "mediates" trades of securities "allotted to him/her by the Chamber[,]"[332] and "sets rates of the allotted securities."[333] The stock broker must be present at the exchange when it is open, "through all the working hours and. . . participate personally, in the particular stock exchange trade[s]."[334] The stock broker keeps a book of individual stock exchange transactions apparently in a hard copy format, although the book "may be replaced by output reports from an automated system, if such a record is confirmed by a stock broker."[335] The broker issues a confirmation of the terms of a trade after it is concluded, at which time the broker may receive a commission. Thus, the stock broker (i) "mediates" trades of securities; (ii) is "allotted" securities by the Chamber; (iii) sets rates of allotted securities; (iv) participates personally in stock exchange trades; (v) keeps a record book of trades; and (vi) issues confirmations. These provisions seem to imply a role for the stock broker somewhat similar to that of a "specialist" on U.S. exchanges, except that the Czechoslovakian stock broker, with certain exceptions, is not allowed to trade for his own account.[336] It

326. *Id.*
327. *Id.* § 25(2).
328. *Id.* § 25(3).
329. *Id.* § 26(1).
330. TBSE Trading Rules, *supra* note 259, VII § 29.
331. *Stock Exchange Act, supra* note 234, § 28(2).
332. *Id.* § 28.
333. *Id.* § 28(3)(b).
334. *Id.* § 28(5).
335. *Id.* § 28(3)(c).
336. *Id.* § 28(3)(d). SECURITIES AND FEDERAL CORPORATE LAW, §12.02 (Harold S. Bloo-

remains to be seen how the stock broker function will be defined in practice on Czechoslovakian exchanges.[337]

The Stock Exchange Act establishes certain rights and responsibilities applicable to "participants in trades on the stock exchange."[338] Among other things, such "participants" must honor their commitments, accept the exchange's clearance and settlement system, submit annual audited financial statements and deposit "a bail (collateral) to ensure the liabilities and risks, resulting from the stock exchange trading and its clearing (settlement)."[339] "Participants in trades" include licensed traders, stock exchange shareholders, and stock brokers.[340]

The Act only briefly addresses the topic of clearance and settlement which has been a major and controversial issue in international securities markets.[341] Settlement of individual trades "in a form of clearing, safe-custody, delivery, eventually, overtaking the securities, is conducted by a bank or by another legal person on the basis of a contract conducted with the stock exchange chamber."[342]

Off-exchange trading of listed securities is also an extremely controversial issue worldwide.[343] The Stock Exchange Act provides as follows

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menthal, ed.) contains the following description of the specialist on U.S. exchanges:

> A specialist is an exchange member who has been designated to act in that capacity as to a particular security or securities listed on the exchange. A representative of the specialist stays continuously at one post and performs the function of storing and executing limited price orders and otherwise upon request executes orders for other members. . . . A specialist also performs a dealer function. . . .[I]t is his function to give the market liquidity and continuity by quoting on a narrower spread at which he is expected to buy or sell for his own account to the extent necessary in order to assure a fair and orderly market. . .

337. TBSE Rules do not expressly refer to "stock brokers" nor do they define a role that is coterminous with that of the stock broker under the Act, although the role given to the "Speaker" under TBSE rules overlaps to some degree. *See infra* note 323 and accompanying text.

338. *Id.* § 18.

339. *Id.*

340. *Id.* § 13(3).

341. Clearance and settlement issues are currently being addressed by the European Community, the International Organization of Securities Commissions and the Group of Thirty, among others. *See e.g.*, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 1.10[2][b] (Harold S. Bloomenthal and Samuel Wolff eds.); *Clearing/Settlement Issues Get IOSCO Recommendations*, 2 Int'l Sec. Reg. Rep. (Buraff) 10 (Sept. 27, 1989).

342. *Stock Exchange Act, supra* note 234, § 27(1).

343. Off-exchange trading is one of several issues that delayed the EEC's adoption of the Investment Services Directive for over a year. Some European countries, such as France, desire to limit trading to recognized securities exchanges, whereas others such as the United Kingdom wish to preserve off-exchange markets, such as the Euromarket. *See* Samuel Wolff, *Securities Regulation in the European Community*, 20 DENV. J. OF INT'L L. & POL. 126 (1991); *Finance Ministers Deadlocked on Off-Exchange Trading Regulations*, Int'l Sec. Reg. Rep. (Buraff) 6 (Dec. 1990). IOSCO has also hotly debated the topic of off-exchange trading. *See U.K. Will Ask Venice Meeting to Use British Rules as Model*, 2 Int'l Sec. Reg. Rep. (Buraff) 4 (Sept. 13, 1989).

with respect to this issue and the related issue of "transparency" (disclosure of trading information):

> Participants in a stock exchange transaction may conclude over-the-counter contracts on listed securities, however, only within the range, allowed by the stock exchange chamber and they are obliged to inform the stock exchange about it.[344]

The limitation of off-exchange trading to transactions "within the range" allowed by the exchange is not entirely clear. It is not apparent whether this limitation applies to volume, price or both, nor is it clear how the measure would be enforced.

[2] *Bratislava Stock Exchange*

The BSE Trading Rules supplement the trading provisions of the Stock Exchange Act. A BSE transaction is defined as one carried out by a BSE member in listed securities on the floor of the exchange during working hours.[345] The BSE member must be represented by an agent in all floor operations.[346] Only agents properly authorised by exchange members are allowed to operate on the floor.[347] The Rules indicate that a BSE member must accept any orders for listed securities "and can carry out such orders only on [BSE] Floor; or can have the orders carried out by other Member[s] of [BSE]."[348] Thus, the BSE Trading Rules prohibit off-exchange trading of listed securities by BSE members. As explained above, the Stock Exchange Act permits off-exchange trading "only within the range, allowed for the stock exchange chamber" and the BSE exercised its apparent discretion under this provision to prohibit off-exchange trading altogether. The BSE Trading Rules at this time also prohibit transactions in options and futures.[349]

A critical role in the functioning of the BSE is played by the "Speaker." Offers are made by BSE agents and are "repeated" by the Speaker who also receives confirmations that a sales contract has been made. "It is an obligation of the Speaker to repeat orally the offers and to make sure that the data shall be registered by computer and records shall be kept."[350] Generally, the Speaker's obligation is to follow the process of trading; monitor compliance with BSE Rules by agents; conduct the course of trading and "carry out decisions necessary for trading."[351] The

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344. *Stock Exchange Act*, *supra* note 234, § 19. *Cf.* TBSE Trading Rules, *supra* note 259, X § 7, discussed *infra* note 348 and accompanying text.

345. TBSE Trading Rules, *supra* note 259, II § 2.

346. *Id.* II § 3. "Agent is an authorised proxy of [TBSE] Member who acts in all transactions on behalf and responsibility of the Member." *Id.* X § 41.

347. *Id.* X § 42.

348. *Id.* X § 7.

349. *Id.* III § 8.

350. *Id.* XII § 51.

351. *Id.* XII § 51.

Speaker also must "settle any dispute related to trading on the spot."[352] It appears to be contemplated that there will be only one "Speaker," but presumably the "Speaker" will have a staff of his own.

[3] *Prague Stock Exchange*

As indicated above an English language translation of the rules of the Prague Stock Exchange is not yet available. It is reported, however, that the PSE will have both a trading floor and an electronic trading system,[353] and that the PSE and BSE may be linked by computers but this " 'will depend on the political situation.' "[354] The PSE will probably have two, possibly three tiers, and it has been estimated that when the exchange begins operating about fifty listed companies will trade on the first tier and 300-400 unlisted companies on the second tier,[355] although this estimate may be overly optimistic. The third market may be established for thinly traded securities and may be limited to institutional traders.[356] Prague is reported to favor a modified version of the French market based upon fixed price sessions,[357] while Bratislava is inclined toward an open outcry system similar to that of Switzerland's with "face-to-face dealing between principals."[358] In April 1992, the Prague Stock Exchange Association signed a protocol with the Paris Stock Exchange pursuant to which the latter will provide equipment and support.[359]

§3.07 Insider Trading

The Stock Exchange Act has several provisions intended to regulate insider trading and abusive trading practices generally, the most important of which is contained in Section 20 of the Act, which provides:

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352. *Id.* XII § 55.

353. CZECHOSLOVAKIA INVESTMENT GUIDE, *supra* note 4. *Cf. Czechoslovakia: Securities Market to Become Independent Company*, HOPODARSKE NOVINY, (Czechoslavakia), July 15, 1992 ("[i]ssues that remain unresolved include whether or not trading will be carried out on a material or purely electronic basis").

354. *Prague to Set Up New Stock Exchange*, PRIVATISATION INT'L, April 1992 (quoting Jan Erben of the Prague Stock Exchange Association); *CSFR Plans Stock Exchanges*, PRIVATISATION INT'L, May 1992.

355. *Prague Plods On Towards a Regulated Stock Market*, FINANCIAL TIMES, (London), May 15, 1992, *Cf. supra* text accompanying note 49, at 5 (the Budapest Stock Exchange had twenty-five securities trading of which six were listed at the end of 1991).

356. *Czechoslovakia: Securities Market to Become Independent Company*, *supra* note 353.

357. *Frances Societe des Bourses Francaises Wins Contract for Stock Exchanges*, EBRD WATCH, (Czech.), May 11, 1992. "The exchange is patterned on other European bourses, based on advice from the European Community." *See also Czechoslovakia: Stock Exchange to be Opened in Prague*, BRIT. BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS, July 16, 1992; *Czechoslovakia: Securities Market to Become Independent Company*, *supra* note 353 ("[t]he market will operate according to the French system, and the decision has been taken to import French software. . .").

358. *British Advice on Strategies*, E. EUR. MARKETS, March 20, 1992.

359. *Prague Stock Exchange with French Know How*, TYDENIK OBCHODU A PODNIKANI, (Czech.), April 29, 1992, at 3.

> The persons possessing, due to the current, or previous job, any information about the facts, which may have an impact on rates of some securities, and which are not possessed by other participants, are not allowed to conclude trades in those securities, or to use such information in favour of other persons until such information becomes known to the general public.[360]

This provision may be under-inclusive in that the proscription only applies to persons possessing inside information "due to the current, or previous job. . ."[361] However, the Chamber may determine by rule the "persons (insiders), who due to their working positions, are not entitled to conduct trades on the stock exchange in certain securities."[362] In addition, the Act provides that participants in Chamber meetings, stock brokers, exchange employees and "legal persons" conducting settlement of trades, must "keep secret" information acquired from insiders, "i.e., information that is important for the development of the financial market, or that touches the interests of individual participants."[363] The Stock Exchange Act provides that for purposes of a civil or criminal action, the foregoing persons may be granted an exemption from this obligation. The exemption is granted by chairman of the stock exchange chamber.[364]

§3.08 Periodic Reporting

In accordance with stock exchange rules, a listed issuer must publicly disclose "during the year" information concerning its business results, annual statements of accounts "verified by the auditor and comments on the financial status."[365] A listed issuer must also, "without any delay," notify the exchange (and the public, if required by the exchange) of "changes in the financial position or other facts, that may result in a change of a security rate, or in worsening of the issuer's ability to comply with the obligations due to the issue of the security."[366] These provisions do not apply "to the problems, related to government bonds, since they are accepted for trading (listed) on the stock exchange without an application and prospectus."[367]

BSE Listing Rules require quarterly reporting for first tier companies, semi-annual reporting for second tier companies and annual reporting for third tier companies.[368] Issuers must periodically submit to the BSE an "activity report" presenting certain information, including financial information, for the relevant period.[369] Further, listed companies

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360. Legal Act of April 21, 1992 on Securities Stock Exchange § 20(3).
361. *Id.*
362. *Id.* § 20(4).
363. *Id.* § 20(5).
364. *Id.*
365. *Id.* § 23(1).
366. *Id.* § 23(2).
367. *Id.* § 24.
368. TBSE Listing Rules, *supra* note 259, II § 8.
369. *Id.* IV § 15.

must within two days disclose to the exchange information on changes in the issuer's "economy influencing directly or indirectly the value or yields of securities. . ." resulting from specified events.[370] The activity reports and material event disclosure must be made available to exchange members on the trading floor, and summaries of such information must be published in two newspapers by the issuer.

§3.09 Violations, Sanctions and Dispute Resolution

[1] *Sanctions*

The Chamber may sanction participants to an exchange transaction and listed issuers who violate the Act; do not satisfy obligations established by the stock exchange; or "purposefully, with the intention to cause damage to the participants in the financial markets, disseminate false or misleading information that had, or might have had, an impact on rates of securities."[371] For these transgressions, the Chamber may issue a public or private reprimand, levy a fine, revoke trading licenses, "recall" stockbrokers or require delisting.[372]

The Ministry of Finance, in supervising the stock exchanges, acts through a "Stock Exchange Commissioner," who is authorized, *inter alia*, to control trading and stock broker activities and countermand decisions of the Chamber. In fact, the Minister of Finance is authorized to withdraw the powers of the Chamber under certain conditions,[373] in which case the Ministry would appoint an authorized representative to act on behalf of the exchange until a new Chamber is elected by the General Assembly.[374] The "Minister of Finance of the Czech Republic or the Minister of Finance of the Slovak Republic have the power to suspend, temporarily, a stock exchange trade, or trades, provided, there is no other way of prevention of extensive economic damages."[375] The exchange has some recourse against the power of the Ministry, however; it may lodge an appeal against it in the Supreme Court of the Czech Republic, or the Slovak Republic, as the case may be. BSE Trading Rules empower exchange officials to order trading breaks, halts and suspensions.[376]

[2] *Dispute Resolution*

Disputes involving stock exchange transactions are resolved in the courts unless the parties agree by written contract to arbitrate disputes in the "stock exchange arbitrary court."[377] The "arbitrary court" (possibly

370. *Id.* § 16.
371. *Stock Exchange Act, supra* note 234, § 31(1)(c).
372. *Id.* § 31(2).
373. *Id.* § 33(1).
374. *Id.*
375. *Id.* § 33(3).
376. TBSE Trading Rules, *supra* note 259, XIV, XV.
377. *Stock Exchange Act, supra* note 234, § 29(1). "In the disputes, arising from trad-

an unfortunate choice of words) is established by the Chamber. By agreeing to arbitrate the parties forego a right to resolve their disputes in court.[378] "The very cause itself is arbitrated by the stock exchange court by means of arbitrary findings, which are final and enforceable."[379]

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ing on the stock exchange, whatever objection, explaining that a mere bet or game is involved, is inadmissible." *Id.* § 2. In the United States, arbitration is now a widely used method of resolving disputes between broker-dealers and their customers. *See* U.S. Federal Arbitration Act, 9 U.S.C.A. § 1 (1970 & Supp. 1992).

378. *Stock Exchange Act, supra* note 234, § 30(2).

379. *Id.* § 30(4).

INTERNATIONAL TRADE SECTION

The Andean Trade Preference Act

GUY C. SMITH*

On December 4, 1991, President Bush signed into law the Andean Trade Preference Act ("ATPA") which authorizes the President to grant duty-free treatment for ten years to eligible imports from Peru, Colombia, Bolivia, and Ecuador.[1] The ATPA represents one of the chief elements of President Bush's efforts to create additional incentives to foster trade in legitimate products in the four Andean countries currently fighting the scourge of drug trafficking. The benefits bestowed under the ATPA are in addition to the duty-free benefits these four countries already receive under the U.S. Generalized System of Preferences ("GSP").[2] When compared with GSP, duty-free treatment under the ATPA extends to a broader array of articles and creates more certainty with respect to the continued eligibility of articles for duty-free treatment. The ATPA also has symbolic importance in that it is a tangible reflection of the U.S. government's commitment to the Andean region.

The purpose of this article is to provide readers with an overview of the ATPA. Part I discusses the genesis of the ATPA. Part II explains the substantive components of the ATPA. Finally, Part III discusses, in gen-

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1. *See* 19 U.S.C.A. §§ 3201-3206 (West Supp. 1992).

2. Under the U.S. Generalized System of Preferences ("GSP"), imports of certain eligible products from designated developing countries may enter the U.S. duty-free. *See* 19 U.S.C. §§ 2461-2465 (1988). Each year, annual reviews are conducted under GSP during which interested parties may petition, *inter alia*, to have products be removed from the list of eligible products with respect to a particular country, or to have a country be removed from the list of designated GSP beneficiaries. The GSP program is currently due to expire on July 4, 1993. *See id.* § 2465. The program is likely to be renewed, but may be modified in scope. *See GSP Renewal Holds $500 Million Price Tag Under Budget Accord Rules*, 10 INSIDE U.S. TRADE 5 (Oct. 30, 1992). For a detailed description of the GSP program, see OFFICE OF THE U.S. TRADE REPRESENTATIVE, A GUIDE TO THE GENERALIZED SYSTEM OF PREFERENCES (1991).

eral terms, the potential impact of the ATPA on the Andean region.

I. GENESIS OF THE ATPA

Support for the ATPA grew out of a variety of initiatives by the Bush Administration geared toward Latin America, particularly the Andean region. These initiatives were aimed, either partially or wholly, at fostering economic alternatives to drug trafficking for the Andean countries. The purpose of these initiatives was to substitute legitimate trade for the drug trade by providing unilateral trade and investment incentives.

The first initiative aimed at the Andean region consisted of a package of measures that is now called Andean Trade Initiative I ("ATI I").[3] ATI I grew out of a visit by then-President Virgilio Barco of Colombia to the United States during September 1989. During that visit President Barco requested that the U.S. examine what it could do to enhance the economic cooperation between Colombia and the United States as part of the Bush Administration's war on drugs.[4] As a result of that request, President Bush announced ATI I, which consisted of, *inter alia*: (1) a special review for the Andean countries under GSP for the purposes of considering the addition of new products to the list of products eligible for duty-free treatment; (2) additional technical assistance to assist the Andean countries improve their trade performance in industrial as well as agricultural products; and (3) a promise to explore the possibility of expanding textile trade between the Andean countries and the United States.[5]

Also, as part of his war on drugs, President Bush attended the "Andean Summit" held during February 1990 in Cartagena, Colombia, which contributed to additional initiatives aimed at the Andean region.[6] During the Andean Summit, the participants discussed a variety of measures aimed at combatting the scourge of drug trafficking, including implementation of trade initiatives and incentives to promote exports and private foreign investment in the Andean countries.[7] The trade and investment

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3. *See Andean Trade Preference Act: Hearings on H.R. 661 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 102d Cong., 1st Sess. 34 (1991) [hereinafter *ATPA Hearings*] (statement of Ambassador Carla A. Hills, United States Trade Representative).

4. *See Statement on Andean Region Trade Initiatives*, 25 WEEKLY COMP. PRES. DOC. 1659 (Nov. 1, 1989).

5. *Id.* Other components of ATI I included the following: (1) efforts to build a political consensus to negotiate a new international coffee agreement; (2) efforts to accelerate negotiations on tariff and non-tariff measures within the context of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade ("GATT"); (3) consultations with other trading partners; and (4) additional support for multilateral development bank efforts to promote meaningful trade policy reforms in Andean countries, *see id.*

6. Also attending the Andean Summit were the presidents of Bolivia, Colombia, and Peru.

7. *See Declaration of Cartagena*, 26 WEEKLY COMP. PRES. DOC. 248-254 (Feb. 15, 1990).

programs were intended to facilitate sustained economic growth and to offset any economic dislocation caused by the fight against drug trafficking.

The Andean Summit also generated the Declaration of Cartagena, which contained several "Understandings" concerning joint efforts to combat the illicit drug trade. As part of the "Understanding Regarding Economic Aspects and Alternative Development," the parties agreed to "work together to increase trade among the three Andean countries and the United States, effectively facilitating access to the United States market and strengthening export promotion, including identification, development and marketing of new export products."[8]

In addition, the ATPA grew in part out of President Bush's Enterprise for the Americas Initiative ("EAI"), which was announced on June 27, 1990. The EAI consists of a tripartite initiative addressing trade, investment, and debt reduction in Latin America.[9] Part of the focus of EAI is to encourage Latin American countries to engage in trade and investment liberalization efforts and to promote trade, not aid, between the United States and that region.[10]

On July 23, 1990, following his meeting with Ecuador's then-President Rodrigo Borja, President Bush announced an additional group of trade measures, now formally called Andean Trade Initiative II ("ATI II"),[11] that was aimed specifically at the four Andean countries.[12] As described in the press release regarding that announcement, the measures were intended to build on the EAI as well as fulfill the President's commitments made at the Andean Summit.[13] As part of these measures, the President announced that he would seek approval of a special tariff preference system for the Andean countries, modeled after the system established in the Caribbean Basin Initiative ("CBI") for Caribbean countries,[14] which would provide duty-free treatment for eligible articles from

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8. *Id.* at 248-251. The "Understandings" in the Declaration of Cartagena also contained a variety of other economic components and specific steps to combat drug trafficking directly, as well as various diplomatic initiatives. These included specific initiatives aimed at promoting alternative development and crop substitution and mitigating the social and economic costs of the fight against illicit drug trafficking. In addition, the countries agreed to attack all facets of drug trafficking with a variety of initiatives, which included, *inter alia*: (1) efforts to prevent consumption and reduce demand; (2) efforts to increase interdiction; (3) involvement of the armed forces in the antinarcotics enforcement; (4) information sharing; (5) eradication of illicit crops; and (6) control of precursor chemicals.

9. *See Bush Announces New Initiatives on Trade, Aid, and Debt Reduction for Latin America*, 7 INT'L TRADE REP. 983-984 (July 4, 1990).

10. *See id.*

11. *See ATPA Hearings*, *supra* note 3, at 38.

12. *See Remarks Following Discussions with President Rodrigo Borga Cevallas of Ecuador*, 26 WEEKLY COMP. PRES. DOC. 1140 (Nov. 7, 1980)

13. *Id.* at 1141.

14. Under CBI, certain articles from designated Caribbean basin beneficiary countries enter the United States duty-free. *See* 19 U.S.C.A., *supra* note 1, § 2701 *et seq.* Duty-free treatment under CBI is permanent. In addition, CBI consists of various non-tariff benefits,

certain designated beneficiary countries in the Andean region.[15] On December 4, 1991 in fulfillment of this objective, President Bush signed into law the ATPA, establishing by legislation a special tariff system for Andean countries.

II. SUBSTANTIVE COMPONENTS OF THE ATPA

Under the ATPA, for a period of ten years commencing on December 4, 1991 and ending December 4, 2001, certain eligible articles from designated Andean countries may receive duty-free treatment when imported into the United States. This preferential tariff regime is essentially identical to the tariff regime established under the CBI, except that the CBI regime has been made permanent.

Under the ATPA, only Bolivia, Ecuador, Peru, and Colombia are eligible to be designated as beneficiary countries.[16] On July 2, 1992, President Bush designated Colombia and Bolivia as beneficiary countries under the ATPA. The designation became effective on July 22, 1992.[17] Neither Ecuador nor Peru has yet been designated as a beneficiary country.[18]

A. *Country Eligibility*

The ATPA has certain country practice standards which the President must take into account in his decision to designate a country as a beneficiary country.[19] The President is prohibited under the statute from designating any country as a beneficiary if the country: (1) is a communist country; (2) has expropriated property of a U.S. citizen without providing prompt, adequate and effective compensation, or entering into good faith negotiations to provide prompt, adequate and effective compensation, or submitting the dispute to arbitration under the provisions

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including, *inter alia*, a special financing mechanism, scholarship assistance, a pilot customs pre-clearance program, and separate cumulation of imports from CBI beneficiary countries in antidumping and countervailing duty investigations. *See* Caribbean Basin Economic Recovery Expansion Act of 1990, Pub. L. No. 101-382, 104 Stat. 629, 655. For a detailed description of the CBI, see U.S. Department of Commerce, *1991 Guidebook — Caribbean Basin Initiative* (1991).

15. *See* 19 U.S.C.A., *supra* note 1, § 2701. Other components of ATI II included expanded agricultural development assistance, the announcement of the results of the special review for the Andean countries conducted under GSP, and reaffirmation of the President's desire to continue encouraging the Andean countries to undertake long-term trade and investment liberalization efforts, *see id.*

16. *See id.* § 3202(b)(1).

17. *See* Proclamation No. 6455, 57 Fed. Reg. 30069 (July 7, 1992); Proclamation No. 6456, 57 Fed Reg. 30097 (July 7, 1992).

18. Designation of these two countries has been delayed because both countries have not met the country practice criteria set forth in the ATPA. For a discussion of the ATPA's country practice criteria, see *ATPA Hearings*, *supra* note 3, at 7-9.

19. These country practice standards are identical to the country practice criteria applicable to Caribbean countries under the CBI and similar to those applicable to developing countries under GSP.

of the International Convention for the Settlement of Investment Disputes or another mutually agreed upon forum; (3) fails to act in good faith in recognizing arbitral awards in favor of U.S. citizens; (4) affords preferential treatment to the products of a developed country and such preferential treatment is likely to have a significant adverse impact on United States commerce; (5) engages in the broadcast of copyrighted material without the express consent of the United States copyright owner or the country fails to work toward the provision of adequate and effective protection of intellectual property rights; (6) is not a signatory to a treaty or convention regarding extradition of U.S. citizens; and (7) has not or is not taking steps to provide internationally-recognized worker rights to its workers.[20] Under the ATPA, the President can waive certain of these requirements if he determines that waiver is in the economic or national security interests of the United States and reports the reasons for such determination to Congress.[21]

The ATPA also has certain additional factors which the President must take into account in his decision to designate a country as a beneficiary country. These criteria include: (1) the expression by such country of its desire to be designated; (2) the economic conditions in the country, including the living standards of its inhabitants and other economic factors; (3) the extent to which the country has assured the U.S. it will provide equitable and reasonable market access; (4) the degree to which the country follows the rules of international trade as established under the GATT and other trade agreements; (5) the degree to which the country uses export subsidies or imposes export performance or local content requirements; (6) the degree to which the trade policies of the country are contributing to the revitalization of the region; (7) the degree to which the country is undertaking self-help measures to promote its own economic development; (8) whether the country has taken or is taking steps to afford its workers internationally-recognized worker rights; (9) the extent to which the country provides adequate and effective means for foreign nationals to secure, exercise, and enforce intellectual property rights; (10) the extent to which the country prohibits its nationals from engaging in the broadcast of copyrighted material belonging to U.S. copyright owners; (11) whether the country has met the narcotics cooperation certification criteria contained in the Foreign Assistance Act of 1961;[22] and (12)

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20. *See* 19 U.S.C.A., *supra* note 1, § 3202(c)(1)-(7).

21. *See id.* The criteria that can be waived if in the national economic or security interests of the United States include whether the country: (1) is a communist country; (2) has expropriated the property of a U.S. citizen without providing prompt adequate and effective compensation; (3) fails to recognize or enforce arbitral award in favor of U.S. citizens; (4) engages in the pirated broadcasts of copyrighted material owned by U.S. citizens or fails to work toward providing adequate and effective protection of intellectual property rights; and (5) has not taken or is not taking steps to afford its workers internationally recognized worker rights, *see id.*

22. Under the Foreign Assistance Act of 1961, as amended, major drug producing countries may receive certain types of U.S. assistance, including duty-free benefits under GSP

the extent to which the country is prepared to cooperate with the United States in the administration of the provisions of the ATPA.[23]

Under the ATPA, the President has authority to withdraw or suspend the designation of any country as a beneficiary country, or the application of duty-free treatment to any article from any country, if the President determines that because of changed circumstances the country should no longer be designated as a beneficiary country.[24] Before the President renders such a determination, the ATPA provides that written comments from the public will be accepted and a public hearing will be held regarding the proposed action.[25] The President is also required to submit to Congress, until the expiration of duty-free benefits under the ATPA, triennial reports concerning the operation of the ATPA, including the results of a general review of the ATPA beneficiary countries' adherence to the ATPA's country practice criteria.[26]

B. *Product Eligibility*

Under the ATPA, certain products are specifically excluded from eligibility for duty-free treatment. Products specifically excluded are (1) textile and apparel articles subject to textile agreements; (2) footwear except certain disposable items of footwear; (3) canned tuna; (4) petroleum and petroleum products; (5) watches and watch parts with any component from a country not eligible for most-favored-nation tariff treatment; (6) certain leather, rubber, and plastic gloves; (7) luggage, handbags, and flat goods; (8) certain leather wearing apparel;[27] (9) certain sugars, syrups

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and CBI, only if the President certifies that they have cooperated fully with the U.S., or taken adequate steps on their own, to control narcotics production, trafficking, and money laundering. *See* 19 U.S.C.A., *supra* note 1, §§ 2491-2495. Countries that otherwise may not meet the certification criteria may nevertheless be certified if certification is in the vital national interests of the United States, *see id.*

23. *See id.* § 3202(d)(1)-(12).

24. *See id.* § 3202(e)(1)(A)-(B).

25. *See id.* § 3202(e)(2)(A)-(B).

26. *See id.* § 3202(f).

27. Although certain leather, rubber, and plastic gloves; certain leather wearing apparel; and luggage, handbags, and flat goods, from designated beneficiary countries are excluded from ATPA duty-free treatment, the ATPA nevertheless reduces the duty-rate for these items when imported from ATPA beneficiary countries. This reduction is equal to 80 percent of the duty rate applicable to the item as of December 31, 1991, except that the reduction may not exceed 2.5 percent *ad valorem*. *See id.* § 3203(c). This reduction is to be implemented in five equal annual stages with the first reduction in the duty rate to apply to entries after January 1, 1992, *see id.* The reduction is in addition to any reduction on duty rates that may be proclaimed as the result of the Uruguay Round of GATT negotiations, except that if the reduction proclaimed is less than 1.5 percent *ad valorem*, the aggregate of the ATPA reduction and the Uruguay Round reduction may not exceed 3.5 percent *ad valorem*. If the Uruguay Round reduction is 1.5 percent of *ad valorem* or greater, the aggregate reduction may not exceed the Uruguay Round reduction plus one percent *ad* valorem, *see id.* The specific Harmonized Tariff Schedule ("HTS") tariff classifications applicable to these items are as follows: leather items — 4202.11.00, 4202.12.20, 4202.12.40, 4202.12.60, 4202.12.80, 4202.19.00, 4202.21.30, 4202.21.60, 4202.21.90, 4202.22.15, 4202.22.40, 4202.22.45,

and molasses; and (10) rum and tafia.[28]

All other products from a designated beneficiary country are eligible for duty-free treatment under the ATPA.

To qualify for duty-free treatment, an article must be the growth, product, or manufacture of a beneficiary country and imported directly from a beneficiary country into the United States.[29] In addition, the sum of the cost or value of the materials produced in the beneficiary country or two or more beneficiary countries, plus the direct cost of processing operations performed in a beneficiary country or countries under the ATPA, must not be less than thirty-five percent of the appraised value of the article at the time it enters the U.S.[30] Materials from and processing performed in CBI beneficiary countries can be counted toward the thirty-five percent value-added requirement.[31] For the purpose of determining

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4202.22.60, 4202.22.80, 4202.29.00, 4202.31.60, 4202.32.40, 4202.32.95, 4202.91.00, 4202.92.15, 4202.92.20, 4202.92.30, 4202.92.45, 4202.92.60, 4202.92.90, 4202.99.00, 4203.10.40, 4203.29.08, 4203.29.18; straw and wickerware — 4602.10.21, 4602.10.22, 4602.10.25, 4602.10.29; and gloves and mittens -- 6116.10.17, 6116.10.45, 6116.10.70, 6116.92.64, 6116.92.88, 6116.93.64, 6116.93.88, 6116.99.48, 6216.00.17, 6216.00.18, 6216.00.28, 6216.00.38, and 6216.00.54. U.S. DEP'T OF COMMERCE, GUIDEBOOK TO THE ANDEAN TRADE PREFERENCE ACT 36 (1992) (Appendix B) (hereinafter "ATPA GUIDEBOOK").

28. *See* 19 U.S.C.A., *supra* note 1, § 3203(b). The HTS tariff classifications for items not eligible for ATPA duty-free treatment, except for textile and apparel articles subject to textile agreements, can be broken down as follows: canned tuna — 1604.14.10, 1604.14.20, 1604.14.30; sugar — 1701.11.03, 1701.12.02, 1701.99.02, 1702.90.32, 1806.10.42, 2106.90.12; rum and tafia — 2208.40.00; petroleum and derivatives — 2709.00.10, 2709.00.20, 2710.00.05, 2710.00.10, 2710.00.15, 2710.00.18, 2710.00.20, 2710.00.25, 2710.00.30, 2710.00.35, 2710.00.40, 2710.00.45; floor coverings — 3921.90.15; footwear — 6401.10.00, 6401.91.00, 6401.92.30, 6401.92.60, 6401.92.90, 6401.99.30, 6401.99.60, 6401.99.80, 6401.99.90, 6402.11.00, 6402.19.10, 6402.19.30, 6402.19.50, 6402.19.70, 6402.19.90, 6402.30.30, 6402.30.50, 6402.30.60, 6402.30.70, 6402.30.80, 6402.30.90, 6402.91.40, 6402.91.50, 6402.91.60, 6402.91.70, 6402.91.80, 6402.91.90, 6402.99.05, 6402.99.10, 6402.99.15, 6402.99.20, 6402.99.30, 6402.99.60, 6402.99.70, 6402.99.80, 6402.99.90, 6403.11.60, 6403.19.15, 6403.19.45, 6403.19.60, 6403.20.00, 6403.30.00, 6403.40.30, 6403.40.60, 6403.51.30, 6403.51.60, 6403.51.90, 6403.59.15, 6403.59.30, 6403.59.60, 6043.59.90, 6403.91.30, 6403.91.60, 6403.91.90, 6403.99.20, 6403.99.40, 6403.99.60, 6403.99.75, 6403.99.90, 6404.11.20, 6404.11.40, 6404.11.50, 6404.11.60, 6404.11.70, 6404.11.80, 6404.11.90, 6404.19.15, 6404.19.20, 6404.19.25, 6404.19.30, 6404.19.35, 6404.19.40, 6404.19.50, 6404.19.60, 6404.19.70, 6404.19.80, 6404.19.90, 6404.20.20, 6404.20.40, 6404.20.60, 6405.10.00, 6405.20.30, 6405.20.60, 6405.20.90, 6405.90.90, 6406.10.05, 6406.10.10, 6406.10.20, 6406.10.25, 6406.10.30, 6406.10.35, 6046.10.40, 6046.10.45, 6406.10.50, 6406.10.77, 6501.00.90, 6503.00.90, 6505.90.30, 6505.90.40, 6505.90.50, 6505.90.60, 6505.90.70, 6505.90.80; glass fibers — 7019.10.10, 7019.10.20, 7019.20.10, 7019.20.20, 7019.20.50; and bedding — 9404.90.10. *See* ATPA GUIDEBOOK, *supra* note 27, at 31-36 (app.B).

Although the duty-free system in the ATPA is patterned after the duty-free regime in CBI, rum and tafia are not statutorily excluded from duty-free treatment under CBI, while they are statutorily excluded under the ATPA. *See id.*

29. *See* 19 U.S.C.A. *supra* note 1, § 3203(a)(1)(A). Also, if a product is substantially transformed into a new and different article in a designated ATPA beneficiary country it may be eligible for ATPA duty-free treatment if exported from the beneficiary country to the U.S. *See* ATPA GUIDEBOOK, *supra* note 27, at 4.

30. *See* 19 U.S.C.A. *supra* note 1, § 3203(a)(1)(A)-(B).

31. *See id.*

the thirty-five percent value-added requirement, a "beneficiary country" includes Puerto Rico and the U.S. Virgin Islands.[32] In addition, fifteen percent of the appraised value attributed to U.S. materials may be applied toward the thirty five percent figure.[33] The ATPA specifically excludes from eligibility for duty-free treatment articles that have merely undergone simple combining or packaging operations, or mere dilution that does not materially alter the article.[34]

Under the ATPA, the President may suspend duty-free treatment on any eligible article if the action is proclaimed as import relief under Title II of the Trade Act of 1974,[35] or for national security reasons under Section 232 of the Trade Expansion of 1962.[36]

The ATPA also requires that the U.S. International Trade Commission prepare and submit to the U.S. Congress, after the ATPA's first twenty four months and every calendar year thereafter until ATPA duty-free treatment expires, a study regarding the economic impact of the ATPA on United States industries and consumers, and, in conjunction with other U.S. government agencies, an assessment of the ATPA's effectiveness in promoting drug-related crop eradication and crop substitution efforts of the ATPA beneficiary countries.[37] In addition, the ATPA requires the Secretary of Labor to, in consultation with other federal agencies, undertake a continuing review and analysis of the effect of the ATPA on U.S. labor and to provide Congress with annual reports regarding the results of this review and analysis.[38]

III. IMPACT OF ATPA

The benefits provided to the designated beneficiary countries under the ATPA are relatively narrow in scope, but are not necessarily insignificant.[39] The benefits are considerably broader than the benefits the An-

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32. *See id.*

33. *See id.* The cost or value of materials from non-CBI or ATPA countries (excluding the U.S., Puerto Rico, and the U.S. Virgin Islands) may count toward the 35 percent value-added requirement if the materials are first substantially transformed in a CBI or ATPA beneficiary country into a new and different article, and then substantially transformed a second time upon incorporation into the exported article. *See* ATPA GUIDEBOOK, *supra* note 27, at pp. 4-5.

34. *See* 19 U.S.C.A., *supra* note 1, § 3203(a)(2)(A)-(B).

35. *See id.* §§ 2251-2253. Title II of the Trade Act of 1974 authorizes the President to take action, which includes the imposition of duties or other import relief, for up to eight years to allow domestic industries that are seriously injured by increasing imports to make a positive adjustment to import competition, *see id.* The ATPA also contains provisions concerning emergency relief for perishable products, *see id.* § 3203(e)(1)-(4).

36. *See* 19 U.S.C. § 1351 (1988). Section 232 of the Trade Expansion Act of 1962 gives the President authority to impose import restrictions, including additional duties, on imports which threaten to impair national security, *see id.*

37. *See* 19 U.S.C.A., *supra* note 1, § 3204(a)-(c).

38. *See id.* § 3205.

39. Although frequently compared to the benefits provided to Caribbean countries under CBI, the ATPA is, in fact, a more limited program. CBI is now a permanent program

dean countries currently receive under GSP. Although a significant percentage of exports from these countries (approximately forty-three percent) already receive GSP or most-favored nation duty-free treatment, under the ATPA an additional $324 million or six percent of total imports from the four countries based on 1990 figures are eligible for duty-free treatment.[40]

Moreover, because the eligibility of certain articles for duty-free treatment under the ATPA is not subject to the annual review process under the GSP program, the ATPA provides greater certainty with respect to continued receipt of duty-free benefits for those products that are eligible for duty-free treatment under the ATPA.

The ATPA also offers certain advantages over GSP value-added requirements. Under GSP, the thirty-five percent value-added requirement must occur within the beneficiary country. Under the ATPA, the thirty-five percent can include processing or materials from other ATPA beneficiary countries, CBI beneficiary countries, Puerto Rico, and the U.S. Virgin Islands. In addition, U.S. materials can be counted toward the thirty-five percent value-added requirement, up to fifteen percent of the appraised value of the merchandise.

Because it provides broader benefits than GSP and institutionalizes for ten years duty-free access to the U.S. market for certain products, it is hoped that the ATPA will serve as an incentive for farmers in Latin America to engage in legitimate agricultural activities as opposed to coca production. The ATPA is also expected to contribute to further growth in U.S. trade in goods and services with beneficiary countries. The theory is that since the ATPA will contribute to the further growth and development of the Andean countries' economies, demand for U.S. goods and services in those countries will also increase. Moreover, it is anticipated that the ATPA will contribute to increased U.S. investment in the Andean region in light of the low labor costs and additional incentives it creates for exporting to the United States.

Finally, the ATPA has symbolic importance. It is a concrete reflection of the U.S government's commitment to the Andean region, and its willingness to provide incentives to encourage trade in legitimate products between the U.S. and the Andean countries.

CONCLUSION

Within the context of the Bush Administration's war on drugs, the ATPA grew out of several initiatives and policies aimed at the Andean

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that in addition to providing duty-free access for certain articles from the Caribbean, also provides, various non-tariff benefits. *See id.* § 2701. By contrast, the benefits to the four beneficiary countries under the ATPA, are limited to the provision of duty-free treatment for certain exports to the United States, *see id.* § 3202.

40. *See* H.R. Rep. No. 337, 102d Cong., 1st Sess. 8 (1991), *reprinted in* 1991 U.S.C.C.A.N. 820.

region. Although perhaps narrow in scope, the ATPA is not necessarily insignificant. A consideration of the substantive content of the ATPA against the backdrop of the GSP regime reveals that the ATPA is broader and more permanent. Moreover, because the ATPA is a concrete reflection of the Bush Administration's commitment to the Andean region by virtue of the ATPA's geographic focus, the ATPA has symbolic importance. In short, the ATPA is likely to promote trade in legitimate products between the U.S. and the Andean countries and thereby have a positive impact on the Andean region.

STUDENT COMMENT

Environmental Law in Mexico*

Today, Mexico faces the challenge of economic growth and development to satisfy its internal economic needs as well as to become an actor in the international market. Accompanying this drive to develop are a variety of environmental impacts. Developing solutions to address Mexico's environmental issues is one of the major endeavors confronting the Mexican government, both presently and prospectively. Aside from the threat of natural catastrophes, such as earthquakes in the central and southern regions, Mexico is troubled with scarce and polluted water resources in the north, poor water quality in the central and lower southeast regions, deforestation and widespread erosion.[1] Significant air pollution problems exist in major cities, such as Mexico City, as well as in urban developments along the U.S./Mexico border.[2] The future of the Mexican economy and the welfare of the Mexican people, depends on developing solutions to Mexico's environmental problems.

This report provides a summary and analysis of the current environmental regimes existing in Mexico. It also provides a discussion of some

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* Author's Note: Since the completion of this report, the Mexican Congress, in May, 1992, passed new legislation reducing the role of the federal environmental authorities. The legislation transformed the Secretariat of Urban Development and Ecology (SEDUE) into the Secretariat of Social Development (SEDESOL). With the transformation of SEDUE into SEDESOL under the new legislation, local authorities have greater discretion in interpreting and applying Mexico's environmental regulations. In addition, the new legislation created the National Institute of Ecology (INECO), which is directed to define federal environmental policy, set national ecological norms and conduct research. The Federal Attorney General for Environmental Protection is now charged with the enforcement of federal standards. Technical norms interpreting and applying the new environmental management and enforcement regime are pending. *Environmental Law; Building and Related Permits*, BUS. INT'L; INVESTING, LICENSING & TRADING, Oct. 5, 1992, *available in* LEXIS, North/South America, Mexico; *Mexico Localizes Environmental Enforcement*, BUS. INT'L; INVESTING, LICENSING & TRADING, Oct. 5, 1992, *available in* LEXIS, North/South America, Mexico; *see SEDUE Re-Emerges Under SEDESOL*, BUSINESS MEXICO, Sept. 1992, *available in* LEXIS, North/South America, Mexico.

1. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, MEXICO, July, 1991 [hereinafter THE WORLD FACT BOOK].

2. *Id.*

of the major political efforts and legal instruments, which exist to help further Mexico's environmental management scheme.

I. OVERVIEW

The Mexican legal system is a mixture of constitutional theory, modeled after the United States, and civil law traditions.[3] The constitution dates back to February 16, 1917. In Mexico, both federal and state governments promulgate laws that are subject to judicial review. Nationally, there are sixty-eight district courts and a series of appellate courts culminating with a supreme court. In the international arena, Mexico accepts the compulsory jurisdiction of the International Court of Justice with reservations.[4]

A. *Political Structure*

Mexico is a federal republic, operating under a centralized government.[5] There are thirty-one states and one federal district.[6] Mexico has a presidential form of government.[7] The president is elected for six-year terms and has the power to appoint a cabinet.[8] The presidential cabinet is comprised of ministers who control various national ministries. The following ministries relate to environmental affairs: 1) agrarian reform, 2) agriculture and hydraulic resources, 3) energy and mines industry, 4) fisheries, 5) health, and 6) urban development and ecology.[9]

The national legislature is comprised of a bicameral Congress.[10] The Senate is the upper chamber, while the lower chamber is known as the Chamber of Deputies.[11] Sixty-four Senate members, two from each state

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3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.* The names of the thirty-one states, along with the federal district are: Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, Mexico, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan and Zacatecas.

7. *Id.*

8. *Mexico Political Structure Table*, BUS. INT'L; COUNTRY REPORT, Feb. 26, 1992, *available in* LEXIS, Intlaw, North/South America, Mexico.

9. *See id.* The remaining ministries, some of which indirectly relate to environmental concerns are: 1) commerce and industrial development, 2) communications and transport, 3) comptroller general, 4) education, 5) finance and public credit, 6) foreign relations, 7) government, 8) labor and social welfare, 9) national defence, 10) navy, 11) programming and budget and 12) tourism.

In May, 1992, the Mexican government transformed the Ministry of Urban Development and Ecology (SEDUE) into the Secretariat of Social Development (SEDESOL). *Mexico Political Structure Table*, BUS. INT'L; INVESTING, LICENSING & TRADING, Oct. 5, 1992, *available in* LEXIS, Intlaw, North/South America, Mexico.

10. *Id.*

11. THE WORLD FACT BOOK, *supra* note 1.

plus an additional two from the federal district, hold office for six years.[12] The Chamber of Deputies is composed of five hundred members: three hundred members are elected directly and two hundered are elected on the basis of proportional representation.[13]

The same political party has been in control of the Mexican federal government since the 1920's.[14] However, the influence of the dominating party, known as the Partido Revolucionario Institucional, has diminished over the years.[15] The incumbent president, Carlos Salinas de Gortari, a member of the Partido Revolucionario Institucional, received merely 50.4 percent of the vote in 1988.[16]

At the regional level, each state has a governor and a local legislature. Governors are elected to serve six-year terms. Each state, acting through its respective legislature, may impose and collect taxes.[17]

B. *Treaties*

In furtherance of its environmental goals and programs, Mexico has entered into bilateral and multilateral international agreements relating to environmental concerns. These agreements may be comprehensive, or specifically targeted to address a particular environmental issue.

One such multilateral agreement, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[18] has been signed and ratified by Mexico. The Basel Convention requires exporting countries to provide advance notice of proposed waste shipments. Wastes can only be sent after the receiving country gives its consent. The receiving country must assure that wastes will be disposed of in an environmentally sound manner.[19]

Mexico is also a party to the 1985 Vienna Convention for the Protection of the Ozone Layer[20] and the Montreal Protocol On Substances that Deplete the Ozone Layer.[21] Likewise, Mexico is a party to several conventions relating to the prevention of marine pollution: the Convention for the Protection and Development of the Marine Environment of the

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12. *Mexico Political* - Feb., *supra* note 8.

13. *Id.*

14. *Id.*

15. *Mexico Political Structure Table*, BUS. INT'L; COUNTRY REPORT, June 21, 1991, *available in* LEXIS, Intlaw, North/South America, Mexico.

16. *Id.* There are five major opposing political parties: the Partido de Accion Nacional, the Partido de la Revolucion Democratica, the Partido Popular Socialista, the Partido Autentico de la Revolucion Mexicana, Partido del Frente Cardenista de Reconstruccion Nacional.

17. *Id.*

18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, U.N.E.P. Doc. IG.80/3, March 22, 1989, *reprinted in* 28 I.L.M. 649 (1989).

19. *Id.*

20. 26 I.L.M. 1516 (1987).

21. 26 I.L.M. 1541 (1987); 30 I.L.M. 537 (1991).

Wider Caribbean Region;[22] the International Convention for the Prevention of Pollution from Ships,[23] and the 1978 Protocol to that Convention (MARPOL 73/78);[24] the 1972 Convention on the Prevention of the Marine Pollution by Dumping of Wastes and Other Matter (the London Dumping Convention);[25] and the Third United Nations Convention on the Law of the Sea (UNCLOS).[26] The United Nations Convention on the Law of the Sea is not yet in force, however it has been signed and ratified by Mexico.

Mexico has also signed bilateral agreements with the United States of America. The two major U.S./Mexico bilateral agreements concerning environmental protection are the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, known as the Water Treaty of 1944,[27] and the 1983 Agreement between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area[28] (the La Paz Agreement) and its five annexes.[29]

The 1944 Water Treaty allocates the surface waters of the Rio Grande/Rio Brave between Mexico and the United States.[30] The 1944 Water Treaty replaced the International Boundary Commission (IBC), originally established under the 1889 International Boundary Convention, with the International Boundary and Water Commission (IBWC).[31] The present IBWC has greater powers to govern water usage, water quality, wastewater treatment, and conservation.

The La Paz Agreement provides for the creation of technical "annexes" concerning specific projects. Annex I addresses Tijuana/San Diego wastewater treatment facilities.[32] Annex II authorizes a joint emergency response team to clean up accidental oil and hazardous substance spills along the two hundred kilometer-wide joint inland international border.[33] Annex III governs the transboundary shipment of hazardous wastes and

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22. 22 I.L.M. 221 (1983).
23. 12 I.L.M. 1319 (1973).
24. 17 I.L.M. 546 (1978).
25. 11 I.L.M. 1291 (1972).
26. U.N. Doc. A/Conf. 62/122 of Oct. 7, 1982, *reprinted in* 21 I.L.M. 1261 (1982).
27. Water Treaty of 1944, Feb. 3, 1944, U.S.-Mexico, 28 U.S.T. 7399, w/supp. protocol signed Nov. 14, 1944.
28. Aug. 14, 1983, T.I.A.S. No. 10827, 22 I.L.M. 1025 (1983).
29. U.S. ENVIRONMENTAL PROTECTION AGENCY AND SECRETARIA DE DESARROLLO URBANA Y ECOLOGIA (SEDUE), INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICO-U.S. BORDER AREA, (First Stage, 1992-1994) at A-8 (1992) [hereinafter INTEGRATED ENVIRONMENTAL PLAN].
30. Darcy Alan Frownfelter, *Water as a Natural Resource - The Regulation of Water by International Treaties, available in* LEGAL ASPECTS OF DOING BUSINESS IN MEXICO, ST. MARY'S L.J., INT'L L. SYMP. (March 6, 1992)(unpublished documents) [hereinafter *Water as a Natural Resource*].
31. INTEGRATED ENVIRONMENTAL PLAN, *supra* note 29, at A-6.
32. 26 I.L.M. 18 (1987)(signed Jul. 18, 1985).
33. 26 I.L.M. 19 (1987)(signed Jul. 18, 1985).

substances between the United States and Mexico.[34] Annex IV addresses copper smelters in specified border areas.[35] Lastly, Annex V confronts the problem of urban air pollution and allows for the identification and appraisal of specific study areas in border cities within Mexico and the United States.[36]

Some lesser known bilateral cooperative agreements entered between Mexico and the United States include the Agreement between the Directorate General of Natural Resources of the Ministry of Ecology and Urban Development and the U.S. Fish and Wildlife Service for Cooperation in the Conservation of Wildlife (1984);[37] and the Agreement between the Forest Service of Mexico and the U.S. Forest Service on Cooperation (1985).[38]

It is important to note that by becoming a signatory to the General Agreement on Tariffs and Trade (GATT),[39] Mexico displayed a commitment to the pursuit of free trade.[40] The recent GATT panel ruling exemplifies the fact that the international dispute resolution process can also have a substantial impact on environmental policy.[41] Beyond treaties and agreements dealing directly with environmental concerns, there are other avenues by which customary international law may have a direct or indirect effect on environmental issues in Mexico.

II. ENVIRONMENTAL LAW

General Concepts of Environmental Law in Mexico

The General Law of Ecological Equilibrium and Environmental Protection, hereinafter referred to as the General Ecology Law, became effective March 1, 1988.[42] The Ministry of Ecology and Urban Development of

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34. 26 I.L.M. 25 (1987)(signed Nov. 12, 1987).

35. 26 I.L.M. 33 (1987)(signed Jan. 29, 1987).

36. 29 I.L.M. 29 (1990)(signed Oct. 3, 1989).

37. INTEGRATED ENVIRONMENTAL PLAN, *supra* note 29, at A-6.

38. *Id.*

39. Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1950)(entered into force Jan. 1, 1948).

40. Bruce Stokes, *Greens Talk Trade*, 23 NAT'L J. 862, 863 (Apr. 13, 1991).

41. NATIONAL WILDLIFE FEDERATION, COMMENTS ON THE DRAFT REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES (Nov. 1991) 5, in NATIONAL WILDLIFE FEDERATION, TRADE AND THE ENVIRONMENT: INFORMATION PACKET (1991)(unpublished documents), [hereinafter COMMENTS ON THE DRAFT REVIEW].

Based upon a complaint brought by Mexico against the United States, a GATT panel held that the Marine Mammal Protection Act, (U.S. legislation), violated GATT. *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594, 1623 (1991); The Bureau of National Affairs, Inc., *U.S. Embargo on Mexican Tuna Violations GATT Rules Panel Finds*, 8 INT'L TRADE REP. 1288 (1991); Jessica Mathews, *Dolphins, Tuna and Free Trade*, THE WASH. POST, October 18, 1991 at A21. The complaint was provoked by a tuna embargo imposed by the United States against Mexico for indiscriminate dolphin kill.

42. General Law of Ecological Equilibrium and Environmental Protection, art. 8(V) (1988) [hereinafter General Ecology Law]. English translation found in, MEXICAN ENVIRON-

Mexico,[43] referred to as SEDUE, is responsible for the formulation and direction of national ecological and environmental policy. SEDUE is the major enforcement body of the General Ecology Law.

SEDUE creates and develops programs to preserve and restore the ecological equilibrium and to achieve an integrated management of natural resources.[44] To improve efficiency, the General Ecology Law encourages cooperation among federal, state and local governments in Mexico.[45] In addition, joint efforts between SEDUE and the United States Environmental Protection Agency (EPA), exist to improve environmental conditions in the border areas, as well as further within Mexico.

SEDUE enforces the General Ecology Law through the issuance of Technical Ecological Norms, NTEs.[46] NTEs are separately issued regulations which establish ecological standards, including criteria, procedures, tests, and facility requirements.[47] Private or public activities which may cause ecological imbalance, or those that may exceed the limitations provided for in the relevant NTE standards are subject to environmental impact evaluation.[48] Thus, the assessment of possible environmental effects must be provided for in the form of an environmental impact statement (EIS) prior to authorization by SEDUE, or by other appropriate state or local agencies.[49] This EIS must provide risk assessments of proposed or modified activities along with preventive and corrective measures to mitigate adverse environmental impacts.[50]

The proposed North American Free Trade Agreement, NAFTA, will likely attract more investment in the country of Mexico. Indeed that is what is hoped for by some. The government of Mexico must therefore

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MENTAL DOCUMENTS, August 1991, (unpublished documents), provided by the World Environment Center [hereinafter MEXICAN ENVIRONMENTAL DOCUMENTS].

For a background analysis of environmental policy in Mexico, leading up to the present regulatory regime, *see* Stephen P. Mumme, C. Richard Bath & Valerie J. Assetto, *Political Development and Environmental Policy in Mexico*, 23 LATIN AM. RES. REV. 7 (1988).

43. Secretaria De Desarrollo Urbano Y Ecologia.

44. General Ecology Law, *supra* note 42, art. 8(V).

45. *Id.* art. 4. Because concurrent jurisdiction exists over most environmental and ecological matters, federal, state and local governments are encouraged to cooperate.

46. *Id.* art. 8.

47. *Id.* arts. 36-37.

48. *Id.* arts. 28-35.

49. *Id.* art. 28. In addition to jurisdiction over environmental impact evaluations, the evaluation of the following specific areas are reserved to SEDUE:

> 1) federal public works; 2) hydraulic works, general communication ways, oil pipelines, gas pipelines, and coal chutes; 3) chemical, petrochemical, steel, paper, sugar, liquor, cement, automotive, and electrical generation and transmission industries; 4) exploration, extraction, treatment and refining of mineral and non-mineral substances reserved to the Federal Government; 5) federal tourism development; 6) installations for treatment, storage, or elimination of hazardous residues, and of radioactive residues; and 7) use of forests and tropical jungles and of species whose regeneration is difficult.

Id. art. 29(I-VII).

50. *Id.* art. 34.

continue to establish and strengthen enforcement powers of the appropriate environmental protection agencies. Increased economic activity will place an increased burden on the environment. A sound and responsive environmental regime must exist throughtout Mexico. The negative environmental behavior patterns, exhibited by many "maquiladora" industries along the U.S.-Mexican border, must not spread to areas of Mexico where environmental enforcement is weak or non-existent.[51]

A. *Air*

The General Ecology Law announces that "[a]ir quality must be satisfactory in all human settlements and in all regions of the nation; and . . . [e]missions of pollutants into the atmosphere . . . must be reduced and controlled to assure air quality satisfactory for the welfare of the population and ecological equilibrium."[52] SEDUE may issue NTEs to control, reduce, or avoid air pollution. These standards should specify permissible levels of emission by pollutant, require the installation of control equipment, establish air quality monitoring systems, establish certification standards, set vehicle emission standards, and establish vehicle testing procedures.[53]

The General Ecology Law requires state and local governments to create and implement procedures "to prevent and control air pollution on property and zones within state jurisdiction."[54] In addition, these authorities shall apply general atmospheric protection criteria by enacting decrees and provisions which designate zones for polluting industries. The installation of emission control equipment shall be required as appropriate.[55]

State and local governments are also required to inventory fixed sources of pollution, establish auto emission verification systems, establish air quality monitoring systems, and regulate emissions from public transportation, excluding federal transportation. In combination, these provisions require authorities to take all preventive measures necessary to avoid environmental risk due to air pollution. The General Ecology Law authorizes states and local governments to enact measures for the enforcement of state environmental laws, including the imposition of sanctions.[56]

All emitters of pollutants into the atmosphere must observe these state and local provisions, along with subsequent regulations. The release of emissions containing hazardous residues or materials may only occur

51. *See infra* notes 184-202 and accompanying text for discussion of the Maquiladora Program in Mexico.

52. General Ecology Law, *supra* note 42, art. 110(I) & (II). The prevention and control of air pollution is addressed in articles 110-116.

53. *Id.* art 112.

54. *Id.* art. 112(I).

55. *Id.* art. 112(III).

56. *Id.*

with prior authorization from SEDUE. In addition, the General Ecology Law requires that authorities create zones where industrial uses are suitable adjacent to residential areas.[57]

The issuance of technical norms or standards for the control of air pollution has occurred since 1988. This action was prompted as a result of severe air pollution problems experienced by a number of cities within Mexico.[58] The essential information and standards contained in these NTEs is provided in the following discussion.

1. Air Pollution Ecological Technical Norms[59]

a. Initial automobile emission standards[60]

Gasoline engines emit pollutants into the atmosphere by inefficient or incomplete combustion of the air-gasoline mixtures in the cylinders. Air quality is thereby reduced in the affected area. Maximum permissible air emissions prevent significant changes in air quality.

This technical norm sets the maximum permissible levels of carbon monoxide and hydrocarbons generated by internal combustion engines using gasoline fuel. "The standards are issued by public order, in the interest of society, and are to be observed by the users of automobiles."[61] These auto emissions standards are set as a function of the year the engine was manufactured.[62]

b. Emission standards for newly manufactured gas powered vehicles[63]

Auto emission standards for new gasoline powered vehicles have been issued by the Secretary of Urban Development and Ecology. These stan-

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57. *Id.* arts. 113 & 114.

58. *See generally, Battling Pollution in Mexico City*, 1991 International Reports - a division of IBC USA (Publications) Inc. Mexico Service, June 5, 1991, *available in* LEXIS, Intlaw, North/South America, Mexico 2.

59. Translations of Mexico's Air Pollution Ecological Technical Norms are available in MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42.

NOTE: The concentrations and units of measurement presented in the forthcoming tables, correspond to the levels as presented in the above referenced documents.

60. NTE-CCAT-003/88.

61. *Id.* art. 2.

62. *Id.* art. 4.

Maximum Permissible Emission Levels

Year	CO (% volume)	HC (ppm)
*1979 and before	6.0	700
1980 - 1986	4.0	500
1987 and later	3.0	400

* In areas located at 1500 meters above sea level, the maximum levels for care made before 1979 are 5.5 CO and 650 HC.

63. NTE-CCAT-004/88.

dards do not apply to agricultural tractors, motorcycles, vehicles weighing less than 400 kg or more than 3,000 kg.[64] With regard to the application of the standard, definitions are provided for the following terms: year, model, automobile, basic chassis, line, engine, gross weight, manufacturing plant, front platform, drive train, and commercial vehicle. A year model is defined as "[t]he period between November 01 of one year, and October 31 of the next year."[65]

Article Four of this technical norm provides tables setting the maximum auto exhaust emission levels for hydrocarbons, carbon monoxide and nitrogen oxide. Table 1 establishes further emission standards for future automobiles.[66] Additional tables provide the standards for commercial vehicles over 2,727 kg gross weight.

c. Automobile inspections[67]

This standard establishes the equipment characteristics and testing procedures for the inspection of gasoline powered motor vehicle emissions. Federal, state and municipal authorities must verify that motor vehicle emissions do not exceed the maximum permissible levels by establishing inspection centers.[68]

This ecological standard sets forth appropriate tests and specific procedures. The standard further provides that the present technical norm should be publicly displayed at all inspection centers, whether public or private.[69]

d. Stationary sources[70]

This standard establishes "maximum permissible levels of emission in the atmosphere of particulates, Carbon Monoxide [(CO)], Sulfur Dioxide [(SO2)], and Nitrogen Oxides [(NOx)] generated by diesel stationary sources, when the combustion gases are not in direct contact with the process materials."[71] Operating diesel stationary sources emit pollutants such as CO, SO2, NOx and particulates. These pollutants may then react

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64. *Id.* art. 1.
65. *Id.*
66. *Id.*

Table 1. Automobiles

Year model of vehicle	Maximum Permissible Emission Levels (g/km)* HC	CO	NOx
1989	2.00	22.00	2.30
1990	1.80	18.00	2.00
1991-92	0.70	7.00	1.40
1993 and later	0.25	2.11	0.62

* g/km = grams of contaminant per kilometer.

67. NTE-CCAT-013/89
68. *Id.*
69. *Id.* art. 14.
70. NTE-CCAT-005/88.
71. *Id.* art. 1.

with other chemicals at a site forming other contaminants with greater toxic properties. Emissions then lead to a deterioration in the surrounding air quality.

Definitions of the following terms are listed: combustion, diesel, combustion equipment, stationary source, combustion process, combustion start-up operation, blow-out operation, and critical zone. In particular, a stationary source is defined as "[a]n establishment, which is involved in industrial, commercial, or service operations, or processes, or activities which do, or may, generate contaminating emissions in the atmosphere." A critical zone is defined as "[a]n atmospheric zone in which, because of its topographic and meteorological characteristics, [a] high concentration of pollutants are registered, or are difficult to disperse."[72]

This standard also governs daily start-up and blow-out operations. It provides that the maximum permissible levels of emissions may be exceeded for a time period no greater than 15 minutes, 3 times a day for each. Quantitative measurement procedures shall be established with the corresponding Official Mexican Standards, or in particular cases, those "issued by the competent authorities."[73]

e. Emissions of solid particulates from stationary sources[74]

Factors considered in setting the maximum emission levels of solid particulates from stationary sources include: the location of the stationary sources, technological developments which reduce pollution, the modification of industrial processes technologies, and the installation of control equipment.[75] These standards exclude those solid particulates generated by calcification furnaces of the cement industry, and by combustion processes.[76] In addition to the definitions of stationary source and critical zone, gas flow is defined as "a quantity of gas, flowing through an area during a certain time period." The standard provides the maximum permissible emissions levels of solid particles in the atmosphere, generated

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72. *Id.* art. 3.

73. *Id.* art. 6.

	Maximum Permissible Emission Levels*	
Contaminants	Critical Zones (Kg/m3)	Rest of the country (Kg/m3)
Particulates	.260	.300
CO	.600	.665
SO2	17.000	34.000
**NOx	2.700	3000

* The maximum permissible levels from diesel combustion processes are expressed in "kilograms of contaminants per cubic meter of diesel, consumed at 298 degrees K (25 degree C)," referred to as Kg/m3.

** Nitrogen oxides are expressed as nitrogen dioxide.

74. NTE-CCAT-009/88.

75. *Id.*

76. *Id.* art. 1.

by stationary sources, according to the flow of gases.[77]

f. Emission levels from stationary sources using fuel oil[78]

These standards were set in consideration of the following factors: only fuel oil is used during combustion processes, the degree of optimization of the processes, the actual control technologies, and possible alternative high quality fuels.[79] The maximum emission levels were set for particulate matter, CO, SO2, and NOx, generated by stationary sources solely utilizing fuel oil. The standards apply only "when combustion gases are not in direct contact with process materials."[80]

Similar definitions to those given in the previously referenced NTE for stationary sources are provided. Of relevance, fuel oil is defined as a "[c]ombustible substance, obtained as a residual in crude oil refining, and which satisfies the established quality control specs."[81]

The maximum contaminant levels from oil combustion processes are expressed in "kilograms of contaminants per cubic meter of diesel, consumed at 298 degrees K (25 degree C),"[82] and are referred to as Kg/m3. The maximum permissible levels may be exceeded during start-up and blow-out, for a period of time not to exceed 15 minutes, 3 times a day.[83]

A reference is made to equipment with combustion capacity in excess of 106 x 10-9 joules/hr, and provides that the maximum levels may be exceeded only during start-up operations, in periods no longer than 7 hours, and for no more than 2 times per year.

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77. *Id.* art. 4.

Maximum Permissible Emission Levels

*Gas flow in the source (m3/min)	Critical zones (Mg/m3)	Rest of the country (Mg/m3)
5	1536	2304
10	1148	1722
20	858	1287
500	326	489
1000	166	249
10000	63	95
50000	32	48

* Please note that the above table only provides a selection of those particular gas flows listed in NTE-CCAT-009/88. Please refer to the standard for a complete listing, and for the extrapolation formula. A formula is provided to calculate the maximum levels for gas flows but is not listed in the table.

78. NTE- CCAT-007/88.

79. *Id.*

80. *Id.* art. 1.

81. *Id.* art. 3.

82. *Id.* art. 4.

83.

g. Maximum emissions from coal burning thermoelectric stations[84]

This standard establishes maximum emissions from coal burning thermoelectric stations of particulates, carbon monoxide, sulfur dioxide, and nitrogen oxides.[85] Coal is defined as a "[s]olid combustible material, which carbon content varies from 10 to 90% in weight."[86]

h. Procedure for measuring carbon monoxide[87]

This ecological standard provides for an official procedure for monitoring and detection of carbon monoxide in the atmosphere. The standard mandates that "federal, state, and municipal officials, responsible for [the establishment] and operation of the manual systems for air quality monitoring and carbon monoxide concentration measurements" observe its requirements.[88] Among its technical requirements, the standard directs that designated stations use a "non-dispersive photometer" method to measure the amounts of carbon monoxide in the atmosphere.[89]

i. Procedure for measuring suspended particulate matter[90]

This standard provides the official procedure for determining the concentration of suspended air particles. Suspended particles are defined as "any solid or liquid particles, dispersed in the atmosphere, with diameter up to 100 [micrometers] in a form of dust, vapor, metal particles,

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Maximum Permissible Emission Levels

Contaminants	Critical Zones Kg/m3	Rest of the country Kg/m3
Particulates	4.240	6.740
CO	.600	.660
SO2	57.000	95.000
*NOx (i)	6.600	6.600
(ii)	8.000	8.000

* Nitrogen oxides are expressed as nitrogen dioxide.
(i) For combustion capacity up to 106 x 10-9 joules/hr.
(ii) For combustion capacity greater than 106 x 10-9 joules/hr.

84. NTE-CCAT-006/88.

85.

Maximum Permissible Emission Levels

Contaminants	Kg/m3*
Participants	3.600
CO	0.270
SO2	51.300
**NOx	10.000

* Kg/m3 = Kilograms of contaminants per cubic meter of coal, in dry form.
** NOx, expressed as nitrogen dioxide.

86. *Id.* art. 3.
87. NTE-CCAT-001/88.
88. *Id.* art. 5.
89. *Id.* art. 4.
90. NTE-CCAT-002/88.

among others."[91] The procedure utilizes a high volume sample.[92] The standard is to be observed by federal, state and municipal officials, responsible for establishing and operating the air quality monitoring systems where suspended particles are found.[93]

B. *Water*

Greater treatment of wastewater is needed for the maintenance of the overall water quality within Mexico. The quantity of water is limited. The border areas of northern Mexico are developing at a rate which far exceeds the development of water resources and treatment facilities. Polluted waters severely limit the "sustainability" of fresh and ground water resources. In addition, depleted and polluted water resources have a negative impact on wildlife.

The water resources in the Rio Grande/Rio Brave basin area are comprised of surface water and ground water.[94] The basin's water resources are considered to be international or transboundary in nature. The 1944 Water Treaty allocates the surface waters in the Rio Grande/Rio Brave basin; however, there is no international agreement or treaty to regulate transboundary groundwater supplies. Supplies for water on both sides of the border are limited. In particular, medium range forecasts indicate that demands will exceed the water supply in the Rio Grande/Rio Brave basin.

The General Ecology Law encourages the rational use of water resources in a manner that protects aquatic ecosystems and equilibrium.[95] Article Eighty-nine of the General Ecology Law requires that a National Hydraulic Program be formulated. It compels officials to create criteria and standards for the protection of the physical environment, as well as for the protection of human health and consumption.[96] The standard directs that environmental impact studies shall be performed, and that restoration of aquatic ecosystems shall occur as is feasible.[97]

SEDUE, the Ministry of Agriculture and Hydraulic Resources, and the Ministry of Fisheries manage and regulate water resources. SEDUE is authorized, under the General Ecology Law, to issue technical norms for the control of surface, groundwater and marine water pollution.[98]

The General Ecology Law contemplates a comprehensive water regu-

91. *Id.* art. 3.
92. *Id.* art. 5.
93. *Id.* art. 2.
94. *Water as a Natural Resource*, *supra* note 30, at 3.
95. General Ecology Law, *supra* note 42, art. 88.
96. *Id.*
97. *Id.* art. 95.
98. *Id*; U.S. Environmental Protection Agency, Office of General Counsel, Office of Enforcement, Mexican Environmental Laws, Regulations and Standards - Preliminary Report of EPA Findings, revised June 19, 1991, 13, 14, (unpublished document), [hereinafter Mexican Environmental Laws].

latory system, implemented by regulations.[99] Although the system is not fully developed, wastewater discharges should occur only when authorized.[100] Unpermitted discharges may lead to penalties or closures.[101]

The National Water Commission is a decentralized agency of the Ministry of Agriculture and Hydraulic Resources.[102] It is charged with the distribution, management, care, and conservation of water throughout Mexico.[103] Its responsibilities include the operation, maintenance and development of the necessary infrastructure for the support of water resource systems.[104]

C. *Natural Resources & Energy*

1. Soil

The General Ecology Law promotes rational land and soil use.[105] It protects soil from degradation and erosion and mandates that land use methods be modified to minimize deleterious effects on the environment. Accordingly, the law supports farming methods which promote or restore ecological equilibrium.[106]

The General Ecology Law provides ecological criteria and direction for soil protection programs and authorizes the development of a national land system. Tax incentives may be given for ecologically sensitive forestry activities, including the "establishment and expansion of forest plantations, and works for the protection of forest soil."[107]

Title IV of the General Ecology Law discusses environmental protection and contains provisions regarding the protection and control of soil.[108] It provides criteria to prevent soil pollution, with specific regard to the control and disposal of solid waste, the regulation of urban development, as well as the use of pesticides, fertilizers and toxic substances in the environment. These criteria authorize the issuance of technical norms in these areas.[109]

2. Mining

Mining has been an economically important activity in Mexico for

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99. Mexican Environmental Laws, *supra* note 98, at 3, 14.
100. *Id.* at 14-16.
101. *Id.* at 15.
102. MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, at 623.
103. *Id.* at 623-25.
104. *Id.* at 625-28.
105. General Ecology Law, *supra* note 42, arts. 98-107.
106. *Id.* art. 99. Listings of registered pesticides is provided in MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, at 486.
107. General Ecology Law, *supra* note 42, art. 107.
108. *Id.* arts. 134-44.
109. *Id.*

centuries.[110] In fact, metals were mined prior to the arrival of the Spanish in the 16th century.[111] Mining activities are subject to federal jurisdiction in Mexico.[112] Article 27 of the Mexican Constitution establishes that all mineral resources belong to the Mexican Nation.[113] Extraction may occur only through federal concessions to Mexican individuals, to corporations incorporated under Mexican laws, or to foreign individuals who agree not to invoke the protection of their government with regard to their concessions.[114] A subsequently enacted law, the Regulatory Law of Constitutional Article 27 in Mining Matters, is more restrictive than the Constitution, and prohibits foreign individuals from holding mining concessions.[115] To prevent and control the harmful effects of exploration or extraction of non-renewable natural resources, the General Ecology Law mandates the issuance of technical standards by SEDUE.[116] These standards should provide for the protection of water, so that it may be put to other uses. Additionally, these standards should provide for protection of the soil so that reclamation may occur and for the protection of flora and fauna.[117] Standards should designate the proper location for the placement of discarded ore, ore sweepings and slag from mining operations.[118]

3. The National Energy Modernization Plan of 1990-1994[119]

The Mexican Energy Plan is "integral, realistic and reaches beyond the time horizon of the present administration."[120] The plan serves as an important guideline in the development and modernization of Mexico.[121] It is national in scope and operates under the three major National Accords which form the framework of Mexico's modernization endeavors: the Accord for Expansion of Democratic Life, the Accord for Economic Recovery with Price Stability, and the Accord for Productive Improvement of the Standard of Living.[122]

The Energy Plan is the responsibility of the Federal Public Administration, yet requires the participation of state and municipal governments, coordinated with private sectors.[123] The plan considers the development of all of Mexico's energy resources, both primary and secondary.

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110. Rodrigo Sanchez-Mejorada Velasco, *Foreign Investment in Mining in Mexico*, 23 ST. MARY'S L.J. 821 (1992).
111. *Id.*
112. *Id.* at 823.
113. *Id.*
114. *Id.* at 823-824.
115. *Id.* at 824.
116. General Ecology Law, *supra* note 42, arts. 108-109.
117. *See id.*
118. *Id.* art. 108(III).
119. MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, at 197.
120. *Id.* at 200.
121. *See id.* at 199.
122. *Id.*
123. *Id.* at 201.

The program sets forth five guiding priorities: productivity, conservation and efficient energy use, the financing of development and expansion of supply, diversification of resources, and increased participation in the world market.[124]

4. Oil

The National Energy Plan states that the hydrocarbon reserves within the Mexican Energy Sector rank eighth in the world.[125] With regard to the production of petroleum and derivative products, Mexico is sixth in the world.[126] Foreign investors seek direct access to these reserves, although Mexican legislation precludes them. Therefore, investment in the development of the Mexican oil industry must be done with caution. Accident mitigation and safety standards should be designed to minimize damage to the environment and health, both on-shore and off-shore. Factories that process petrochemical derivatives directly from raw materials, must be registered with the ministry controlling energy and mines.[127]

5. Nuclear energy

With respect to nuclear energy, the General Ecology Law demands that government authorities monitor the exploration, and exploitation of the use of nuclear minerals, nuclear fuels, and nuclear energy.[128] The nuclear industry, and activities related thereto, should be managed and conducted in accordance with appropriate standards for nuclear and radioactive installations. These standards should assure physical safety in and around nuclear or radioactive installations, so that risks to human health are avoided and preservation of ecological equilibrium is maintained. Accordingly, environmental impact assessments are required with respect to nuclear energy development.[129]

D. *Preservation*

Title III, Chapter 1 of the General Ecology Law recognizes the need for endangered species identification and range protection, especially along the developing border regions.

Areas within Mexican territory may be designated as protected natu-

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124. *Id.* at 203.

125. *Id.* at 199. A National Wildlife Federation report ranks Mexico's petroleum deposits as second only to Saudi Arabia's. National Wildlife Federation, *Environmental Concerns Related to a United States-Mexico-Canada Free Trade Agreement*, (Nov. 27, 1990), at 9, *in* NATIONAL WILDLIFE FEDERATION, TRADE AND THE ENVIRONMENT: INFORMATION PACKET (1991)(unpublished documents) [hereinafter *Environmental Concerns*].

126. MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, at 199.

127. *Id.* at 632.

128. General Ecology Law, *supra* note 42, art. 154.

129. *Id.*

ral areas under the General Ecology Law.[130] Protected natural areas, under federal jurisdiction, are classified as biosphere preserves, special biosphere preserves, national parks, national marine parks, natural monuments, areas for the protection of natural resources, areas for the protection of flora and fauna, urban parks, and zones subject to ecological conservation.[131] The latter two classifications are subject to state and/or municipal jurisdiction.[132] This section also provides for a degree of public participation: "[i]n the establishment, administration and development of protected natural areas . . . the residents thereof shall participate . . . in order to encourage integrated development of the community and assure protection of the ecosystems."[133]

Biosphere preserves are areas greater than 10,000 hectares which: 1) contain at least one or more ecosystems that have not been significantly altered by human activity; and 2) contain at least one unaltered zone and inhabited by endemic, threatened, or endangered species.[134] Activities to preserve the ecosystems, such as scientific and ecological educational research, may be authorized.[135] Uses which may alter the ecosystem may be limited or prohibited. The creation of new population centers is prohibited within a biosphere preserve, however buffer zones can be established for communities located within the preserve area at the time of its establishment.[136]

Chapter 1 also establishes "special biosphere preserves" which are similar to biosphere preserves, yet contain fewer numbers of endemic, threatened or endangered species. As a result, such areas are inappropriate for consideration as biosphere preserves.[137]

The General Ecology Law and the Forestry Law govern the creation of national parks.[138] Factors considered in designating a park area are scenic beauty, the scientific, educational or recreational values of an area, the existence of nationally important flora or fauna, and the suitability for tourism development. These parks may be utilized by the public for research, education, recreation, tourism, and activities related to preservation of the natural resources and ecosystems contained therein. Forestry uses may also be allowed when SEDUE determines that the area in question is ecologically suitable.[139]

National marine parks are established in marine zones and may in-

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130. *Id.* art. 44. (The articles relating to protection of natural areas are located in the General Ecology Law, Title 2.)
131. *Id.* art. 46.
132. *Id.* arts. 55-56.
133. *Id.* art. 47.
134. *Id.* art. 48.
135. *See id.*
136. *Id.*
137. *Id.* art 49.
138. *Id.* art. 50.
139. *Id.*

clude beaches and federal maritime land contiguous zones.[140] Within these areas, activities related to preservation, education, research, and recreation are allowed. The General Ecology Law, the Federal Fisheries Law, the Federal Sea Law, international legal standards and other applicable laws may authorize the use of natural resources in these areas.[141]

The General Ecology Law and the Forestry Law direct the establishment of natural monuments.[142] Natural monuments contain one or more natural elements of national significance which are deemed worthy of protection. These elements may be of historical, aesthetic, scientific or unique value.[143]

E. *Hazardous Activities and Hazardous Waste*

SEDUE seeks to ensure that hazardous activities occur only in designated zones.[144] Highly hazardous activities are listed in the federal Diario Official.[145] Those engaging in highly hazardous activities must submit accident prevention plans corresponding to the applicable regulations, in order to receive approval by federal regulatory authorities. State and local governments shall regulate those activities not designated as highly hazardous.[146]

Mexico's listing of hazardous wastes is similar to the procedure established in the United States.[147] Standards for the regulation of hazardous materials are found in Articles 150 to 153 of the General Ecology Law. Like hazardous activities, hazardous materials are identified and listed in the federal Diario Official. Testing procedures for the identification and characterization of such wastes are similar to those of the United States.

The use and disposal of hazardous materials and hazardous residues must comply with the technical standards established by SEDUE.[148] Imports and exports of these substances are to be tracked, regulated and subjected to compliance guarantees. Furthermore, hazardous substances generated from primary materials brought into Mexico for industrial use, under the temporary import system, are to be returned to the country of origin.[149] Thus, these standards, including limited disposal and recycling methods, require maquiladora industries to transport hazardous wastes

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140. *Id.* art. 52.
141. *Id.*
142. *Id.* art. 51.
143. *Id.*
144. General Ecology Law, *supra* note 42, arts. 145-49.
145. *Id.* art. 146.
146. *Id.*
147. A detailed description of Mexico's hazardous waste management program may be found in, MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, section V, at 282-485.
148. General Ecology Law, *supra* note 42, art. 152.
149. *Id.* art. 153.

and residues over the border to the United States.[150]

Sadly, only a small portion of hazardous waste generated on the Mexican side of the border is actually being transported back over to the United States for proper disposal;[151] instead, illegal dumping of hazardous wastes occurs. Despite the existence of a cradle-to-grave tracking system, this policy is not being effectively implemented in Mexico. Illegal dumping of hazardous waste is controversial in Mexico. Poor management techniques in and around maquiladora industries are having a severe and irreversible impact on health and the surrounding environment.

According to existing laws, generators of hazardous waste must submit reports on all movement of hazardous wastes to SEDUE every 6 months. Specifically, a generator must notify SEDUE when the generator is unable to send the appropriate forms documenting a treatment, storage or disposal facility. All facilities must reduce the volume of hazardous waste which they generate, and apply physical, chemical or biological treatment.[152] Violators of hazardous materials regulations are subject to sanctions.

F. *Miscellaneous*

In addition to those areas discussed above, the General Ecology Law authorizes the issuance of standards for the prevention and control of pollution by noise, vibrations, thermal energy, lighting, odors and visual pollution.[153] Emission limits are set by SEDUE, in consideration of the health standards as determined by the Secretariat of Health.

III. IMPLEMENTATION

A. *Enforcement mechanisms and procedures*

Mexico's environmental laws are enforced through the use of inspection and oversight procedures.[154] Non-compliance can result in administrative or criminal charges.[155] Administrative violations are infractions, and are subject to sanctions ranging from fines, varying degrees of closure, to an administrative arrest of up to 36 hours.[156] Appeals may be made through appropriate procedures.[157]

Criminal charges, sentences and fines may be imposed for prior viola-

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150. *See infra* notes 184-202 and accompanying text for discussion of the Maquiladora Program in Mexico.

151. *Hazardous Waste from U.S.-Owned Plants in Mexico Dumped Illegally, Panel Told*, 14 INT'L ENV'T REP. CURRENT REP. (BNA) 656, Dec. 4, 1991.

152. Mexican Environmental Laws, *supra* note 98, at 17.

153. General Ecology Law, *supra* note 42, arts. 155-56.

154. *Id.* arts. 161-169.

155. *Id.* art. 160.

156. *Id.* arts. 171-75.

157. *Id.* arts. 176-81.

tions or flagrant criminal behavior.[158] The imposition of state and local penalties is also authorized.[159] In addition to these enforcement measures, "denunciations" may be brought by any member of the public before federal or local authorities, pursuant to approved procedures.[160] The authorities are directed to investigate these allegations.

Overall, SEDUE's enforcement mechanisms have stiffened. In 1991, SEDUE began requiring bonds for firms not in compliance with environmental regulations.[161] The bond must equal the cost of installing pollution abatement equipment.[162] Subsequent findings of non-compliance can lead to forfeiture of the bond.[163]

Mexican environmental review is still lacking. Procedures for meaningful public participation in the development of environmental policies should be formulated. Furthermore, community "right-to-know" laws do not exist in Mexico.[164] In the United States, such laws require industry disclosure of hazardous substances and toxic emissions on an annual basis.[165] Public awareness of known or potential hazards should be encouraged by the Mexican government.

The National Program for Environmental Protection (1990-1994), broadly sets out basic environmental programs to be accomplished within Mexico during the 1990s.[166] Under this decree, ecological and environmental efficiency is established as a national priority.[167] The program provides objectives, strategies, goals, and announces guidelines, in the form of stages, for execution.[168]

B. *Border Plan*

The Mexico-U.S. Border has been identified as an area warranting special study and cooperative efforts. Through the joint efforts of the U.S. EPA and the SEDUE of Mexico, a plan has been formulated for the protection of human health and environmental ecosystems. The binational International Boundary and Water Commission, has contributed to the

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158. *Id.* arts. 182-87.

159. *Id.* art. 188.

160. *Id.* arts. 189-94.

161. *Companies Face New Environmental Scrutiny*, BUS. INT'L; BUS. LATIN AM., Nov. 4, 1991, *available in* LEXIS, Intlaw, North/South America, Mexico, [hereinafter *New Environmental Scrutiny*]; *Environmental Law; Building and Related Permits*, BUS. INT'L; INVESTING LICENSING & TRADING, Sept. 1, 1991, *available in* LEXIS, Intlaw, North/South America, Mexico.

162. *Id.*

163. *Id.*

164. Andres Ochoa-Bunsow, (of the law firm of Baker & McKenzie Abogados, S.C.), *Brief Summary of Mexico's Environmental Laws and Regulations*, *in* MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 42, at 910.

165. *Id.*

166. MEXICAN ENVIRONMENTAL DOCUMENTS, *supra* note 44, at 674.

167. *Id.*

168. *Id.* at 685-86.

formulation and development of the plan known as the Integrated Environmental Plan for the Mexico-U.S. Border Area.[169]

The border plan was developed as the result of a joint Presidential directive. The directive was issued in the form of a communique by President Carlos Salinas de Gortari, of the United Mexican States, and President George Bush, of the United States of America.[170] The plan is based upon the foundation laid out by the 1983 Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, (often referred to as the La Paz Agreement).[171]

The border plan recognizes that environmentally based sustainable development is necessary for continued growth in the border area.[172] This development must include the participation of industry and border area communities. The border plan is part of an active environmental planning process that is not intended to become stagnant. It is a "dynamic, binational document that will be revised and expanded as new information is developed, as implementation of solutions evolves, and as further experience is gained in working together to achieve common goals."[173] The next review and revision of the plan is scheduled to occur in 1994.[174]

The border area is defined as an area 100 kilometers (62 miles) on each side of the U.S./Mexico border. Targeted areas include 15 pairs of "sister cities," located within the Mexican states of Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon and Tamaulipas; and California, Arizona, New Mexico and Texas, in the United States. Border Plan Facts[175] provides a brief synopsis of the proposed plans for these sister cities, including cooperative enforcement strategies, new initiatives, cooperative planning, training, and education and proposals to increase citizen and state/local government participation.

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169. INTEGRATED ENVIRONMENTAL PLAN, *supra* note 29.

170. The communique stated:

> The Presidents emphasized the need for ongoing cooperation in the area of environmental protection. Both Presidents instructed the authorities responsible for environmental affairs of their countries to prepare a comprehensive plan designed to periodically examine ways and means to reinforce border cooperation in this regard, based on the 1983 Bilateral Agreement. Such a mechanism should seek ways to improve coordination and cooperation, with a view to solving the problems of air, soil, and water quality and of hazardous wastes. State and municipal authorities of both governments and private organizations in both countries should participate in such tasks as appropriate.

Id. at I-1.

171. *See supra* note 28.

172. INTEGRATED ENVIRONMENTAL PLAN, *supra* note 29, at I-2.

173. *Id.* at I-4.

174. *Id.*

175. *Border Plan Facts*, available as a composite brochure from the U.S. EPA and SEDUE (Feb. 1992).

C. *State and Local Environmental Law - Chihuahua (an example)*

Mexican states are encouraged to develop and enforce their own environmental legislation.[176] Mexico has received $88 million from the World Bank to assist in the decentralization of SEDUE.[177] Decentralization will help reduce the amount of federal bureaucratic "red tape."

As an example of local environmental legislation, the Ecological Law for the State of Chihuahua[178] mirrors the General Ecology Law, promulgated at the federal level. The objective of the Chihuahuan law is to preserve and restore ecological equilibrium and environmental protection.

Chihuahua's environmental statute provides for concurrent jurisdiction at the state and municipal levels. It also provides for the creation of a State Ecology Commission (La Comision Estatal de Ecologia). At the local level, the law requires each municipality to have a Municipal Ecology Committee (Un Comite Municipal de Ecologia) for local coordination and implementation. Public participation is encouraged through the promotion of educational programs, special interest groups, and the dissemination of information.[179]

Title III of the state law announces principles of ecological policy, and the instruments or standards for implementation. This section of the law essentially parallels the federal law, absent provisions for the issuance of ecological technical standards.

Title IV addresses the preservation and restoration of ecological equilibrium and natural resource conservation. Therein are provisions for the determination, registry, and management of protected natural areas within the local jurisdiction; guidelines for preservation and restoration of ecological equilibrium; and provisions for the rational use of water resources. Title V discusses the subject of environmental protection. It provides for the regulation of air pollution; water pollution and pollution of aquatic ecosystems; noise, vibrations, thermal energy and lighting; visual pollution and protection of the atmosphere.

Title VI governs the regulation of activities capable of noxious effects. The areas specifically addressed for regulation are hazardous activities, mineral extraction, municipal services, and non-hazardous solid wastes.

Title VII is unique to state law. It addresses the protection of non-

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176. *Plan to Decentralize Enforcement of Environmental Law Described by Chirinos*, 14 INT'L ENV'T REP. CURRENT REP. 624 (Nov. 20, 1991).

177. *Id.*

178. *Ley Ecologica Para El Estado De Chihuahua*, contained in Folleto Anexo Periodico Oficial No. 86, October 26, 1991, provided by the law firm of Bryan, Gonzalez Vargas y Gonzalez Baz, S.C. (document in Spanish). At the time of this writing, four of the six Mexican border states have enacted state environmental laws. INTEGRATED ENVIRONMENTAL PLAN, *supra* note 29, at A-13. These laws have not yet resulted in the promulgation of regulations pursuant to them.

179. *Id.* art. 16.

smokers from cigarette smoke. It establishes blanket prohibitions in specified places, and the designation of non-smoking areas in certain establishments. Finally, Title VIII authorizes measures for control and sanctions. The mechanisms parallel those of the federal legislation, with the exception of the order of criminal activities.

IV. PRACTICAL CONSIDERATIONS

A. *Trade and the Environment*

Linking economic growth to environmental protection in Mexico is a means to ensure that protection measures are implemented.[180] Theoretically, increased trade can lead to increased investment within Mexico, thereby bolstering the economy. Economic growth, in turn, can lead to greater means by which to promote environmental enforcement.[181] Economic growth can also foster increased environmental efficiency in industry.[182]

Some advocates call for the integration of trade and environmental issues for the promotion of sustainable development.[183] These advocates do not view the promotion of trade measures as anti-environment. Instead, they view trade as a means to develop and implement environmental protection.

This position is not a cure-all to Mexico's environmental problems. The intersection of economic activities with that of environmental concerns, may be viewed as a measure of checks and balances. Sustainable development and a healthy global economy are considered interrelated. Therefore, expenditures for pollution prevention in Mexico must exceed funds allocated for pollution clean-up.

B. *Maquiladora Program*

The environmental and social problems of Mexico are exacerbated within the "maquiladora" zones or regions.[184] The maquiladora zones are predominantly located along the U.S.-Mexican border where thousands of maquiladora industries thrive.[185] Historically, environmental regulation within the areas has been lax.[186] Precisely how the maquiladora industries

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180. COMMENTS ON THE DRAFT REVIEW, *supra* note 41, at 3.

181. *Questions and Answers about the North American Free Trade Area*, 1991 National Trade Data Bank, *available in* LEXIS, Intlaw, AM [hereinafter *Questions and Answers*].

182. *Id.*

183. COMMENTS ON THE DRAFT REVIEW, *supra* note 41, at 1; *see also* Stewart Hudson, *Trade, Environment, and the Pursuit of Sustainable Development*, (Nov. 1991) 1, *available in* NATIONAL WILDLIFE FEDERATION, TRADE AND THE ENVIRONMENT: INFORMATION PACKET (1991)(unpublished documents).

184. Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REP., May 6, 1991, at 32.

185. *Id.*

186. *Id.*

will be transformed by the advent of free trade is still uncertain.[187]

A maquiladora is a Mexican corporation operating under an approved Maquila Program.[188] Maquila programs are approved by the Mexican Secretariat of Commerce and Industrial Development (SECOFI).[189] Maquiladoras benefit from foreign investment and relaxed customs treatment.[190]

Maquiladoras are export-oriented.[191] Production at a maquiladora plant varies from the simple assembly of goods, to the manufacture of a product from start to finish using imported raw materials.[192] Only under special conditions, may the end products remain in Mexico.[193]

There is generally no limitation in choosing the location of a maquiladora.[194] The only exceptions are that no new facilities may be established in the urban areas of Mexico City, Guadalajara, or Monterrey.[195] These restrictions exist due to the already overburdening industrialization and congestion in these areas.[196] Any other existing state restrictions are imposed due to environmental concerns based on the type of industry.[197]

Maquiladoras must comply with strict environmental laws and regulations.[198] All industrial companies must have operating licenses from SEDUE.[199] New maquiladora plants and expanding facilities must file an environmental impact statement with SEDUE for the implementation of new processes or new construction.[200] Permits for the discharge of waste water and air emissions are required.[201] As mentioned previously, companies that use hazardous materials must obtain "special manifests" for the handling of these materials and wastes.[202]

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187. For a general discussion of the maquiladora program from an economic and historical perspective, *see* Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will The Program Continue?*, 23 ST. MARY'S L.J. 697 (1992).

188. Bryan, Gonzalez Vargas y Gonzalez Baz, S.C., *Manufacturing in Mexico, The Mexican In-Bond (Maquila) Program: The Most Commonly Asked Questions*, (January, 1992), *in* LEGAL ASPECTS OF DOING BUSINESS, ST. MARY'S L.J., INT'L L. SYMP. (March 6, 1992) (unpublished documents), provided by St. Mary's University School of Law, [hereinafter *Manufacturing in Mexico*].

189. *Id.*

190. *Questions and Answers*, *supra* note 181.

191. *Id.*

192. *Manufacturing in Mexico*, *supra* note 188, at 1.

193. *Id.* at 8; *see Questions and Answers*, *supra* note 181.

194. *Manufacturing in Mexico*, *supra* note 188, at 1.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 9.

199. *Id.* at 8.

200. *Id.*

201. *Id.*

202. *Id.* 8-9.

C. *Special Concerns*

The infrastructure of the border area is inadequate for water treatment and distribution.[203] Before the border area can survive the onslaught of economic development resulting from the proposed Free Trade Agreement, a water treatment and distribution infrastructure must be developed. Similarly, the infrastructure for the disposal of solid and hazardous wastes must be developed. Landfills such as hazardous waste containment areas and recycling plants do not exist in many areas of Mexico.[204] Technology that works well in the United States, e.g., wet scrubbers, may not be practical in Mexico where water resources are scarce.[205] Pollution control and abatement technologies must always be adapted or suited to the local environment and economy.[206]

V. THE FUTURE

The government of Mexico has resolved to strengthen the enforcement of environmental law within its borders. Such a position is meant to send a strong message to investors and developers already operating within the country, and to those who would venture to start up new businesses. The overall business climate in Mexico has already improved as a result of President Salinas' economic modernization program.

The proposed Free Trade Agreement, expected to come into effect on January 1, 1994, will assuredly bring economic growth to Mexico. Yet, environmental destruction and neglect will not be condoned. Future investors will have to respond to what the Mexican government hopes will become a stronger environmental regime.

This report has furnished an overview of the environmental law that already exists in Mexico. The promulgated regulations provide the teeth for enforcement of both general and specific laws. The detail and strength of these new laws as seen in the air pollution and hazardous waste fields are indicators of the future. The Mexican government intends to strengthen and develop environmental regulations in Mexico, including improvement of pollutant monitoring and tracking systems.

Although historically environmental enforcement in Mexico has been lax, manufacturers and businesses should anticipate stricter environmental protection and enforcement. Would-be entrepreneurs are encouraged to consult the federal Diario Official and with local Mexican governmental authorities for recently promulgated laws and regulations affecting their current or prospective businesses within a particular locality.

As it presently stands, with the recent changes in environmental enforcement, businesses operating within the U.S.-Mexico border areas and

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203. *U.S., Mexico Take On Border Pollution*, WALL ST. J., Feb. 25, 1992, at B1.
204. *New Environmental Scrutiny*, *supra* note 161.
205. *Id.*
206. *Id.*

Mexico City are under the heaviest scrutiny for compliance with environmental law and regulations.

Terzah N. Lewis

DOCUMENT

Petition of the Tamils of Sri Lanka Deprived of Their Internationally Protected Human Rights For A Grant of United Nations Effective Remedy and Declaratory Relief

IN THE UNITED NATIONS GENERAL ASSEMBLY
ECONOMIC AND SOCIAL COUNCIL,
HUMAN RIGHTS COMMISSION,
THE SECRETARY GENERAL

UNITED NATIONS PLAZA
NEW YORK, NEW YORK

UNITED NATIONS, ex. rel.
GLOBAL ORGANIZATION OF PEOPLE
OF INDIAN ORIGIN, FRIENDS OF
INDIA SOCIETY INTERNATIONAL,
NATIONAL FEDERATION OF INDIAN
AMERICAN ASSOCIATIONS, on behalf of
the Tamils in Sri Lanka,

PETITIONERS,

vs.

THE GOVERNMENT OF SRI LANKA,

RESPONDENTS

TO: THE SECRETARY-GENERAL OF THE UNITED NATIONS, THE MEMBERS OF THE GENERAL ASSEMBLY, THE ECONOMIC AND SOCIAL COUNCIL AND THE COMMISSION ON HUMAN RIGHTS

The PETITIONERS herein invoke the jurisdiction of the United Nations and its organs by virtue of the provisions of the United Nations

Charter, the Universal Declaration of Human Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, the Convention on the Prevention and Punishment of the Crime of Genocide and the Sri Lankan constitution, and file this petition on behalf of the Tamils in Sri Lanka, praying for peace in the country, institution of recognized judicial procedures, and cessation of torture, extrajudicial killings of civilians and attempted genocide.

I. BACKGROUND INFORMATION[1]

1. There are a number of circumstances surrounding the civil and political conflict in Sri Lanka. The following information discusses the main factors which contribute to the unrest.

2. First, the population consists of 74% Sinhalese speaking and 26% Tamil speaking. Because the Sinhalese fear economic and political challenge by Tamils, although the Tamils are so clear a minority, the Sinhalese have discriminated against the Tamils in politics, language, education, and employment.

3. In the 1920s, the British turned over greater political authority to the people of Sri Lanka causing friction between the Sinhalese and the Tamils. With the introduction of the Donoughmore Constitution of 1931, the system of representation in the State Council abolished the proportional communal electorals which were replaced by a territorial election procedure creating a Sinhalese-dominated State Council.

4. After Sri Lanka obtained independence in 1948, the Sinhalese politicians used their majority status to reduce Tamil representation in the legislation by over 40% by disenfranchising nearly a million plantation Tamils. On June 5, 1956, the Sinhala Only Act, making Sinhalese the only official language of the country, was enacted. Tamil was not even recognized as the language of a national minority. The 1972 Sri Lankan Constitution changed the name of the country from Ceylon to Sri Lanka, made it a republic, gave Buddhism pride of place, and removed safeguards provided for minorities in section 29 of the 1949 constitution which had granted independence.

5. The Tamils objected to several provisions of the new constitution which was adopted in their absence. In order to be promoted, minorities must show proficiency in the Sinhalese language. This has severely limited education and job opportunities for those who do not speak Sinhalese.

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1. Background information obtained from: *Ethnic Conflict and Reconciliation in Sri Lanka*, by Chelvaduri Manogaran; *The Breakup of Sri Lanka*, by A. Jeyaratnam Wilson; and *Hearing Before the Subcommittees on Human Rights and International Organizations and on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representatives, 98th Congress, 2nd Session.*

6. In 1971, the university entrance requirements were changed to the disadvantage of the Tamil students. The minimum grade average was raised for Tamil students, and students from predominantly Sinhalese areas were to receive preference for acceptance.

7. The 1980 unemployment rate for Tamils was 41% compared to 20% for Sinhalese. Labor-intensive industries have been promoted in Sinhalese-dominated areas; the language requirement has excluded many Tamils from public sector jobs and, as yet another obstacle for the Tamil minority, the Tamils who lived in other areas (other than Colombo) came under repeated communal attacks and, due to fear for their safety, had to move to the North and East parts of the country which were neglected in regard to development, siting of industries and infrastructure.

8. In order to resist oppression, parties representing the Tamil people united to form the Tamil United Liberation Front (TULF), the main parliamentary opposition party after the elections held in 1977. Subsequently, after the communal pogrom of 1983, Tamil parliamentarians were expelled from parliament and went into exile in India. TULF goals include a nonviolent resolution to the conflict and the peaceful establishment of a separate Tamil state (Eelam) in the Northeast part of Sri Lanka.

9. The Tamil youth formed several militant groups, including the Liberation Tigers of Tamil Eelam (LTTE), which is the only group fighting the Government now, and resorted to violence to gain greater autonomy and independence for Tamils. These groups have taken violent action against the Sinhalese army and police, Tamils suspected of informing, and moderate Tamil politicians.

10. In response, the Government curbed important legal safeguards, permitting detention without charge or trial for up to eighteen months for all Tamils, and permitted the disposal of bodies without inquiry. Consequently, the government condemned all Tamils for the actions of the few militants.

II. STATEMENT OF THE FACTS

A. *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

11. The Associated Press (AP) reported on August 10, 1987, that the Sri Lankan Government had freed 667 Tamils from a prison in southern Sri Lanka. Many of the men released claimed they were tortured and abused while in detention in various camps. "Our fingernails were pulled out and we were beaten with pipes and barbed wire," said one. Vyvyan Tenorio, *Sri Lanka's freeing of Tamils: step toward redressing rights abuses,* CHRIS. SCI. MON., Aug. 11, 1987, at 7. He claimed soldiers beat nine Tamils to death when the Tamils went to help three friends, purportedly shot by soldiers when the prisoners were late for meals. *Id.*

12. In September 1991, Amnesty International reported on a person

who had been detained at Plantain Point army base in Trincomalee and then released. The person described the fate of fellow-detainees to a journalist: "I was kept blindfolded for two days and beaten with iron bars. I saw some of my friends being beaten to death. Then their corpses were heaped together with tires and burnt inside the camp." AMNESTY INTERNATIONAL, SRI LANKA - THE NORTHEAST: HUMAN RIGHTS VIOLATIONS IN A CONTEXT OF ARMED CONFLICT, Sept. 1991, at 20.

13. Government security officials acknowledge that security forces have used torture to elicit information and cooperation from suspected members of the Liberation Tigers of Tamil Eelam (LTTE). Police have also detained suspects on suspicion and used torture to elicit information in criminal investigations. 1990 Human Rights Report, U.S. Dep't. of State Dispatch, Feb. 1, 1991 [hereinafter Human Rights Report].

B. *Political and Other Extrajudicial Killings*

14. The U.S. State Department reports that political and other extrajudicial killings carried out by government forces, police, and vigilante-squads have resulted in large scale human rights abuses in Sri Lanka since 1983. The killings have included members of the Tamils, opposition parties, and civilians. Many of the civilian political killings have been vigilante-style deaths, often characterized by leaving the burned or mutilated bodies in public areas to serve as warnings. In 1990, an estimated 2,600 noncombatant deaths were caused by both government and anti-government forces. Human Rights Report.

15. In 1991, Amnesty International reported that thousands of defenseless civilians were extrajudicially executed in the northeast by Government forces; executions continued to be committed by government forces and "death squads" in the south as well. Many of the victims were stabbed, hacked to death, or burned alive. Amnesty International alleges at least 3,000 Tamils were killed or "disappeared" in the Amparai district between June and October of 1991. Many of these people were believed to have been victims of extrajudicial execution. AMNESTY INTERNATIONAL, SRI LANKA REPORT, 1991, at 210.

16. For example, on February 17, 1991, after the LTTE ambushed soldiers from the Vijayabahu regiment at Kondaichchi, near Mannar, army personnel from the same regiment were reported to have killed four Tamil school teachers who were traveling from Mannar. Their bodies were found dumped in a well at Vankalai. AMNESTY INTERNATIONAL, SRI LANKA - THE NORTHEAST: HUMAN RIGHTS VIOLATIONS IN A CONTEXT OF ARMED CONFLICT, Sept. 1991, at 18 [hereinafter NORTHEAST REPORT].

17. According to the U.S. Department of State, the Sri Lankan Government in 1989 announced that it would establish an independent commission to investigate vigilante groups, but no members were ever appointed. Charges were brought against security force members in two vigilante cases and legal proceedings were initiated in 20 other cases in which security force personnel allegedly murdered civilians between 1988

and 1990. None of these cases, however, had been resolved by the end of the year, partly due to a large backlog in the judicial system and partly due to killings and intimidation of witnesses. Human Rights Report.

18. For example, on February 18, 1990, Richard de Zoysa, a well-known journalist and actor who documented death squad killings in the south, was abducted from his home in the middle of the night. The following morning, his body washed ashore on a beach near Colombo. He had been shot in the head at close range. Steve Coll, *The Mothers Who Won't Disappear; In Sri Lanka, a Maternal Cry Against the Death Squad,* WASH. POST, March 3, 1991, at F1. His mother claimed the abductors included police officers, two of whom she identified. The Attorney General found insufficient evidence to warrant an indictment against the accused police officers and instructed the police to continue their investigation. Human Rights Report. Although motives for the murder are not clear, speculation revolves around de Zoysa's reporting on human rights matters, his alleged ties to leftist organizations and his reputed authorship of a satirical play aimed at President Premadasa. *Id.*

19. Reports indicate that members of the regular security forces (i.e., the army, the police and the Special Task Force (STF)) were responsible for many of the reported extrajudicial executions and "disappearances." NORTHEAST REPORT at 21.

C. *Disappearances*

20. The United Nations Working Group on Enforced or Involuntary Disappearances (the "Working Group") reported to the Commission on Human Rights in January 1991 that, during the period under review, the Working Group transmitted 246 newly reported cases of disappearances to the Government of Sri Lanka, of which 44 were reported to have occurred in 1990. Forty-two of those cases were transmitted by cable under the urgent action procedure. *Report of the Working Group on Enforced or Involuntary Disappearances,* U.N., Economic and Social Council, Commission on Human Rights, 47th. Sess., Jan. 17, 1991, at 69.

21. The Working Group's visit to Sri Lanka in October 1991 revealed that killings and other violations had resulted in a huge number of disappearances between 1983 and 1991, "by far the highest number ever recorded by the Working Group for any single country." In its report of May 31, 1992, "Human Rights Accountability in Sri Lanka," Asia Watch observed that "a common estimate by human rights groups of the total number of reported disappearances of suspects after arrest by the security forces or abduction by vigilante groups linked to the security forces is 40,000 since 1983." *Human Rights Accountability in Sri-Lanka,* ASIA WATCH, May 31, 1992, at 5.

22. According to Amnesty International, over 3,000 Tamil people are reported to have "disappeared" in the custody of government forces in the east since June 1990. That such serious abuses have continued well into 1991 is confirmed by recent reports in the Sri Lankan and interna-

tional press, as well as from other sources. NORTHEAST REPORT, at 17. In Batticaloa town, over 1,500 people were reported to the Local Peace Committee as "disappeared" between June and December 1990. *Id.* Similarly, large number of "disappearances" have also been reported from Trincomalee, Vavuniya, Mannar and Kayts. *Id.*

23. In September 1990, over 100 Tamils disappeared after being removed from a refugee camp in the east, according to credible sources. Human Rights Report. While the Government lifted the Emergency Regulations (ER) authorization granted to security forces to dispose of bodies without inquest, others (55b-f) still restrict full public inquiries into the causes and circumstances of deaths. *Id.*

D. *Arbitrary Arrests and Detention*

24. The Sri Lankan Constitution provides that no person "shall be arrested except according to procedure established by law." An arrested person must be informed of the reason for his/her arrest and brought within 24 hours before a magistrate who may authorize bail or, for serious crimes, order continued detention. Detainees are generally brought before a magistrate within a few days of arrest, but there are reports of detainees who are never informed of the reason for their arrest. *Id.*

25. Persons may challenge the legality of their detention either by filing a Writ of Habeas Corpus in the Courts of Appeal or by charging the Government before the Supreme Court with violating fundamental constitutional rights. There are cases, however, in which these provisions did not provide effective means of redress to persons alleging arbitrary detention. *Id.*

26. In September 1991, Amnesty International reported the establishment of the Human Rights Task Force (the "Task Force") under the chairmanship of a former judge of the Supreme Court of Sri Lanka, J.F.A. Soza. The Amnesty International delegation met with Justice Soza and discussed with him in detail the terms of reference of the newly-established body. NORTHEAST REPORT at 33. The Task Force, which is a permanent body, has six parts to its mandate, which is generally described as "to monitor the observance of fundamental rights of detainees." *Id.* at 34.

27. Amnesty International was assured that a register of all people detained under the Prevention of Terrorism Act (PTA) and Emergency Regulations (ER) would be kept centrally, regularly updated and made accessible to members of the public. Amnesty International was also assured that the authority of the Task Force would extend to all places of detention, including army camps and possible unofficial "safe houses." *Id.* These assurances have not been fully implemented, for, as Amnesty International reported, Government security forces often refuse to acknowledge individual detentions, and the authorities, despite widespread detentions, did not disclose how many political prisoners were held in the northeast nor whether any had been charged. AMNESTY INTERNATIONAL

SRI LANKA REPORT, 1991, 210.

E. *Violations of Geneva Conventions*

28. The following are a few examples:

> On 11 July 1990, government forces ordered aerial bombings on civilian targets.
> On 20 July 1990, Vibriocholarae, the causative organism of cholera, was found in the shells of bombs dropped by Sri Lankan forces on Jaffna.
> On 10 September 1990, chemical weapons were used by government forces.

F. *Destruction of Essential Services and Institutions*

29. As of 15 August 1990, the following essential services and institutions have been bombed: Jaffna General Hospital; Manipay Green Memorial Hospital; Phillips Hospital; Killinochi Base Hospital; Mullaitivu Base Hospital; over 13 private medical clinics, laboratories and pharmacies; thermal power station at Chunnakam; Jaffna Petroleum Corporation; telephone links to Trincomalee and Jaffna; train service in the North and East; Jaffna Old and New Markets; Thinnevely and Chavakachcheri markets; over 14 places of worship. Postal services are at a standstill.

G. *Refugees*

30. There are about 50,000 Tamil refugees in Canada, 210,000 in India (an additional 150,000 unofficially), 100,000 in Europe, and over one-half million displaced persons in Sri Lanka who are internal refugees. UNHCR's official position is that "it is not safe for a Tamil refugee to return to Sri Lanka unless the person is manifestly a refugee". *Report of the Canadian Human Rights Mission to Sri Lanka*, January 1992, at 30.

H. *Lack of Accountability*

31. Recent reports by Asia Watch *(Human Rights Accountability in Sri-Lanka*, ASIA WATCH, May 31, 1992.) and the Canadian Human Rights Mission to Sri Lanka (*Report of the Canadian Human Rights Mission to Sri Lanka*, January 1992) confirm that the vast majority of cases of abuse of power by the security forces are never brought to justice. Officers in the police and army seem to operate with almost total impunity. The new agencies established by the Government of Sri Lanka since 1990 to respond to international criticism of the government's continuing human rights abuses have not been effective. To illustrate, the Special Task Force on Human Rights was established on November 30, 1990 "to formulate and implement a strategy to meet charges of human rights violations." Asia Watch reports that "by May 1992 it had little to show in terms of concrete results." *Human Rights Accountability in Sri-Lanka*, ASIA WATCH, May 31, 1992. at 15.

32. Similarly, the Human Rights Task Force the Government established in August 1991 suffers from "a number of shortcomings," according to the Asia Watch Report. The Report notes that as of April 1992, the officials of the Task Force "had not yet attempted to visit detainees in police stations and detention centers run by the police or in army camps in the Northeast, nor had they begun keeping records on persons detained at interrogation centers or other temporary holding facilities. This is a serious shortcoming since, as a rule these are the facilities where the most serious violations occur." *Id.* at 16.

33. The Presidential Commission of Inquiry into the Involuntary Removal of Persons was appointed in January 1991 for one year and in January 1992 its mandate was extended for another year. The Commission is, however, not allowed to inquire into disappearances occurring before January 1990. The pace of its investigation is extremely slow, which will prevent it from fulfilling its task. Neither have other special commissions appointed to investigate specific cases of retaliatory killings by government troops and military attacks on relief workers fulfilled their tasks. *Id.* at 20-22.

III. JURISDICTION

34. The organs and agencies of the United Nations, including the SECRETARY GENERAL, the GENERAL ASSEMBLY, the HUMAN RIGHTS COMMISSION, and the SUBCOMMISSION ON THE PREVENTION OF DISCRIMINATION and the PROTECTION OF MINORITIES, have the jurisdiction to receive and hear this petition and to provide the relief requested.

35. The organs of the U.N. are endowed with explicit and inherent powers to assume jurisdiction of the cases of the kind presented in this petition as reflected in the UN CHARTER. Chapter 1, article 1(3), of the U.N. CHARTER obligates the U.N. and member states to encourage "respect for human rights and for fundamental freedoms." It is clear that torture, abductions, killings, and attempted genocide are violations of not only the letter, but the very spirit of international law as evidenced in instruments such as the UNIVERSAL DECLARATION OF HUMAN RIGHTS (G.A. Res. 217A (III), at 71, U.N. Doc. A/180 (1948)) and the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 22, U.N. Doc. A/6316 (1966).

36. The GENERAL ASSEMBLY is authorized to act under Chapter IV, article 22 of the U.N. Charter to establish an AD HOC TRIBUNAL empowered to grant the relief requested. For instance, in 1950 the GENERAL ASSEMBLY established a special tribunal to deal with various claims arising in the former Italian colony of Libya. Given the circumstances detailed in this petition, such a tribunal is equally justified and necessary to carry out the very principles and purposes for which the United Nations was established: to ensure international peace and secur-

ity, and to guarantee the protection of fundamental human rights.

37. All members of the United Nations have pledged themselves under the UNITED NATIONS CHARTER, articles 55 and 56, to take action to ensure respect for human rights. Article 55 states in part,

> with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . .
>
> (c) universal respect for, and deservance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 states:

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55.

38. Such pledge indicates that under the Charter, Member States must be prepared to take action to assist in enforcing human rights. If an organ of the United Nations determines that the rights of petitioners (or those they represent) were violated by the respondent, Members must act according to their pledge to cooperate with the United Nations in taking necessary steps under the Charter to promote "universal respect for, and observance of, human rights."

39. The respondent, SRI LANKA, is a member of the United Nations and, as such, is obligated to act in compliance with any determinations of the U.N. organs concerning this matter.

40. The GENERAL ASSEMBLY has the inherent power to establish methods and instruments to carry out the objects and purposes of the U.N. CHARTER, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS and other instruments of international law. The SECRETARY GENERAL, acting as an agent of the GENERAL ASSEMBLY, also possesses inherent powers to carry out these principles.

IV. COMPETENCE

41. Under the human rights provisions of the UNITED NATIONS CHARTER, the UNIVERSAL DECLARATION OF HUMAN RIGHTS, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, the CONVENTION AGAINST TORTURE, and the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, the petitioners, the Tamils, are proper parties to invoke the jurisdiction of the United Nations in requesting a United Nations investigation on their behalf in order to find redress for the deprivation of their basic human rights. Further, the petitioners are proper party petitioners in requesting a United Nations investigation in order to obtain release of those being held under arbitrary arrest and detention, to

restrain the carrying out of extrajudicial executions, and to order the release of said individual petitioners who may so desire to leave respondent's said detention centers and clandestine prisons.

42. The respondent, Sri Lanka, has willfully and definitely violated obligations undertaken as a member of the United Nations and as a member of the international community by denying and violating the human rights of its nationals who reside within its confines.

43. The respondent, Sri Lanka, as a signatory to the UNITED NATIONS CHARTER, the UNIVERSAL DECLARATION ON HUMAN RIGHTS, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT, and the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, is accordingly thereby obligated to comply with the terms of these instruments.

44. The oppression of the Tamils, the petitioner minority, in the areas of education, employment, politics, language, and security of person is specifically recognized as a violation of international law pursuant to the UNIVERSAL DECLARATION OF HUMAN RIGHTS and the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. The respondent, Sri Lanka, as a member of the international community of nations, is obligated to comply with accepted norms of international law.

45. The actions of the respondent merit the creation of an AD HOC TRIBUNAL to investigate and punish those responsible for the arbitrary arrests, detention, extrajudicial killings and torture of the said petitioners, individually and as a class.

46. The actions of the respondent in violating the petitioners' rights in the areas of education, employment, politics, language, and security of person, violate international law and internationally prescribed standards of conduct. These violations warrant sanctions against Sri Lanka.

V. CONTENTIONS

47. That the oppressed minorities are all legal residents of the state of Sri Lanka.

48. That the victims have been neither charged with nor found guilty of any crime or violation of international or domestic law.

49. That the victims have not been allowed hearings or any of the other requirements of due process guaranteed under international human rights law. The victims have been denied communication with their families or others. The families of abducted persons have been denied either communication with the victims or acknowledgement of their whereabouts by the Government of Sri Lanka.

50. That the victims have been denied their human rights to be free from arbitrary arrest and imprisonment, torture, and other inhumane treatment. The Tamil society has been denied its collective right to be

free from genocide. Specifically, those rights guaranteed under the UNIVERSAL DECLARATION OF HUMAN RIGHTS that are violated include all rights set forth to be assured without distinctions of any kind, including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (art. 2), the right to life liberty and security of person (art. 3), the right not to be tortured or treated to cruel, inhuman, or degrading treatment or punishment (art. 5), the right to equal protection against discrimination (art. 7), the right to an effective remedy by competent national tribunals for acts violating fundamental human rights (art. 8), the right to be free from arbitrary arrest, detention or exile (art. 9), the right to a fair and public hearing by an independent and impartial tribunal (art. 10), the right to freedom of movement and residence within the borders of the state (art. 13), the right to take part in government, access to public service, and universal and equal suffrage (art. 21), the right to free choice of employment (art. 23), the right to education equally accessible to all on the basis of merit (art. 26), the right to freely participate in the cultural life of the community (art. 27), and the right to be free from activity aimed at the destruction of any of the rights set forth (art. 30).

51. That similar rights are protected under the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, in articles 6(1), 7, 9(1), 9(3), 12(1), 14(1), 25, 26, and 27. Other internationally protected rights and freedoms include: that the death penalty shall only be imposed for the most serious of crimes (art. 6(2)), freedom from state-caused genocide (art 6(3)), freedom from the death penalty for persons below 18 years of age (art. 6(5)), the right to be promptly informed of the reasons for arrest (art. 9(2)), the right of detained persons to be treated with humanity and respect for dignity (art. 10(1)), and the right to be presumed innocent until proven guilty (art. 14(2).

52. The CONVENTION AGAINST TORTURE AND OTHER FORMS OF CRUEL, UNUSUAL AND DEGRADING TREATMENT OR PUNISHMENT imposes upon the parties to the agreement to "take effective legislative, administrative, judicial, or other means to prevent acts of torture."

53. That the respondent is a member of the United Nations and signatory to the UNITED NATIONS CHARTER, the UNIVERSAL DECLARATION OF HUMAN RIGHTS, the CONVENTION AGAINST TORTURE, and OTHER CRUEL, UNUSUAL AND DEGRADING TREATMENT OR PUNISHMENT, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, and the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, and is therefore obligated to uphold the provisions of these documents. The respondent is also obligated to cooperate with other nations and the UNITED NATIONS in securing respect for human rights in Sri Lanka.

54. That the respondent has been directly involved in acts of arbitrary arrest, torture, inhumane treatment, abduction and killing.

55. That the victims and their families have no available remedy to secure justice. The oppressed population has no available remedy to guarantee their protection from arbitrary arrest, torture, inhumane treatment, abduction and annihiliation.

56. The oppressed population's only available remedy is through an AD HOC COMMISSION-TRIBUNAL of the UNITED NATIONS pursuant to a RESOLUTION by the HUMAN RIGHTS COMMISSION calling upon the GENERAL ASSEMBLY to adopt WORLD HABEAS CORPUS as the only effective way to implement INTERNATIONAL HUMAN RIGHTS LAW as embodied in the UNITED NATIONS CHARTER, the UNIVERSAL DECLARATION OF HUMAN RIGHTS, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, the CONVENTION AGAINST TORTURE AND OTHER CRUEL, UNUSUAL AND DEGRADING PUNISHMENT, and the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. Alternatively the SECRETARY-GENERAL may either appoint such an AD HOC COMMISSION authorized to make findings or the SECURITY GENERAL may convene the SECURITY COUNCIL to order the establishment of an AD HOC COMMISSION, which may report back to the SECURITY COUNCIL, and which may then act through a SECURITY COUNCIL RESOLUTION or provide for other remedial and declaratory action.

57. That such a tribunal is requested to determine that the respondent has violated its obligations under the UNITED NATIONS CHARTER.

58. That the UNITED NATIONS should support the establishment of an appropriate government which will recognize the right of all Sri Lankans to be adequately and effectively represented in the government. An appropriate government is one which will meet the legitimate aspirations of the minorities to be treated equally with the Sinhalese majority, in particular, a federal or confederate government of two states.

VI. QUESTIONS PRESENTED

59. Have the Government of Sri Lanka and its Special Task Force, or other instruments within its control, subjected Tamil and other populations to torture or to cruel, inhuman or degrading treatment or punishment in violation of Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights?

60. Have the Government of Sri Lanka and its Special Task Force, or other instruments within its control, carried out extrajudicial and arbitrary killings of civilians and non-combatant Tamil and other populations in violation of Article 3 of the Universal Declaration of Human Rights and Article 6(1) of the International Covenant on Civil and Political Rights?

61. Have the Government of Sri Lanka and its Special Task Force, or

other instruments in its control, carried out extrajudicial and arbitrary arrests and detention of civilians and non-combatant Tamil and other populations, many resulting in the disappearance of those arrested or detained in violation of Articles 3, 9 and 10 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights?

VII. ARGUMENTS

A. *Torture*

62. In response to the first question, the Government of Sri Lanka and its Special Task Force, or other instruments in its control, have violated the Government's obligations under the Universal Declaration of Human Rights (the "Declaration") and the International Covenant on Civil and Political Rights (the "Covenant") by committing documented acts of torture, and cruel, inhuman, or degrading treatment or punishment of people in its custody.

63. Sri Lanka ratified the Covenant without reservations in 1980 and has recognized the competence of the Human Rights Committee to hear interstate complaints under Article 41. The Government of Sri Lanka, as a member of the United Nations, is also held accountable under the Declaration and has embodied freedom from torture in its own constitution.

64. In Article 7, the Covenant states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Likewise, the Declaration and Sri Lanka's constitution both use this same language in Articles 5 and 11, respectively. As a party to these agreements, and by its own constitution, Sri Lanka has assumed an obligation to respect the rights enumerated in these documents and to ensure the protection of such rights through its laws and institutions.

65. Those cited as responsible for committing human rights violations under the authority of the Government include members of the military, the police, and the Special Task Force (STF) (a police commando unit). In some areas of the east, members of unidentified groups who wear plain clothes and use unmarked vehicles have also been cited. These people operate in much the same manner as the plain-clothes "death squads" linked to Government forces which were a feature of the recent counter-insurgency drive in the south. NORTHEAST REPORT, at 14.

66. Other forces opposed to the LTTE have also been cited as responsible for committing abuses. The Government has assisted in the creation of armed groups within the civilian population, such as the Muslim home guards, and has also mobilized the armed cadres of anti-LTTE militant Tamil groups to assist in its campaign against the LTTE. Sometimes, members of these groups appear to be used as proxies for the regular security forces, committing abuses which the security forces ignore and for which members of the security forces cannot be held directly responsible. *Id.*

67. The documentation of these abuses and their link to the Government have been reported by several organizations:

68. The U.S. Department of State Dispatch reports "some government security officials acknowledge that security forces have used torture to elicit information and cooperation from suspected members of the JVP and LTTE." Human Rights Report.

69. Amnesty International published a comprehensive report on the human rights situation in Sri Lanka. This report was the result of a visit by an Amnesty International investigation team sent to the country in June 1991. The delegation conducted detailed discussions with Government officials, political leaders, and individuals active in the field of human rights. They interviewed dozens of victims and relatives of victims of human rights violations allegedly committed by the Sri Lankan security forces and paramilitary groups associated with them. NORTHEAST REPORT, at 1. While this report concentrates on the more serious violations of extrajudicial executions and "disappearances," it also highlights some of the abuses which constituted torture and cruel, inhuman or degrading treatment or punishment.

70. For example, one person who had been detained at Plantain Point army base in Trincomalee and then released, reported to a journalist that he had been blindfolded and beaten with iron bars. He saw some of his friends beaten to death, their corpses then heaped together and burned. *Id.* at 20

71. Amnesty International places responsibility for abuses such as these with the Government forces and elements under its control. It observes that the arming of civilian groups by the Government appears to repeat the practice which occurred in the south, when it distributed weapons for self-defense to home guards and to politicians for their bodyguards. *Id.* at 15. Muslim home guards are also reported to have detained Tamil people and then handed them over to the police. *Id.* at 16

72. Petitioners contend that regardless of how the abuses are carried out — directly by Government forces or indirectly through elements under its control — this link places responsibility for the abuses of torture and mistreatment of Tamils on the Government of Sri Lanka.

73. The International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights must be interpreted in accordance with the dominant purpose of both documents; that is, to promote human rights. Therefore, the right to freedom from torture or cruel, inhuman, or degrading treatment or punishment must be interpreted broadly because there are no permissible limitations allowed under international law.

74. Although Article 4(1) of the Covenant allows certain derogations in times of public emergency which threaten the life of the nation, Article 4(2) specifically states there may be no derogation from Article 7. Thus, even if the Government claims a public emergency due to armed conflict, this would not override the protection from torture provided for in the

Covenant.

75. Even though Article 4(2) prohibits any derogation from Article 7, the Government has claimed a public emergency through the Prevention of Terrorism Act (PTA) of 1979. This Act was initially a temporary measure, but an amendment in 1982 made the PTA a permanent part of Sri Lankan law. *The Human Rights Crisis in Sri Lanka: Its Background and Possible Solutions,* 15 DEN. J. INT'L. L. & POL'Y. 173, 370. The PTA undermines the inalienable human rights of certain citizens of Sri Lanka, both on its face and in its application. It is argued that the Government has no valid interest in its continued application, since after eight years it has proven itself to be ineffective as a tool to curb terrorist activity. *Id.* at 369.

76. Part IV of the PTA permits trial under special procedures which curtail normal legal safeguards. *Id.* at 370. Section 16(1), for example, provides extremely liberal rules on the admissibility of certain statements made to the police. Section 7(3)(a) of the PTA gives police the authority to take any suspect "to any place for the purpose of interrogation and from place to place for the purpose of investigation." *Id.*

77. Although Sri Lanka has not adopted the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), its Constitution forbids torture and cruel, inhuman, or degrading treatment or punishment, while the Emergency Regulations (ER) allow the use in court of confessions made to police officers and place the burden of proof on defendants to show that a confession was exacted under duress. Human Rights Report.

78. Additionally, Sections 22, 23 and 31(i) of the PTA attempt to make that document and its provisions retroactive. The definition of "unlawful activity" under Section 31 expressly includes "any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offense under this Act." Provisions of retroactivity such as this are specifically prohibited by the Covenant and the Declaration. Article 15 of the Covenant states that "no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law, at the time when it was committed." Article 11(2) of the Declaration also expressly prohibits retroactive imposition of criminal sanctions on actions that were not criminal when committed. Thus, the retroactive language of the PTA is invalid under international law and contravenes the historic principle that no ex post facto law should be passed.

79. The Declaration also prohibits derogation from the inalienable rights set forth in that document. Article 29(2) states:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 29(3) adds:

> These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

80. Thus, any limitations on the rights declared in the Declaration must be to promote, and not hinder, human rights. That is, the purposes and principles of the United Nations as stated in the preamble to the Declaration include "promoting respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance. . . ." The actions of the Sri Lankan Government in torturing and mistreating people in its custody is directly contrary to these stated purposes and is contrary to the aspiration of Article 29.

81. Consequently, since the Covenant, the Declaration and Sri Lanka's constitution declare that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or torture or to cruel, inhuman degrading treatment or punishment, and as it is the express desire of the United Nations to prohibit derogation from freedom from torture, the actions of the Government clearly violate international law.

B. *Extrajudicial Killings and Disappearances*

82. In response to the second question, the Government of Sri Lanka has been linked to extradjudicial and arbitrary killings of civilians and non-combatant Tamils and other populations and has thus violated Article 3 of the Declaration and Article 6(1) of the Covenant.

83. As a party to the Covenant and the Declaration, and by its own constitution, Sri Lanka must ensure protection of the right to life. The Government may only restrict this right to the extent permitted by the Covenant and the Declaration.

84. Sri Lanka has ratified the Covenant without reservations and, in addition, has recognized the competence of the Human Rights Committee to hear inter-state complaints under Article 41. Moreover, Sri Lanka is bound by the Declaration and by the prohibition on extrajudicial and arbitrary killings in its own constitution.

85. Article 6(1) of the Covenant states: "Every human being has the inherent right to life. This right shall be protected by the law. No one shall be arbitrarily deprived of his life." The Declaration secures that "everyone has the right to life, liberty and security of person" in Article 3. Sri Lanka's own constitution (Article 1394) provides: "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law." As a party to these instruments, and by its own constitution, Sri Lanka has assumed an obligation to respect the rights enumerated in these documents and to ensure the protection of such rights through its own laws and institutions.

86. Reports indicate that members of the regular security forces—the army, the police and the Special Task Force (STF)—were responsible for

many of the reported extrajudicial executions and "disappearances." Others were reportedly perpetrated by home guards who launched retaliatory attacks on Tamil civilians, with the apparent acquiescence of the security forces.

87. The documentation of these abuses linked to the Government has been gathered by several organizations:

88. *The U.S. Department of State.* The report by the State Department indicates that political killings have been carried out by the government's security forces, police and vigilante squads. It is argued through strong circumstantial evidence and a wide range of observers, including human rights groups, opposition politicians, individual government officials, and members of the security forces themselves, that there is a link between the government security forces and these vigilante groups. It is likely that vigilantes often commit extrajudicial killings with the knowledge and acquiescence of some government officials.

89. Although charges were brought against security force members in two vigilante cases and legal proceedings were initiated in 20 other cases in which security force personnel allegedly murdered civilians between 1988 and 1990, none of these cases had been resolved by the end of 1990. In one case in which police officers were accused of shooting a teenager, a number of witnesses received death threats; three witnesses and an attorney for the deceased's family were killed, one witness disappeared after being abducted from his office by armed men, and two lawyers connected with the case went into hiding. Human Rights Report.

90. *Amnesty International.* Amnesty International documents human rights violations in Sri Lanka in its September 1991 report. Prisoners taken by the security forces have not been the only victims of extrajudicial execution. Reports indicate such killings have been conducted by home guards and other instruments of the government. NORTHEAST REPORT, at 18. Even when they are not directly involved, there is evidence indicating the acquiescence or collaboration of the security forces in such attacks in some cases by other parties.

91. In an incident reported to Amnesty International, for example, a convoy of Tamil civilians travelling to Batticaloa from Colombo and Valachchenai on February 20, 1991 were attacked by Muslim home guards outside Eravur. Six passengers on the buses were killed. Others were injured, and some are unaccounted for. Witnesses said that home guards in uniform were responsible and it is reported that the military neither did anything to prevent this attack nor to intervene once it had begun. NORTHEAST REPORT, at 19.

92. Moreover, reports indicate that members of the regular security forces were responsible for many of the reported extrajudicial executions and "disappearances." For example, extrajudicial executions, burning of bodies and "disappearances" started in several towns in the east within days of government forces moving in. Father Eugene Hebert, an American Jesuit priest who has lived in Sri Lanka for 42 years, described the

outbreak of killings in Batticaloa as follows in a letter to his brother-in-law:

> When the army first came in on June 25 no shot was fired as the Tamil Tigers had withdrawn to fight first in Jaffna. But then began arrests of innocent citizens, looting, killings, and burning of bodies on public roads to terrorize the people. I had to supervise the burial of two, a man and woman, who had been killed, put into a sack and thrown off the bridge into the lagoon just in front of St. Sebastian's Church. They had been in the water three days before we were able to get the army to let us bury them.

NORTHEAST REPORT, at 22.

Disappearances and extrajudicial executions continued to be committed in large numbers in the Batticaloa area after this date, and Father Hebert himself apparently disappeared on August 15, 1990 while travelling along a road reportedly deserted except for army check posts. *Id.*

93. *Report of the Canadian Human Rights Mission to Sri Lanka, January 1992.*

A team of distinguished Canadians from academia, political parties, the Canadian Bar Association, and community and human rights groups visited Sri Lanka from January 22 to 29, 1992, and following their visit reported that the human rights abuses in Sri Lanka were "shocking to the conscience and. . . . unacceptable in any civilized society." *Report of the Canadian Human Rights Mission to Sri Lanka*, January 1992, at 15. They added: "Extensive and reliable evidence was presented to the Canadian team from a variety of sources, detailing the widespread abuse of human rights by the security forces and by paramilitary groups co-operating with the Government." *Id.* They found that in Sri Lanka "today, people live under the threat of extra-judicial killing, disappearance, torture, and arbitrary arrest and detention at the hands of the state security forces. . . ." *Id.* They found governmental coverup of "abusive acts perpetrated in its name," *Id.* at 17 and concluded that "the government has not yet demonstrated a serious commitment to stop the human rights violations being committed by members of the security forces and allied groups." *Id.* at 18.

94. Amnesty International and the U.N. Working Group have reported numerous arbitrary arrests and detentions by the Government of Sri Lanka. These reports confirm that many of those arrested and detained pose little or no threat to national security. For example, in 1991, Amnesty International reported that according to Sri Lankan governmental information, 7,619 people were in detention in the south as of June 1991. Of those, approximately 500 were Tamils. The government would not disclose why these people were being detained or what the charges were against them.

95. *Report of Asia Watch, Entitled "Human Rights Accountability in Sri Lanka," May 1, 1991.*

The report finds the Sri Lankan government's complicity in serious

rights abuses.

96. *The Report of the U.N. Working Group on Enforced or Involuntary Disappearances, January 1992.*

The Report found that by far the highest number of disappearances ever recorded for any country had occurred in Sri Lanka.

97. *Memorandum Prepared on Behalf of the European NGO Forum on Sri Lanka by the Country Working Group on Sri Lanka (Geneva), and submitted at the Forty-eighth Session of the U.N. Commission on Human Rights in February 1992.*

The Memorandum details the enormity of human rights violations in Sri Lanka. It states:

> The record of human rights violations including arbitrary arrests, detentions without trial, deaths in custody, 'disappearances,' arbitrary killings and disregard for the norms set by international human rights and humanitarian law continue to be matters of grave concern deserving serious attention by all those who are concerned about the situation in Sri Lanka. *Id.* at p. 1.

98. *ICCPR's Examination of Sri Lanka's Second Periodic Report in April 1991.*

Members of the UN Human Rights Committee stressed that emergency measures taken by the Government in addressing the difficult situation it faced in dealing with violence must be within the framework of the law, and that some of these provisions, including indefinite detention without charge or trial and retroactive application of criminal laws, are in violation of Sri Lanka's international legal obligations. *See, e.g.,* U.N. Doc. CCPR/C/SR 1095, ¶¶ 16, 17.

99. *Forty-eighth Session of U.N. Commission on Human Rights.*

The Chairman of the United Nations Commission on Human Rights made a statement on the human rights situation in Sri Lanka on February 27, 1992, which reads in part:

> The Commission calls upon the government of Sri Lanka to further intensify its efforts to ensure the full protection of human rights and further calls upon all parties to respect fully the universally accepted rules of humanitarian law.
>
> The Commission urges the government of Sri Lanka to continue to pursue a negotiated political solution with all parties, based on principles of respect for human rights and fundamental freedoms, leading to a durable peace in the north and the east of the country.
>
> The Commission urges the government of Sri Lanka to implement the recommendations of the Working Group, and expresses its satisfaction at the willingness of the government of Sri Lanka to take the necessary steps to implement the recommendations of the Working Group.

100. These reports of disappearances and extrajudicial killings by the

Government and elements under its control are only a few of the many examples of such abuses. Extrajudicial killings are widespread against the Tamil population, continue to occur under the direction of the Sri Lankan Government and are in direct violation of Article 6(1) of the Covenant and Article 3 of the Declaration.

101. The Covenant and the Declaration must be interpreted in accordance with the dominant purpose of both documents (i.e., promoting human rights). Therefore, the right to life must be interpreted broadly and the permissible limitations must be interpreted strictly and narrowly.

102. In situations of armed conflict, fundamental human rights cannot be ignored. "Disappearances" and the deliberate killing of prisoners and other defenseless individuals cannot be justified under any circumstances. International human rights law clearly maintains that certain fundamental rights, particularly the right to life and the right not be subjected to torture, must be protected by governments at all times and under all circumstances. Killings by members of the armed opposition do not provide justification for government forces to deliberately kill defenseless people. Nor is there any justification for enforced "disappearance" or torture of prisoners in the custody of government forces.

103. Article 4(1) of the Covenant states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

104. Although Sri Lanka has officially declared a public emergency through its Emergency Regulations and the Prevention of Terrorism Act, Article 4(2) of the Covenant specifically states that no derogation from certain articles, including 6 and 7, may be made under this provision. Thus, even in the context of an armed conflict, the Covenant provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (Article 6(1).)

105. In order for the government to invoke the death penalty, the accused person must be charged and given a trial before a competent court which gives its final judgment. Moreover, under Article 4 of the Covenant, there may be no derogation from the duty to uphold the right to life even in "time of public emergency which threatens the life of the nation."

106. According to Article 6(2) of the Covenant, in countries such as Sri Lanka which have not abolished the death penalty, the death sentence "may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not

contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

107. Further limitations on the death penalty in Article 6 solidify the right to life. The United Nations Human Rights Committee states that the right to life "should not be interpreted narrowly." The Human Rights Committee has described the protection against arbitrary deprivation of life in Article 6 as being "of paramount importance." It has stressed the need for governments to "take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces." In addition, the public emergency limitation in Article 4(1) of the Covenant, allowing derogation from certain articles, specifically prohibits derogation based on discrimination against race, color, sex, language, religion or social origin. Since the Sri Lankan Government's acts of repression are directed specifically at the Tamils, who have their own ethnic, religious, and linguistic traditions which are distinct from the Sinhalese, repression constitutes the prohibited discrimination in Article 4(1). Again, any derogation by the Sri Lankan Government for public emergency reasons is contrary to its obligations under the above-mentioned international prescriptions.

108. The Sri Lankan constitution, in Article 15(1), provides that "the exercise and operation of the fundamental rights declared and recognized by Articles 13(5) and 13(6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security." Also, Article 15(7) states that the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 "shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality. . . ." While these Articles allow derogation from the stated provisions, they clearly do not allow derogation from the freedom from torture in Article 11, nor derogation from the freedom from being "punished by death or imprisonment except by order of a competent court" in Article 13(4). Thus, the stated restrictions on fundamental rights delineated in the constitution apply only to those listed provisions. As torture and killings are not listed, there are no restrictions which may impinge upon these rights.

109. Because the Covenant, the Declaration and the Sri Lankan constitution all protect the right to life and because there may be no derogation from this right, even for public emergencies, the Government's actions of arbitrary killings and extrajudicial executions violate international law.

C. *Arbitrary Arrests and Detention*

110. In response to the third question regarding arbitrary arrests and detention, the Constitution of the Democratic Socialist Republic of Sri Lanka (the "constitution"), Article 13 provides:

> 13(1). No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.
>
> 13(2). Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedures established by law, and shall not be further held in custody, detained or deprived of personal liberty except. . . .in terms. . . .made in accordance with procedures established by law." *The Constitution of the Democratic Socialist Republic of Sri Lanka*, Chapter III, Article 13 (1979).

111. The constitution, however, limits these provisions for freedom from arbitrary arrest, detention and punishment in Article 15(7) which states:

> 15(7). The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13 (1) and 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality. . . .

112. Similarly, the Universal Declaration of Human Rights (Articles 3, 9 and 10) provides:

> Article 3. Everyone has the right to life, liberty and security of person.
>
> Article 9. No one shall be subjected to arbitrary arrest, detention or exile.
>
> Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. *Universal Declaration of Human Rights*, United Nations General Assembly, Dec. 10, 1948.

113. According to Article 29 (2) of the Declaration, however, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Thus, this provision also allows member states to limit fundamental rights in the interest of national security.

114. Under customary international law, Sri Lanka is bound by the provisions of the Declaration. While Articles 3, 9 and 10 may be limited by state governments in the interest of national security, the facts show the Government of Sri Lanka has exploited this limitation beyond its intended use. Amnesty International, Asia Watch, the Canadian Human Rights Mission, the United Nations Working Group and the U.S. State Department have all reported such violations. For example, over 3,000 Tamil people have disappeared in the custody of government forces since June of 1990 and government security forces have refused to acknowledge

individual detentions. It is unlikely these Tamils have all disappeared voluntarily, yet the government refuses to acknowledge they are being detained. It is also unlikely the government is detaining all of these Tamils for national security reasons.

115. Finally, Article 9 of the International Covenant on Civil and Political Rights provides:

> 19(1). Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. *International Covenant on Civil and Political Rights*, General Assembly of the United Nations, adopted Dec. 16, 1966.

116. Sri Lanka has ratified the Covenant and is bound by its provisions under Article 2, which states:

> 2(1). Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,. . ." *International Covenant on Civil and Political Rights*, General Assembly of the United Nations, adopted Dec. 16, 1966

117. The facts clearly show the Government of Sri Lanka has subjected Tamil people to arbitrary arrests and detention. Government security forces have taken people from their homes and detained them without explanation. Many of these people have either disappeared or have been found dead. Rarely are the detainees or their actions shown by the government to be a threat to national security.

118. The Sri Lankan people deserve to live their lives in peace, free from the threat of arbitrary arrests, detentions and exile. It is the responsibility of the Government of Sri Lanka to protect and ensure these rights protected by the Declaration, the Covenant, and Sri Lanka's own constitution; not to participate in violating them.

III. PRAYER

119. Pursuant to the U.N. Charter, Article 22, Petitioners pray for the formation of an AD HOC COMMISSION to function as an AD HOC TRIBUNAL to be convened by a resolution of the HUMAN RIGHTS COMMISSION, the GENERAL ASSEMBLY, the SECURITY COUNCIL, and the SUBCOMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, to hear the complaint of the petitioners for the victims and the Tamils of Sri Lanka, and to investigate the allegations of torture, arbitrary arrest, disappearances, killings, and attempted genocide.

120. Petitioners also pray for the establishment of a truly representative government in Sri Lanka which will prevent future violations of human rights and assure the protection and nondiscrimination of the minority people of Sri Lanka.

121. Petitioners also pray that the AD HOC TRIBUNAL be authorized to function as an INTERNATIONAL CRIMINAL TRIBUNAL to try officers and agents of the respondent under international criminal law.

122. Petitioners also pray that proper sanctions be taken against the respondent Government of SRI LANKA for any refusal to comply with any of the orders or decisions that the tribunal or any other organ of the UNITED NATIONS makes in relation to this matter.

123. Petitioners also pray that the UNITED NATIONS authorize a full investigation of the matters presented in this petition and subsequently authorize a complete and public disclosure of all evidence and findings of fact at the conclusion of such investigation.

124. Petitioners also pray that the U.N. establish an ad hoc tribunal for Writ of World Habeas Corpus to ventilate and adjudicate all cases of deprivation of human liberty.

Respectfully submitted,

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BOOK NOTES

FALKOWSKI, JAMES E., INDIAN LAW/RACE LAW: A FIVE-HUNDRED YEAR HISTORY; Praeger Publishers, New York, NY (1992); ISBN 0-275-94318-6; 170 pp. (hardcover).

James Falkowski has been studying Indian law for about twenty years. The reader must go no further than the first paragraph of the preface in *Indian Law/Race Law: A Five-Hundred Year History* to know the author has a strong opinion on the subject. He theorizes that human rights violations toward indigenous peoples of the Western hemisphere have been institutionalized, and continually justified, through a dual system of international laws: those that apply to "civilized" peoples and those that apply to "uncivilized" peoples.

In arriving at this conclusion, the text first traces the early development of international law toward indigenous populations, beginning with the European "discovery" of North America. These foreign conquests brought a right to conquer, purchase and colonize land, depriving the Indians of their human rights in the process. Both the Spanish and English perspectives toward the Indians are examined, and the roots of the prejudices toward these native peoples is discussed.

It is not until after World War I that Woodrow Wilson attempts to secure Indian rights through the Native Inhabitants clause of the League of Nations Covenant. This covenant was expanded under the United Nations Charter. Falkowski argues that the UN continually ignored the problems faced by indigenous peoples, however, until the UN Decade to Combat Racism commenced in the 1970s. Subsequently, the UN produced several important studies on worldwide indigenous populations.

The author also argues the International Court of Justice and other international tribunals have continually failed to recognize the rights of indigenous peoples. Several cases are examined, such as *Island of Palmas* and *Western Sahara*. Specifically, the United States' policy of self-determination is discussed in several Supreme Court cases. Theories justifying colonial expansion by the French and the U.S. are also explored.

The author concludes from his examination of relevant caselaw and covenants that current international law is a compromise between attempts to apply law to all peoples and the bias favoring Christian-Euro-

pean peoples. Although international attempts to recognize the rights of indigenous people should be lauded, the next step by the international legal system should be taken: a Universal Declaration on the Rights of Indigenous Nations and Peoples.

Lisa Berkowitz

EMERGING HUMAN RIGHTS: THE AFRICAN POLITICAL ECONOMY CONTEXT; Edited by George W. Shepherd, Jr. and Mark O.C. Anikpo; Consortium on Human Rights Development; Greenwood Press, Westport, Connecticut (1990); ISBN 0-313-26853-3; 244pp. (hardcover) Index.

The political economy approach to human rights contemplates that political decisions control the allocation of resources in society, and in turn, those political choices are dependent on economic choices. On a global scale, political economists contend that new states, their citizens and political decision-makers, are dependent on the international economy. This has led to the realization that the distribution of wealth and basic human rights are closely related to the international political system. It is from this theoretical basis that George W. Shepard and Mark O.C. Anikpo guide this collection of essays recognizing the African contribution to the emergence of new human rights in the global political economy.

The book was initiated by conferences conducted at the Port Harcourt University in Nigeria (June 7-11, 1987) and at the University of Denver (November 9-10, 1984). The intention of the conferences and the book, as indicated in the book's Acknowledgments, is to contribute to a better understanding and respect for the individual and collective rights of African peoples. The essayists in this collection advocate change within the global structure to provide for "redistributive justice in an unjust and unequal world." Africa, in the minds of these authors, is the proper forum of the twentieth century in which to apply and test political economy notions to effectuate this change.

The first five essays of the collection are concerned with the theoretical framework from which "new human rights" derive. These essays discuss topics such as the morality and justice in an existing inequitable global system, the historical formulation of basic human rights and their modern application, in the theological origins of human rights, and the African struggle in the postcolonial era for development to meet social, economic and psychological needs. Although the focus of these writings is theoretical, the authors provide concrete details of the African politics, economics and societies to illustrate the need for change.

The remaining essays in the collection illuminate myriad issues and violations of human rights in Africa. From the plight of South Africa to refugee movements to Nigerian militarism, these authors paint a vivid picture of a continent crippled by social inequalities, exploitation by Western capitalist countries, sickness and starvation, and political turmoil. From these images, the essayists propose their solutions, couched in the political economy context, to achieve justice and a global human rights consciousness.

As with any book which strives to address the problems of an entire continent, the essays contained in this collection tend to be brief and cursory, highlighting the issues and facts most useful for the conveyance of a

particular author's message. The essays range from sixteen to twenty-four pages in length, including endnotes for further research assistance. The text includes a selected bibliography, as well as an index. Although the index is short on topical headings to direct readers to particular areas of interest, it does contain many references to individuals; international and African scholars, world leaders, and most importantly, actors in the African political economy. Finally, the book ends with a summary of the essay contributors, which includes: S.O. Alubo, MArk O.C. ANikpo, Zdenek Cervenka, Osita Eze, Julious O. Ihonvbere, Stanlie James, Obed O. Mailafia, Okwudibia Nnoli, Mokwugo Okoye, Nienanya Onwu, Michael J. Schultheis, and George W. Shepherd, Jr.

Patricia Thatcher

THE AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW; Edited by D.W. Creig and Philip Alston; Australian National University Publication, Canberra, Australia (1992); $120.00; ISBN 07315 1407 6; 555pp. (hardcover).

The *Australian Year Book of International Law* contains a collection of speeches given at a conference held at the Australian National University in August of 1990. The speeches revolve around the two themes of the conference: the consent and acceptance of international law as binding, and gender bias in the writing and interpretation of international laws.

The book represents a survey of current developments in international law. The atmosphere of the conference, gleaned through the various speeches, is an intense appreciation for the importance of international law. Yet, one may also sense a vagueness as to what constitutes international law expressed by the constant need to define the international field. The speakers seems to be looking to self-actualize themselves as a legal field separate from other legal specialties. The speech by Professor Douglas Johnston of the University of Victoria concerning a cross-disciplinary perspective of consent in international law highlights this dilemma.

Although the two themes of the conference are presented in interesting ways by speakers from several countries, the absence of representatives from South America, Africa or the former communist countries appears blatant. The presence of these countries could have transformed an extensive survey of current international law issues into a more complete presentation.

Most interesting among the speeches are those concerning gender. Whether the sterotypically slow response of the legal world to social concerns, or the realization that many problems still await solution, the decision to place gender as one of the themes of the conference is refreshing. In her article, "Gender and International Law: Women and the Right to Development," Professor Marilyn Waring of the University of Waikato suggests that international law, and laws in general, are gender biased. For example, the Universal Declaration of Human Rights declares that human beings "should act towards one another in a spirit of brotherhood." A more common example appears in the "reasonable man" standard applied by the courts in the United States.

This compilation not only constitutes a current discussion of two topical academic international law issues, but offers valuable insight on how to approach these issues in the future.

Geraldine J. Cummings