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Euthanasia and Physician-Assisted Suicide in the Democratic World: A Legal Overview

By Raphael Cohen-Almagor*

This essay addresses the ways that different democracies handle the issue of the right to die with dignity. The familiar distinction between active and passive euthanasia is discussed as well as the current legal positions in the Netherlands, Australia, the United States, Switzerland, Belgium, England, France and Canada. This analysis articulates that the movement toward legalizing euthanasia and physician-assisted suicide (PAS) is growing and that there is more legal involvement in end-of-life medical decisions.[1]

I. Introduction

This essay addresses the varied perspectives of different democracies toward euthanasia and PAS. Furthermore, the current legal positions in the Netherlands, Australia, the United States, Switzerland, Belgium, England, France and Canada are analyzed.

Some patients may feel that they are about to die or wish to draw their death nearer while maintaining their dignity. Faced with the deterioration of the functions of their bodies, patients may find it hard to maintain their dignity. Some of them feel exhausted and no longer wish to continue their struggle, especially when they are required (so they feel) to use their energies not only to fight the decaying forces but also against relatives and nursing personnel who may treat them as either infantile or senile,[2] subjects worthy or unworthy of their mercy. The patients'

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1. *See* Lori D. Pritchard Clark, *RX: Dosage of Legislative Reform to Accommodate Legalized Physician-Assisted Suicide*, 23 CAP. U. L. REV. 689, 702–703 (1994) (stating that "The judiciary is becoming increasingly aware of the constitutionally based rights of patient autonomy and self-determination in the context of right-to-die situations"); Albert R. Jonsen, *Physician-assisted suicide*, 18 SEATTLE UNIV. L. REV. 459, 462 (1995) (stating that "In the early 1990s, Washington, California, and Oregon put the legalization of euthanasia before their voters. All three states have the initiative process that allows the signatures of a certain number of citizens to place a proposal on the ballot. If the proposal passes in a general election, it becomes law, without action by the elected legislature."); Brendan A. Thompson, *Final Exit: Should the Double Effect Rule Regarding the Legality of Euthanasia in the United Kingdom Be Laid to Rest?,* 33 VAND. J. TRANSNAT'L L. 1035, 1067 (2000) (claiming that if confusion exists as to what is permissible under the double effect rule, British courts are likely to hear many more cases in which physicians refuse to treat patients without approval from the court).

2. *See* David R. Schanker, Note, *Of Suicide Machines, Euthanasia Legislation, and the Health Care Crisis,* 68 IND. L.J. 977, 981–82 (1993) (stating that "Autonomy may be extended to allow euthanasia where the patient is not in pain but wishes to die for other reasons: a deterioration in quality of life, the loss of dignity, or the wish not to burden his family financially with a prolonged hospital or nursing home stay").

* **D. Phil. (Oxon., 1991); Chairperson, Library and Information Studies, University of Haifa; formerly Director, Medical Ethics Think-tank, The Van Leer Jerusalem Institute (1995-1998).**

motivations and inclinations help us recognize the right to die with dignity.[3] A necessary distinction is that between the *right* to die with dignity and the *process* of dignified dying.

II. Active and Passive Euthanasia

Liberals consider first and foremost the rights and interests of the individual.[4] It has been argued that respecting human life permits, and in some cases supports, mercy killing (merciful treatment that results in death).[5] In this context, a distinction has been made between *active* and *passive* euthanasia.[6] Euthanasia is a Greek term meaning "easy death."[7] *Active euthanasia* involves prescribing medication or treatments aimed at shortening a person's life and alleviating his or her suffering.[8] The attending physician may do it using a poisonous injection or pre-

3. *See* David Orentlicher, *The Alleged Distinction Between Euthanasia and the Withdrawal of Life-sustaining Treatment: Conceptually Incoherent and Impossible to Maintain*, 1998 U. ILL. L. REV. 837 (1998) (arguing that euthanasia enhances patient welfare and reduces risks of abuse); Clark, *supra* note 1, at 710 (defining patient autonomy as "the act of functioning independently without control by others," and defining patient self-determination as a "decision according to one's own mind or will, without outside influence" and claiming both are necessary in physician-assisted suicide).

4. *See* Julia Belian, *Deference to Doctors in Dutch Euthanasia Law*, 10 EMORY INT'L L. REV. 255, 262 (1996) (stating a Dutch doctor's duties as having to care for the patient as the patient wishes, to alleviate suffering, and to improve quality of life as some considerations in determining euthanasia laws); *see also* Herbert Hendin, M.D., *The Dutch Experience,* 17 Issues L. & Med. 223, 225 (2002) (describing the Dutch as a liberal country and stating that euthanasia is acceptable in the Netherlands if the patient makes the voluntary request, is suffering unbearably, and there are no reasonable alternatives); Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia,* 76 CALIF. L. REV. 151, 155 (1988) (discussing neonatal euthanasia and the fact that some parents claim to have a privacy right to control decisions about their children's welfare and medical care without governmental interference).

5. *See* Kent S. Berk, *Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?*, 67 TUL. L. REV. 485, 487–500 (1992) (stating that individuals should have the right to die with dignity, should have the choice to live in pain or die in peace, and that life may not be worth living if it cannot be enjoyed free from pain); Timothy Paul Brooks, *Survey of Developments in North Carolina Law, 1987: V. Criminal Law:* State v. Forrest: *Mercy Killing and Malice in North Carolina*, 66 N.C. L. REV. 1160, 1172 (1988) (stating that when a patient's life holds only the prospect of pain and deterioration, the life to be sustained can no longer be "the sort of free and rational activity that gives us dignity"); Clark, *supra* note 1, at 715 (detailing the story of a physician-assisted suicide and the doctor's desire to challenge the medical profession to take an in-depth look at end-of-life suffering).

6. *See* Compassion in Dying v. Washington, 85 F.3d 1440, 1447 (1996) (differentiating between passive euthanasia as letting death run its course and active euthanasia as permitting one person to kill another); Maricarmen Jenkins, *Perstpectives on the Latimer Trial: Moral Judgement and the Case of Robert Latimer*, 64 SASK. L. REV. 545, 549–50 (2001) (stating an often-made moral distinction between active and passive euthanasia that while active euthanasia is thought to be always morally objectionable, passive euthanasia, at least in some cases, is morally permissible); Antonios P. Tsarouhas, *The Case Against Legal Assisted Suicide,* 20 OHIO N.U. L. REV. 793 (1994) (describing active euthanasia as an affirmative action on the part of a physician which accelerates death and passive euthanasia as an act where the physician prescribes a course of action which hastens the patient's death).

7. *See* Jonsen, *supra* note 1, at 459 (stating the word euthanasia was first used by Francis Bacon in the sixteenth century to mean "good" or "happy death"); Schanker, *supra* note 2, at 981 (noting that "To the ancient Greeks, the term *eu thanatos* meant "good or easy death," in the sense of dying peacefully and with a psychologically balanced state of mind."); Thompson, *supra* note 1, at 1038 (stating that the word euthanasia is derived from two Greek words meaning good (*eu*) death (*thantos*)).

8. *See* Jenkins, *supra* note 6, at 550 (describing active euthanasia as the taking of a person's life by use of lethal injection); Schanker, *supra* note 2, at 983 (noting that "Active euthanasia is the administration of any means intended to produce death, such as the deliberate injection of a lethal dose of morphine."); Tsarouhas, *supra* note 6, at 793 (describing active euthanasia as an affirmative action on the part of a physician which accelerates death).

scribing large doses of drugs with the intention of cutting short the patient's life.[9] Some describe this action as "killing."[10]

Passive euthanasia (also termed "forgoing life-sustaining treatment")[11] may take two forms: one is abstention from performing acts that prolong the patient's life.[12] An example may be refraining from connecting a patient to a respirator or to a resuscitation machine. The other form involves discontinuation of actions designed to sustain life. This means withdrawing machines to which the patient has already been connected.[13]

It might be argued that if PAS is sometimes morally permissible,[14] then active euthanasia would also sometimes be morally permissible because both are morally equivalent actions.[15]

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9. *See* Jenkins, *supra* note 6, at 550 (using lethal injection as an example of active euthanasia); Schanker, *supra* note 2, at 983 (utilizing a lethal dose of morphine to illustrate active euthanasia); Thompson, *supra* note 1, at 1039 (stating that "Active euthanasia is defined as taking positive steps, which shorten the life of an ill person, usually by means of administering drugs.").

10. *See* Natalie Abrams, *Active and Passive Euthanasia*, PHILOSOPHY, 1978, vol. 53 at 257–63; Philip Montague, *The Morality of Active and Passive Euthanasia,* ETHICS IN SCI. & MED., 1978, vol. 5 at 39–45; Bruce Jennings, *Active Euthanasia and Forgoing Life-Sustaining Treatment: Can We Hold the Line?* JOURNAL OF PAIN AND SYMPTOM MGMT., July 1999, vol. 6, no. 5 at 312–16.

11. *See* Tsarouhas, *supra* note 6, at 793–94 (stating that some commentators equate passive euthanasia with withdrawal of medical treatment). *See generally* Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice*, 82 MINN. L. REV. 939 (1998) (using the terms active euthanasia and withdrawal of life support throughout the article in place of active and passive euthanasia); Clark, *supra* note 1, at 692 (stating that another label given for passive euthanasia is "abatement of life-sustaining treatment").

12. *See* Clark, *supra* note 1, at 692-93 (defining passive euthanasia "as the act of withholding or withdrawing life-sustaining treatment in order to allow the death of an individual"); *see also* Anne Gifford, Comment, *Atres Moriendi: Active Euthanasia and the Art of Dying*, 40 UCLA L. REV. 1545, 1546 n.3 (noting that passive euthanasia involves the removing of artificial life support systems such as respirators or simply discontinuing medical treatments necessary to sustain life); Barney Sneiderman, *The Case of Nancy B.: A Criminal Law and Social Policy Perspective*, 1 HEALTH L. J. 25, 28–29 (noting that one can distinguish between active and passive euthanasia by categorizing one as "killing" and the other as "letting die").

13. *See* Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan Toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 DENV. U. L. REV. 175, 180 (1993) (illustrating that passive euthanasia involves the refusal to make extraordinary efforts to keep a person alive); Andrew L. Plattner, *Australia's Northern Territory: The First Jurisdiction to Legislate Voluntary Euthanasia, and the First to Repeal It*, 1 DEPAUL J. HEALTH CARE L. 645, 647 n.10 (citing "Euthanasia—The Australian Law in an International Context," Department of the Parliamentary Library, Research Paper No. 4 1996–97 (Sept. 20, 1996), available at http://www.aph.gov.au/prs/pubs/rp/97rp4.htm) (defining passive euthanasia occurring when medical treatment is withdrawn or withheld from a patient, not at the request of the patient, in order to end the patient's life).

14. *See* Alfred F. Conard, *Elder Choice*, 19 AM. J. L. & MED. 233, 238–39 (1993) (discussing the misery of elders as a result of a state of extreme debility); *see also* Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1, 4–5 (1996) (stating that assisted suicide is consistent with the fundamental values underlying the legal and ethical requirements of respect for the rights of those who are both terminally ill and competent); Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2024 n.35 (1992) (citing Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 424 (Mass. 1977)) (stating how there is an increased recognition within the courts regarding the protections of a patient's status as a human being).

15. *See* Messinger, *supra* note 13, at 248-49 (discussing the difficulties, in light of current medical technology, in distinguishing between active and passive euthanasia); *see also* Baron, *supra* note 14, at 10 (discussing how there is disagreement amongst the medical community as to whether there is an "important difference between" active euthanasia and physician-assisted suicide); Patrik S. Florencio & Robert H. Keller, *End-of-Life Decision Making: Rethinking the Principles of Fundamental Justice in the Context of Emerging Empirical Data*, 7 HEALTH L.J. 233, 254 n.120 (1999) (recognizing that some legal and ethical analysts claim that there is no moral distinction between the termination of life-prolonging treatment by active or passive means).

This is the prevalent view in the Netherlands.[16] Undoubtedly the role that the consenting doctors would be expected to play is great and onerous.[17] Doctors who agree with this rationale would argue that while it is true that the doctor's job is to prolong life, his or her job is also to prevent suffering and ensure the preservation of human dignity.[18] Sometimes prolonging life and the preservation of human dignity are mutually exclusive.[19] For a small minority of patients, the continuation of living at all costs is not an appealing option.[20] These patients should not be ignored. Medicine and ethics should address their needs. Although not an easy task, the solution must not be beyond our reach either medically or ethically. That solution might change the nature of medicine, but the "nature of medicine" is not a static concept;[21] it is

16. *See* Florencio & Keller, *supra* note 15, at 240 (noting that the Dutch courts have recognized physician-assisted suicides and mercy killings); *see also* Maria T. Celo-Cruz, *Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?*, 18 AM. J.L. & MED. 369, 385 (1992) (stating that there is the belief that the practice of voluntary active euthanasia in the Netherlands has been inseparable from the overtly involuntary form); Dr. G. Steven Neeley, *The Constitutional Right to Suicide, The Quality of Life, and the "Slippery-Slope": An Explicit Reply to Lingering Concerns*, 28 AKRON L. REV. 53, 68 (1994) (discussing how the increased flexibility of the Dutch courts has allowed various forms of euthanasia to be recognized).

17. *See* Annette E. Clark, *Autonomy and Death*, 71 TUL. L. REV. 45, 101–02 (1996) (arguing that if the physician's role is expanded to include performing acts such as euthanasia there would be a loss of trust between the patient and the doctor which would have a detrimental effect on their relationship); *see also* Baron, *supra* note 14, at 4 (stating that the threats of criminal charges and civil litigation make physicians wary of complying with a patient's request for the performance of euthanasia); Messinger, *supra* note 13, at 202–03 (stating that not only is there divided opinion within the medical community regarding what role physicians should play regarding euthanasia, there is also concern amongst the medical community regarding the stigma attached to doctors who perform such acts).

18. *See* Clark, *supra* note 17, at 101–02 n.277 (citing David Orentlicher, *Physician Participation in Assisted Suicide*, 262 JAMA 1844, 1844 (1989)) (illustrating the tension within the medical community between the right to self-determination and the perception that performing euthanasia is an assault on the sanctity of life); *see also* Baron, *supra* note 14, at 4–5 (stating that assisted suicide is consistent with the fundamental values that guide all health care decision making, including the promotion of the patients' well-being and respecting their autonomy); Clark, *supra* note 1, at 690 (arguing that historically physicians have been hailed for their life-sustaining efforts; however, as technology creates even more powerful medications, in conjunction with extensive treatment options that function to prolong the span of suffering, there comes a point where dignity of the patient should predominate).

19. *See* Edmund D. Pellegrino, *Ethics*, 265 JAMA 3118, 3118–19 (1991) (noting that some proponents of assisted death take the position that it is unjust to allow those who are on life-sustaining treatment to choose death by refusal of treatment, but to deny that same choice to those not dependent on some form of life support); *see also* Conard, *supra* note 14, at 238–39 (citing John E. Ruark et al., *Initiating and Withdrawing Life Support: Principles and Practice in Adult Medicine*, 318 NEW ENG. J. MED. 25, 28 (1988)) (arguing how hopelessly ill patients do not benefit from medical interventions); Clark, *supra* note 1, at 690 (noting that at some point it is essential for society to elevate quality of life over proliferation of life).

20. *See* Sidney H. Wanzer et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look,* 320 NEW ENG. J. MED. 844, 847–48 (1989) (stating that some patients who are undergoing severe suffering and confronting an unbearable or meaningless existence would have to endure an inhumane dying process without the complete control of their medical treatment); s*ee also* Florencio, *supra* note 15, at 234 (noting the significant number of terminally ill patients who receive inadequate management of pain during the course of their illness); Messinger, *supra* note 13, at 226 n.443 (discussing how some terminal ill patients become little more than an experimental mass, subjected to countless treatments in a hope to sustain life).

21. *See* Messinger, *supra* note 13, at 200–04 (noting that as rapid advancements were made regarding medical technology both the medical and legal communities' perspective changed regarding the issue of euthanasia); *see also* Clark, *supra* note 17, at 105 n.304 (citing Singer & Mark Siegler, *Euthanasia—A Critique*, 322 NEW ENG. J. MED. 1881, 1881–82 (1990) (noting that there is a changing consensus that physicians believe that the medical profession does not adequately fulfill its obligations towards the dying due to complications that result from the current medications)); Note, *supra* note 14, at 2035–38 (discussing how time changes the ethical views of the medical profession especially in regard to euthanasia).

in constant flux (see, for instance, the agenda and terminology of the Hippocratic Oath).[22] The history of the last thirty years shows that medicine has changed dramatically due to rapid technological developments.[23] These same developments make it possible to prolong life in difficult situations.[24] An acrobatic argument that acknowledges technological advances but dismisses the evolving ethical issues that pose uncomfortable and disturbing questions is unfair to the community of patients.

III. Comparative Law

Active euthanasia is considered a criminal offense in most countries of the world.[25] The Netherlands exhibits the most permissive attitude in this sphere.[26] Euthanasia and assisted suicide have been practiced and tolerated in the Netherlands for the past twenty years,[27] even though it remained, until the passage of the euthanasia law, an illegal act under articles 293 and

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22. *See* Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 246 (1995) (stating that the Hippocratic Oath defines a physician's obligations); *see also* Lawrence K. Altman, M.D., *The Doctor's World: Despite Many Shifts, Oath as Old as Apollo Endures in Medicine*, N.Y. TIMES, May 15, 1990, at 3 (emphasizing that "[m]any of the oath's principles or moral rules . . . have been modified by laws, judicial decisions, professional customs and medical advances."); Alan Maynard, *Evidence-based Medicine: an Incomplete Method for Informing Treatment Choices*, THE LANCET, Jan. 11, 1997 (concluding that physicians are taught under the Hippocratic Oath to care for a patient and enhance his welfare).

23. *See* Ellis S. Benson, *The Past as a Prologue: A Look at the last 20 years; History of Laboratory Medicine*, MED. LABORATORY OBSERVER, July 1989, at 27 (finding advances of the 1970s and 1980s in laboratory medicine); *see also* Henk Have, *Medical Technology Assessment and Ethics: Ambivalent Relations*, THE HASTINGS CENTER REP., Sept. 15, 1995, at 13 (commenting on how technologies impact the domain of medicine); Sen. Frank Murkowski, *Tripartisan Plan Best on Drug Costs*, ANCHORAGE DAILY NEWS, Aug. 2, 2002, at B6 (noting that "Over the past three decades, medicine and health care have seen remarkable innovations and breakthroughs . . . science, research and technological developments are helping our citizens to live longer, healthier lives.").

24. *See* Pamela Elfenbein, *Medical Resource Allocation: Rationing and Ethical Considerations—Part I*, PHYSICIAN EXECUTIVE, Feb. 1994, at 3 (discussing that technological development imposes arduous decision-making); *see also* Ruud Meulen, *What Do We Owe the Elderly? Allocating Social and Health Care Resources*, THE HASTINGS CENTER REP., Mar. 1999, at S1 (stating that "The power and prestige of contemporary medicine have come to reside in the search for medical cures and the use of high-technology, acute-care services to extend life."); Charles Normand, *Economics, Health, and the Economics of Health*, BRIT. MED. J., Dec. 21, 1991, at 1572 (stating that "the need to choose has become a visible feature of the debate about health services").

25. *See Swiss National Council Debate over Relaxation of Euthanasia Law*, NEUE ZUERICHER ZEITUNG, July 6, 2001, at 25 (reporting that active euthanasia is illegal in Switzerland); Yonhap News Agency, *South Korea: New Code of Ethics for Doctors sparks Controversy over Euthanasia*, BBC WORLWIDE MONITORING, Nov. 18, 2001 (noting that "All forms of euthanasia . . . are legally forbidden in Korea."); Caoimhe Young, *Wife's Mercy Killing Tragedy: 14 Years Jail Sentence for Criminal Act*, THE MIRROR, Feb.1, 2002, at 5 (stating that euthanasia is a criminal offense in Ireland).

26. *See* Dr. Jeremy Butler, *Dutch Example a Way of Circumventing Andrew Bill*, THE AUSTRALIAN, Apr. 1, 1997, at 14 (announcing that voluntary active euthanasia has a long history in the Netherlands); *see also* Vikram Dodd, *Legal Barriers to Euthanasia are Receding*, THE GUARDIAN, Sept. 1, 2001, at 3 (stating that the Netherlands became the first country to legalize euthanasia); Arunabha Sen Gupta, *Euthanasia and Abuse of Freedom*, THE STATESMAN, Jan.16, 1999 (saying that the "Netherlands never had legal sanctions, but because of a 'tolerant judiciary' the practice of euthanasia is common among Dutch physicians.").

27. *See* Gay Alcom, *Third of Patients Helped to Die: Study*, SYDNEY MORNING HERALD, Feb. 14, 1997, at 3 (noting that "Voluntary euthanasia has been practiced openly in the Netherlands for two decades."); Jay Branegan, *I Want to Draw the Line Myself*, TIME, Mar. 17, 1997, at 30 (emphasizing that euthanasia is tolerated in the Netherlands).

294 of the Penal Code.[28] Several lower court decisions, supported by a Supreme Court decision and reflected in the policies of regional attorneys general and further promulgated by the Royal Dutch Medical Association,[29] have held that when euthanasia meets a certain set of guidelines, it may be defended under a plea of *force majeure* and so is reasonably sure of being subjected to prosecution.[30] The euthanasia law, which was approved by the Dutch Upper House of Parliament on April 10, 2001,[31] places euthanasia and PAS outside the Dutch Penal Code when doctors follow a specified administrative procedure.[32] Euthanasia and PAS would be supervised, not as in the past by the public prosecutor,[33] but by a public regional committee consisting of a doctor, a lawyer, and an ethics expert.[34] Doctors must be "convinced" that the patient's request is voluntary and well considered[35] and that the patient is facing "unremitting and unbearable" suffering.[36] Also, the doctor must advise the patient of his or her situation and prospects[37] and

28. *See* Schanker, *supra* note 2, at 992 n.85 (stating "He who, on the explicit and serious desire of another person, deprives him of his life, will be punished with an imprisonment of up to 12 years or a fine in the 5th category (100,000 guilders)"); *see also id.* (noting that article 294 provides for criminal sactions).

29. *See Dutch Medical Association Tries to Clarify Grey Areas on Euthanasia*, INT'L HEALTHCARE NEWS, Oct. 1, 1995 (stating that the Royal Dutch Medical Association has published a 39-page policy document on euthanasia).

30. *See* Schanker, *supra* note 2, at 994 (noting that force majeure was used as a defense and the court found that no crime has been committed).

31. *See* Margaret P. Battin, *The Least Worst Death* (Oxford Univ. Press, 1994), 130–31 (noting that on Apr. 10, 2001, the Dutch House of Parliament approved a new euthanasia law).

32. *See A Dying Law,* THE LAWYER, Apr. 29, 2002, at 31 (announcing that "[r]ecent legislative changes in the Netherlands have meant that—albeit under a strict protocol—the Dutch Penal Code now recognizes voluntary euthanasia."); *see also* Hiroyasu Goami & Yomiuri Shimbun, *No Consensus Yet On Euthanasia,* The Daily Yomiuri, Nov. 3, 1992, at 9 (finding that "courts have established strict, legal guidelines for administering lethal drugs in cases of euthanasia"); Jos V.M. Welie, *Why physicians? Reflections on the Netherlands' New Euthanasia Law; Perspective*, THE HASTINGS CENTER REPORT, Jan. 1, 2002, at 42 (reporting that Holland imposes an administrative procedure instead of a legal standard on use of euthanasia).

33. *See* Belian, *supra* note 4, at 255 (referring to the Rotterdam decision which stated the rules in performing euthanasia); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 893, 927 (2000) (noting that the court in Rotterdam set out criteria narrowing the circumstances when physician-assisted suicide would be allowed). *See generally* Nurit Lev, Note, *The Legalization of Euthanasia: The Right to Die or the Duty to Die*, 19 SUFFOLK TRANSNAT'L L. REV. 297 (1995) (discussing the rules that the Rotterdam court declared in order to perform euthanasia).

34. *See Netherlands Planning to Legalize Euthanasia*, BUFFALO NEWS, Aug. 11, 1999, at 1A (noting that physicians have each case reported to the coroner); Belian, *supra* note 4, at 255 (mentioning what the doctor has to do in order to perform the euthanasia); Margaret Funk, Note, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the state of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149 (2000) (referring to the various tasks the doctor must complete before performing the euthanasia).

35. *See Dutch Legalize Euthanasia, The First Such National Law*, N.Y. TIMES, Apr. 1, 2002, at 5 (stating that patients not only have to be facing an interminable suffering, but also must be making a voluntary, well-considered request to die); Lev, *supra* note 33, at 297 (stating that the patient's request for euthanasia must be voluntary and well-thought-out); Andy Soltis, *Dutch Vote to Legalize Euthanasia*, N.Y. POST, Nov. 29, 2000, at 026 (stating that the patient's request must be voluntary and well-considered).

36. *See* Anthony Deutsch, *Netherlands Legalizes Euthanasia; Measure is the First Passed by a Country*, WASH. POST, Apr. 11, 2001, at A19 (noting that the Netherlands became the "first nation to pass a law allowing doctors to end the life of patients with unbearable terminal illnesses"); *The World; In Brief/The Netherlands; Law that Permits Euthanasia Takes Effect*, L.A. TIMES, Apr. 2, 2002, at A(1)(4) (stating that euthanasia is permitted if the patient faces unbearable, interminable suffering); Carol J. Williams, *Netherlands Oks Assisted Suicide; Europe: Despite 11th-Hour Protests, Dutch Government Becomes First to Fully Legalize Euthanasia. For the Record*, L.A. TIMES, Apr. 11, 2001, at A(1)(1) (mentioning that the patient must be experiencing unbearable suffering).

37. *See Dutch Legalize Euthanasia, supra* note 35, at A5 (stating that the doctor and patient "must be convinced that there is no other solution"); Lev, *supra* note 33, at 297 (stating that the doctor must tell the patient about any alternatives to euthanasia).

reach a firm conclusion with the patient that there is "no reasonable alternative."[38] Furthermore, at least one other independent physician must examine the patient.[39] Guidelines also require parental consent before incurably sick minors, ages 12 to 16, can request euthanasia.[40] The termination of life must be carried out with medically appropriate care and attention.[41] The physician is obliged to report the death to the municipal pathologist, specifying whether the cause of death was euthanasia or assisted suicide.[42]

The new law establishes a legal basis for advance euthanasia declarations via a type of "living will" in which competent patients would request euthanasia in the event they become mentally incompetent.[43] Though such a statement does not imply that a physician has a duty to perform euthanasia, it provides the legal opening to end the life of incompetent patients who had signed such a document.[44]

This law changed the emphasis on who should prove guilt or innocence if the code of practice is breached.[45] Previously, the onus was squarely on the doctors to prove that they had

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38. *See* Julia Belian, *Deference to Doctors in Dutch Euthanasia* Law, 10 EMORY INT'L L. REV. 255, 256 (1996) (stating that in order for euthanasia to take place, the patient has to be given alternatives to consider); *Dutch Legalize Euthanasia, supra* note 35, at 5 (noting that the doctor and patient have to be convinced that there are no other alternatives); Lev, *supra* note 33, at 297 (mentioning that the doctor and the patient must come to the conclusion that there are no reasonable alternatives other than euthanasia).

39. *See* Funk, *supra* note 34, at 149 (noting that a second opinion is required); Lev, *supra* note 33, at 297 (indicating that at least one other physician has to examine the patient before euthanasia can be performed); Carol J. Williams, *supra* note 36, at A(1)(1) (stating that the patient has to be advised by another doctor besides the one assisting in the suicide).

40. *See The Netherlands: Bill on Euthanasia and Assisting Suicide in the Netherlands,* 5 EUR. J. OF HEALTH L. 299, 324 (1998) (stating that parental consent is needed when a minor child is involved); Tony Sheldon, *Netherlands Gives More Protection to Doctors in Euthanasia Cases*, BRIT. MED. J., vol. 321 (Dec. 9, 2000) at 1433 (noting the existence of various legal obstacles whenever a minor is involved).

41. *See Holland Makes Euthanasia Legal*, NEWSDAY (N.Y.), Apr. 11, 2001, at A22 (stating that "life must be ended in a medically appropriate way"); Lev, *supra* note 33, at 303 (declaring that the procedure must be done with care); *Officials Planning to Legalize Euthanasia*, CHI. TRIBUNE, Aug. 11, 1999, at 6N (simply stating that "euthanasia be 'carefully carried out'").

42. *See* Funk, *supra* note 34, at 149 (noting that a physician's report is provided by the municipal pathologist); *Netherlands Planning to Legalize Euthanasia*, *supra* note 34, at 1A (explaining that the physician has to report the death to the pathologist).

43. *See* Anthony Deutsch, *supra* note 36, at A19 (describing how the new law allows a patient "to leave a written request for euthanasia, giving doctors the right to use their discretion when patients become too physically or mentally ill to decide for themselves"); Carol J. Williams, *supra* note 36, at A(1)(1) (stating how written requests or living wills are allowed to be considered if the patient becomes "too debilitated" to make a judgment); *Netherlands Planning to Legalize Euthanasia*, *supra* note 34, at 1A (suggesting that doctors were free to perform euthanasia on incompetent patients if the patient had signed a document authorizing the euthanasia while he was competent).

44. *See Netherlands Planning to Legalize Euthanasia*, *supra* note 34, at 1A (suggesting that doctors were free to perform euthanasia on incompetent patients if the patient had signed a document authorizing the euthanasia while he was competent); Belian, *supra* note 4, at 255 (implying that patients would be able to make these advance euthanasia declarations); Funk, *supra* note 34, at 149 (arguing that it would be possible for patients to request euthanasia in the event they became incompetent).

45. *See Netherlands Planning to Legalize Euthanasia*, *supra* note 34, at 1A (implying that since the doctor is supervised by a public regional committee, it is the committee who will be responsible for proving that the doctor followed the guidelines); Belian, *supra* note 4, at 255 (stating what the responsibilities will be of the doctors and of the committee in performing euthanasia); Funk, *supra* note 34, at 149 (mentioning how the committee will supervise the doctor in performing the euthanasia).

followed the guidelines and were therefore innocent of any offence.[46] However, the new law shifts the responsibility for proving guilt to the regional committees.

Australia also allows for euthanasia and PAS for certain types of patients. On May 25, 1995, the Legislative Assembly of the Northern Territory passed the Northern Territory Rights of the Terminally Ill Act 1995[47] (the "Act") allowing terminally ill patients to commit suicide with a doctor's help.[48] The legislation, applied only in the Northern Territory,[49] enabled a terminally ill Australian adult, experiencing "unacceptable" pain, to be examined by a qualified physician to determine whether the patient could be cured.[50] The Act required confirming examinations by two other independent physicians, one specializing in treating terminal illness and the other a qualified psychiatrist,[51] to confirm that the patient is terminally ill and not clinically depressed.[52] After considering the advice of the consultants, medical assistance to die could not take place if there were palliative care options "reasonably available to the patient to alleviate the patient's pain and suffering to levels acceptable to the patient."[53]

The Act also included provisions intended to ensure that the patient was making an informed choice.[54] The doctor had to have informed the patient of the nature of the illness, its likely course and the medical procedures available.[55] Upon having the pertinent information, the patient could indicate that he or she wishes to end his or her life.[56] The doctor had to be satisfied that the patient had considered the possible implications of the decision for his or her family,[57] and that the decision had been made freely, voluntarily and after due consideration.[58]

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46. *See* Julia Belian, *supra* note 4, at 260 (1996) (stating that the panel would decide whether to prosecute the doctor); *Netherlands Planning to Legalize Euthanasia*, BUFFALO NEWS, Aug. 11, 1999, at 1A (mentioning how the panel can recommend prosecution if it thinks that the doctor has not followed the guidelines); Marlise Simons, *Dutch Becoming First Nation to Legalize Assisted Suicide*, N.Y. TIMES, Nov. 29, 2000, at A3 (discussing how the physicians will remain accountable for their actions to a panel of their peers).

47. *See* Funk, *supra* note 34, at 154 (stating that the legislation passed by the Northern Territory of Australia, the Rights of the Terminally Ill Act, was enacted in 1995); David A. Pratt, *Too Many Physicians: Physician-Assisted Suicide After Glucksberb/Quill*, 9 ALB. L.J. SCI. & TECH. 161, 183 (1999) (discussing that the Northern Territory passed the Act on May 25, 1995); Plattner, *supra* note 13, at 645 (declaring that the legislature for the Northern Territory of Australia enacted the Rights of the Terminally Ill Act on May 25, 1995).

48. *See* Rights of the Terminally Ill Act (1995) (N. Terr. Austl. Laws), *available at* http://www.nt.gov.au/lant/parliament/committees/rotti/rotti95.pdf (hereinafter "RTI Act").

49. *See* John I. Fleming, *Death, Dying, and Euthanasia: Australia Versus the Northern Territory*, 15 ISSUES L. & MED. 291, 295 (2000) (mentioning that the legislation would not apply to the rest of Australia); Funk, *supra* note 34, at 157 (stating that the Northern Territory of Australia passed the 1995 bill permitting euthanasia on its own volition); Plattner, *supra* note 13, at 645 (implying that the legislation only applied in the Northern Territory).

50. *See* RTI Act § 4.

51. *Id*. at § 7(1)(b).

52. *Id*. at § 7.

53. *Id*. at § 8.

54. *Id*. at § 7(1)(e)-(g).

55. *Id*. at § 7(1)(e).

56. *Id*. at § 7(1)(f).

57. *Id*. at § 7(1)(g).

58. *Id*. at § 7.

The Act provided for a nine-day "cooling off" period comprised of two stages.[59] First, seven days had to elapse between the initial request and the signing of the certificate of request and a further 48 hours before providing assistance to terminate life.[60] Second, the signing of the certificate had to be witnessed by two doctors.[61] If the patient was physically unable to sign the certificate, a person other than the doctors and psychiatrist referred to, who was at least 18 years old, could sign it on behalf of the patient.[62] The person could not be likely to receive any financial benefit from the patient's death, and forfeited any benefit if he or she would in fact have received it.[63] The statute provided that the patient could rescind at any time and in any manner,[64] and the physician was under no obligation to assist suicide.[65] If the physician chose to comply with the patient's request, death could be hastened by prescribing or preparing a lethal substance, giving the substance to the patient for self-administration, or administering the lethal substance to the patient.[66] The doctor had to remain present until the death of the patient.[67]

The legislation became operative in July 1996,[68] and in the following nine months four patients who requested to die received help from Dr. Philip Nitschke under the provisions of the Act.[69] The Act was annulled in March 1997, when federal parliamentarians—by 38 votes to 34, with one abstention—passed the Commonwealth Euthanasia Laws Bill 1996.[70] That

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59. *Id.* at § 7(1)(i).

60. *Id.* at § 7.

61. *Id.* at § 7(1)(j)-(k).

62. *Id.* at § 9.

63. *Id.*

64. *Id.* at § 10.

65. *Id.* at § 7(1)(o).

66. *Id.* at § 3 (defining the meaning of "assist" when the physician chooses to comply with a patient's request for assisted suicide); Plattner, *supra* note 13, at 648 (mentioning the different ways the doctor could perform the euthanasia); *see also Euthanasia—the Australian Law in an International Context*, Parliament of Australia, Department of the Parliamentary Library, Research Paper No. 4 1996–97 (1996), *at* http://www.aph.gov.au/library/pubs/rp/1996-97/97rp4.htm (last visited Sept. 10, 2002) (mentioning that the doctor could administer the lethal substance to the patient himself or the doctor could give the patient the lethal substance and allow the patient to take the substance on his own).

67. *See* RTI Act § 7; Simon Chesterman, *Last Rights: Euthanasia, the Sanctity of Life, and the Law in the Netherlands and the Northern Territory of Australia*, 47 INT'L & COMP. L.Q. 362, 386–87 (1998) (stating that the doctor must remain with the patient until the patient dies); Plattner, *supra* note 13, at 647–48 (mentioning that the doctor cannot leave the patient until the patient dies).

68. *See* Lara L. Manzione, *Is There a Right to Die?: A Comparative Study of Three Societies (Australia, Netherlands, United States)*, 30 GA. J. INT'L & COMP. L. 443, 451 (2002) (discussing how the Northern Territory of Australia legalized the right to die in 1996 by enacting the RTI Act); Andrew L. Plattner, *Australia's Northern Territory: The First Jurisdiction to Legislate Voluntary Euthanasia, and the First to Repeal It*, 1 DE PAUL J. HEALTH CARE L. 645, 645 (1997) (stating that the RTI Act became effective on July 1, 1996); Pratt, *supra* note 47, at 183–84 (stating the effective dates of the RTI Act 1995 are from July 1, 1996, to Mar. 24, 1997).

69. *See* Manzione, *supra* note 68, at 464 (stating that Dr. Nitschke is allegedly responsible for assisting in the deaths of at least four people under the Northern Territory's RTI Act); Plattner, *supra* note 13, at 650 (mentioning that Dr. Nitschke was present for all four of the Northern Territory assisted suicides); Brendan A. Thompson, Note, *Final Exit: Should the Double Effect Rule Regarding the Legality of Euthanasia in the United Kingdom be Laid to Rest?*, 33 VAND. J. TRANSNAT'L L. 1035, 1038 (2000) (noting that all four people who died under the law were patients of Dr. Nitschke).

70. *See Where Angels Fear to Tread* (Science Channel No. 8 in Israel on Nov. 4, 1998) (stating that the promulgation of the Euthanasia Laws Bill has effectively replaced the Northern Territory Act); *see also* Pratt, *supra* note 47, at 183 (stating that the Federal Parliament of Australia overrode the RTI Act 1995); Plattner, *supra* note 13, at 651 (noting that the Commonwealth Parliament repealed the Northern Territories Act by four votes).

measure effectively prohibits Australian territories from enacting legislation that permits "the form of intentional killing of another called euthanasia . . . or the assisting of a person to terminate his or her life,"[71] but allows the making of laws regarding the withdrawal or withholding of life-sustaining treatment and the provision of palliative care to the dying,[72] provided these do not sanction the intentional killing of the patient.[73] After Federal Parliament overturned the Northern Territory's euthanasia law,[74] Dr. Philip Nitschke revealed that he had helped 15 patients, including some from the Northern Territory, to end their lives.[75]

In the United States, attempts made in 1988–1992 in the states of Washington[76] and California[77] to pass laws recognizing the possibility of active euthanasia were unsuccessful.[78] In a 1998 referendum,[79] Michigan voters overwhelmingly (70 percent to 30 percent) rejected the

71. *See* Patrick Quirk, *Euthanasia in the Commonwealth of Australia*, 13 ISSUES L. & MED. 425, 434 (1998) (explaining that the Euthanasia Laws Bill was introduced to remove euthanasia from the Northern Territories' legislative power); Pratt, *supra* note 47, at 183 (noting that the Euthanasia Laws Bill does not prohibit Australian territories from enacting legislation that permits euthanasia); Plattner, *supra* note 13, at 651 (stating that thanks to the Euthanasia Laws Bill the authority to grant euthanasia is no longer in the hands of Australian legislatures).

72. *See* Euthanasia Laws Act 1997, No. 17, 1997 (Austl.) *available at* http://scaleplus.law.gov.au/ (regarding the prohibition of "a form of intentional killing called euthanasia" but retaining the withdrawal of life-sustaining treatment); Funk, *supra* note 34, at 163–64 (noting that terminally ill patients are entitled to a limited form of relief short of intentional killing); Manzione, *supra* note 68, at 452 (inferring that euthanasia is a form of active physician-assisted suicide; withdrawal of life support or palliative care is not).

73. *See* HELGA KUHSE, "*From Intention to Consent,"* in MARGARET P. BATTIN, ROSAMOND RHODES & ANITA SILVERS (EDS.), PHYSICIAN ASSISTED SUICIDE (Routledge 1998), at 252 (comparing the intentional killing with other methods of alleviating pain or discomfort).

74. *See* Andrew Trew, *Regulating Life and Death: The Modification and Commodification of Nature*, 29 U. TOL. L. REV. 271, 305 (1998) (stating that the Northern Territories' RTI Act 1995 was declared unconstitutional); Pratt, *supra* note 47, at 183–84 (explaining that the unconstitutionality was decided by the Parliament of the Commonwealth of Australia); Plattner, *supra* note 13, at 651 (dealing with the allegations of the unconstitutionality of the Northern Territories' Act).

75. *See* Darren Gray, *Doctor: I helped 15 patients die*, THE AGE (Melbourne), Nov. 27, 1998 (noting that Dr. Philip Nitschke helped 15 patients to end their lives); Chris Ryan, *Right-to-die bill pleases doctor*, THE AGE (Melbourne), Jul. 11, 1997 (describing the attitudes of some physicians regarding legislation permitting certain forms of euthanasia). *See generally* H. Kuhse et al., *End-of-Life Decisions in Australian Medical Practice*, 166 MED. J. OF AUS. 191–96 (1997) (discussing further deliberation on end-of-life practice).

76. *See* Initiative for Death with Dignity, Washington Initiative No. 119 (1991) (noting that, to date, the United States has been unsuccessful in enacting laws permitting active euthanasia); Ultimate Pro-Life Resource List, *Euthanasia in America*, *available at* http://www.prolifeinfo.org/fact12.html (stating that the referendum attempts in Washington have failed); *see also* International Task Force on Euthanasia and Assisted Suicide (IAETF) Update (noting that the efforts of some states to pass legislation which permits active euthanasia were unsuccessful), *available at* http://www.internationaltaskforce.org/iua14.htm (last visited Sept. 10, 2002).

77. *See* The California Death with Dignity Act, California Proposition No. 161 (1992) (illustrating the need for a physician-assisted suicide); Manzione, *supra* note 68, at 455 (stating that the referendum attempts in California have failed); *see also* IAETF, *supra* note 76 (noting the state of California, despite its numerous efforts, has failed to legalize physician-assisted suicide).

78. *See* Manzione, *supra* note 68, at 455 (emphasizing that repeated attempts through initiatives in both California and Washington have failed); Ultimate Pro-Life Resource List, *supra* note 76 (recounting the attempts of some states to enact legislation legalizing physician-assisted suicide); *see also* IAETF, *supra* note 76 (describing the lack of success of some states to enact laws permitting euthanasia).

79. *See* Manzione, *supra* note 68, at 456–57 (stating that Michigan held a referendum concerning physician-assisted suicide in 1998).

legalization of physician-assisted suicide,[80] and in November 2000, Maine voters did the same,[81] failing to pass the ballot measure to legalize PAS by a narrow 51 percent to 49 percent.[82] In November 1994, voters in Oregon approved the first American law allowing doctors to hasten death for the terminally ill.[83] The Oregon Death with Dignity Act ("Oregon Act") was designed to protect the following interests of the patients: avoiding unnecessary pain and suffering;[84] preserving and enhancing the right of competent adults to make their own critical health care decisions;[85] avoiding tragic cases of attempted or successful suicides in a less

80. *Id*. at 456 (stating that the vote resulted in an overwhelming rejection in Michigan, with 71 percent not favoring physican-assisted suicide); *see also State Denies Proposal B*, THE MICHIGAN DAILY, Nov. 4, 1998, *available at* http://www.pub.umich.edu/daily/1998/nov/11-04-98/news/news6.html (last visited Sept. 11, 2002) (stating that the state of Michigan attempted to legislate in the area of physician-assisted suicide); Gregory K. Pike, *Michigan's Proposal B for Assisted Suicide Rejected*, Southern Cross Bio-Ethics Institute (SCBI), *at* http://www.pub.umich.edu/daily/1998/nov/11-04-98/news/news6.html (last visited Sept. 11, 2002) (noting that a proposed attempt to legalize euthanasia in the state of Michigan was rejected).

81. *See* Penney Lewis, *Rights Discourse and Assisted Suicide*, 27 AM. J.L. & MED. 45, 58 n.10 (2001) (noting that Maine had rejected physician-assisted suicide in its own referendum in Nov. 2000); *see also* Manzione, *supra* note 68, at 456–57 (noting that a proposed attempt to legalize euthanasia in the state of Maine was rejected); Oregon Death with Dignity Act, Oregon State Statutes, Model State Act, Longwood University, *at* http://www.lwc.edu/administrative/library/suic.htm (last visited Sept. 11, 2002).

82. *See* Tim Christie, *Voters in Maine Reject Assisted-Suicide Law,* THE REGISTER-GUARD (Eugene, Ore.) (Nov. 14, 2000); *see also* Manzione, *supra* note 68, at 456–57 (stating that the result of the Maine referendum of Nov. 2000 was a narrow 51 percent to 49 percent decision against physician-assisted suicide); Oregon Death with Dignity Act, *supra* note 81 (stating that a proposed attempt to legalize euthanasia in the state of Maine was rejected by a very narrow margin).

83. *See* Carol A. Pratt, *Efforts to Legalize Physician-Assisted Suicide in New York, Washington and Oregon: A Contrast Between Judicial and Initiative Approaches—Who Should Decide?,* 77 OR. L. REV. 1027, 1032 (1998) (noting that Oregon was the first state to pass a statute legalizing physician-assisted suicide in America); *see also* Timeline of the Issue, Death with Dignity National Center, at http://www.deathwithdignity.org/resources/timeline.htm (asserting that the law legalizing physician-assisted suicide was the first of its kind in the world); Oregon's Measure 16, The Hemlock Society USA, at http://www.hemlock.org/ddact.html (last visited Sept. 11, 2002) (stating that the state of Oregon was a pioneer in the area of a physician-assisted suicide).

84. *See* Or. Rev. Stat. § 127.805 (2001) (providing in pertinent part, "(1) An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897"); s*ee also* Barbara Coombs Lee, *Testimony Before The U.S. House Subcommittee On The Constitution Concerning The Legality Of Assisted Suicide* (Apr. 29, 1996) (explaining that Elvin Sinnard founded "Oregon Right to Die" following the suicide of his wife, who had suffered through excruciating pain brought on by a terminal heart condition), *available at* http://gos.sbc.edu/l/lee.html (last modified Jul. 1, 2002). *See generally* Death with Dignity National Center: Missions, Principles, Programs (providing that "[i]f a terminally ill patient's suffering becomes intolerable despite unrestricted efforts to palliate, the situation constitutes a medical emergency and requires a compassionate medical response"), *available at* <http://www.deathwithdignity.org/about/mission.htm> (last visited Oct. 1, 2002).

85. *See* Fourth Annual Report on Oregon's Death with Dignity Act (noting that approximately 85 percent of the 91 patients who died in Oregon after ingesting a lethal dose of medication between 1998 and 2001 stated that loss of autonomy was a principal factor in their decision), *available at* http://www.ohd.hr.state.or.us/chs/pas/ar-index.htm (last modified Sept. 25, 2002); s*ee also* Daniel Avila, *Assisted Suicide and the Inalienable Right to Life*, 16 ISSUES L. & MED. 111, 119 (Fall 2000) (noting that Jack Kevorkian's personal philosophy espouses a patient's personal autonomy from government when harm is merely directed at himself); Shoshana K. Kehoe, *Current Public Law and Policy Issues: Giving the Disabled and Terminally Ill a Voice: Mandating Mediation for All Physician-Assisted Suicide, Withdrawal of Life Support, or Life-Sustaining Treatment Requests,* 20 HAMLINE J. PUB. L. & POL'Y 373, 377 (Spring 1999) (discussing the role of mediation as a check against external coercive pressures that may plague a terminally ill patient considering suicide).

humane and dignified manner;[86] protecting "the terminally ill and their loved ones" from financial hardships they wish to avoid;[87] and protecting "the terminally ill and their loved ones from unwanted intrusions into their personal affairs" by law enforcement officers and others.[88]

In 1994, the Oregon law was narrowly approved (51 percent to 49 percent) by a vote of state residents,[89] but was promptly put on hold amid great legal wrangling.[90] Two days before the Death with Dignity Act was to take effect, a lawsuit was filed by a group of physicians, residential care facilities, and terminally ill Oregon residents challenging the Act on constitutional grounds.[91] The federal district court granted a temporary injunction and eight months later struck down the Oregon Act on equal protection grounds.[92]

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86. *See* Lewis, *supra* note 81, at 58 (noting how suicide may be viewed as a fundamental right rooted in human dignity); *see also* Dinitia Smith, *Evolving Answers to the Why of Suicide; Is It a Medical Problem? A Moral or Social Failure? An Assertion of Freedom?,* N.Y. TIMES, July 31, 1999, at B9 (stating that suicide can be construed by some to be a consequence of failed personal relationships, which leaves a mark of shame on the families of those who take their lives). *See generally* Linda Chaver, *A Teenager Shows Us How to Die With Dignity,* CHI. TRIB., July 2, 1997, at 19 (providing that advocates of assisted suicide explain that terminally ill patients favor dying in the comfort of family rather than dying alone).

87. *See* Daryl J. Miller, Comment, *Legal Killing: The Imminent Legalization of a Physician's Affirmative Aid-in-Dying,* 34 SANTA CLARA L. REV. 663, 692 (1994) (stating that terminally ill patients may want to relieve families from financial strain due to funds allocated to terminal care); *see also* Symposium*, Last Rights? Confronting Physician-Assisted Suicide in Law and Society: Legal Liturgies on Physician-Assisted Suicide,* 26 STETSON L. REV. 481, 498 (Winter 1996) (noting that terminally ill patients worked for life to amass funds simply to pour them into medical care).

88. *See* Washington v. Glucksberg, 521 U.S. 702, 732 (1997) (holding that Washington's ban on assisted suicide did not violate the Due Process Clause); *see also* William J. Tarnow, *Recognizing a Fundamental Liberty Interest Protecting the Right to Die: An Analysis of Statutes Which Criminalize or Legalize Physician-Assisted Suicide,* 4 ELDER L.J. 407, 424 (Fall 1996) (maintaining that the right to privacy from government intrusion has been advanced as an argument for allowing assisted-suicide, but with mixed results). *See generally* Krischer v. McIver, 697 So. 2d 97 (1997) (holding that Florida's assisted-suicide statute was constitutionally valid and that it was the legislature's role to allow doctors to administer lethal drugs).

89. *See* Mark O'Keefe, *Assisted-suicide measure survives,* THE OREGONIAN, Nov. 10, 1994, at A1 (noting that the state's Democratic party and the moderate wing of the Oregon Republican party supported Measure 16); Patrick M. Curran, Jr., Note*, Regulating Death: Oregon's Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 727-28 (Jan. 1998) (explaining the setbacks of the opponents to the ballot); *see also* Pratt, *supra* note 83, at 1082 (noting that the key difference between the Oregon initiative and similar efforts in California and Washington was that the Oregon physician was not hastening the patient's death, as the autonomy lay with the patient).

90. *See* Meredith Adams, *Oregonians Still Debating Assisted-Suicide Law,* CHI. TRIB., Dec. 8, 1994, at 33 (noting that despite the passing of Measure 16, there was ardent backlash from the Roman Catholic establishment and state doctors struggling with ethical considerations); Brad Knickerbocker, *Assisted-Suicide Law In Oregon Stirs National Discontent,* CHRISTIAN SCI. MONITOR, Dec. 12, 1994, at 3 (describing how the day before the act was to take effect, some doctors, patients, nursing home operators, and right-to-life advocates protested by filing a suit in federal district court). *See generally Constitutional Law and Civil Rights Symposium, Part II: The Right to Die: Death with Dignity in America*, 68 MISS. L.J. 407 (Winter 1998) (discussing the National Right to Life Committee's (NRLC) decision to seek a restraining order from a "predictably conservative" federal district judge in Eugene, Florida).

91. *See* Lee v. Oregon, 869 F. Supp. 1491, 1493 (D. Ore. 1994) (providing that the plaintiffs claimed that Measure 16 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the First Amendment rights of freedom to exercise religion and of association, and the Americans with Disabilities Act).

92. *See id.* at 1498 (concluding that Measure 16 violates the Equal Protection Clause of the Constitution because it makes no distinction between terminally ill patients who are competent, incompetent, unduly influenced, or who are abused when they wish to commit suicide, thereby irrationally depriving the terminally ill of safeguards against suicide which the non-terminally ill enjoy). *But see* Baron, *supra* note 14, at 14–16 (noting that the Oregon Act was declared unconstitutional under the Equal Protection Clause in federal district court and was on appeal to the U.S. Court of Appeals for the Ninth Circuit).

This decision was subsequently vacated for procedural reasons,[93] remanding the judgment of the district court for lack of jurisdiction.[94] Then, in 1997, the state's voters backed the law again,[95] this time by a decisive margin of 60 percent to 40 percent.[96]

The Oregon Act is a significant step toward establishing a patient's right to autonomy and choice in deciding end-of-life issues.[97] The findings of the Oregon Health Division portray the people opting for assisted suicide as well-educated,[98] well-insured,[99] often in hospice care,[100]

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93. See Henry Weinstein, *Aided-Suicide Law Clears Court Hurdle; Ruling: Federal Panel Rejects Challenge to Oregon Measure that Allows Doctors to Help Patients,* L.A. TIMES, Feb. 28, 1997, at A3 (noting that the U.S. Ninth Circuit Court of Appeals in San Francisco rejected the lawsuit which challenged Oregon's Death with Dignity Act because the individuals and organizations bringing suit lacked standing).

94. *See* Lee v. Oregon, 107 F.3d 1382, 1392 (9th Cir. 1997) (holding that the federal courts did not have jurisdiction to hear the plaintiff's claims because of standing and ripeness defects); *see also id*. at 1386 (stating that "Plaintiffs have failed to allege a concrete and particularized injury in the first instance").

95. *See generally* William A. Lund, *What's in a Name? The Battle over Ballot Titles in Oregon,* 34 WILLAMETTE L. REV. 143, 145 (Winter 1998) (noting that prior to the vote, controversy erupted between Oregon's Democratic governor and Republican-led legislature over how to title the ballot for Measure 51); Kim Murphy, *Voters in Oregon Soundly Endorse Assisted Suicide*, L.A. TIMES, Nov. 5, 1997, at A1 (stating how officials said that the repeal effort involved the highest voter turnout since 1963); B. Drummond Ayres, *The 1997 Elections: Referendums; Oregon Stays With Its Law on Suicides,* N.Y. TIMES, Nov. 5, 1997, at A24 (explaining how the repeal effort marked the first time in Oregon history that a measure which had been voted into law by the electorate was being returned for a new vote).

96. *See* R. Cohen-Almagor & Monica G. Hartman, *The Oregon Death with Dignity Act: Review and Proposals for Improvement,* 27 J. LEGIS. 269, 269–98 (2001) (reviewing and proposing improvements for the Oregon Death with Dignity Act); *see also* Jane Meredith Adams, *Assisted suicide gains in propriety; Oregon vote confirms years of steadily growing public support; Ethics*, BOSTON GLOBE, Nov. 9, 1997, at D3 (reporting that the Oregon Death with Dignity Act was affirmed decisively by a 60 to 40 percent margin); David J. Garrow, *The Oregon Trail,* N.Y. TIMES, Nov. 6, 1997, at A31 (noting that aid-in-dying advocates were victorious in the face of their opponents multi-million dollar campaign).

97. *See* Patricia Illingworth & Harold Bursztajn, *The Implementation Of Oregon's Law: Death With Dignity or Life With Health Care Rationing,* 6 PSYCHOL. PUB. POL. & L. 314, 320 (June 2000) (discussing the potential for Oregon's Death with Dignity Act to serve the autonomy interests of the terminally ill so long as there is an informed-consent process to guide the patient making the decision); *see also* Cohen-Almagor & Hartman, *supra* note 96, at 270 (noting that the Oregon Act allows terminally ill patients to receive prescriptions for lethal drugs to be self-administered). *See generally* Steve P. Calandrillo*, Coralling Kevorkian: Regulating Physician-Assisted Suicide in America,* 7 VA. J. SOC. POL'Y & L. 41, 88 (Fall 1999) (describing the decisive 60 to 40 percent vote supporting the Oregon Death with Dignity Act in its second referendum).

98. *See* Cohen-Almagor & Hartman, *supra* note 96, at 293 (analyzing implications and conclusions of the Oregon Health Division Reports that well-educated patients chose to participate); *see also* David Brown, *A Picture of Assisted Suicide; Most Who Use Oregon Law are Educated, Insured; Some Change Their Minds*, WASH. POST, Feb. 24, 2000, at A03 (summarizing the findings of the Oregon Health Division, and noting lack of evidence of uneducated persons disproportionately seeking participation in the program); Amy D. Sullivan et al., *Legalized Physician-assisted Suicide in Oregon—the Second Year*, 342 NEW ENG. J. OF MED. 598, 599 (2000) (noting that almost half of the patients were college graduates).

99. *See* Andrew I. Batavia, *So Far So Good: Observations on the First Year of Oregon's Death with Dignity Act*, 6 PSYCHOL. PUB. POL'Y & L. 291, 295 (2000) (refuting the concern that certain groups, such as uninsured individuals, are particularly vulnerable to coercion to seek physician-assisted suicide) *see also* Brown, *supra* note 98, at A03 (noting findings of the Oregon Health Division reports that well-insured people opt for assisted-suicide). *But see* Yoel Goldfeder, *Assisted Suicide and The Illusory Poverty Component*, 5 GEO. J. ON POVERTY LAW & POL'Y 335, 336 (1998) (arguing that poor, uninsured individuals are more likely to seek assisted suicide).

100. *See* Sullivan, *supra* note 98, at 599 (analyzing data collected by the Oregon Health Division about patient's participation in hospice care); *see also* Brown, *supra* note 98, at A03 (noting that often people in hospice care opt for assisted suicide). *But see* Kathleen Foley & Herbert Hendin, *The Oregon Report: Don't Ask, Don't Tell*, 15 ISSUES L. & MED. 336, 336 (2000) (questioning the enrollment in a hospice program as a reliable indicator of adequate care).

and very concerned about loss of independence.[101] The most frequently cited reasons for PAS in both years were loss of autonomy[102] (cited by 81 percent of patients in 1999 and by 75 percent in 1998) and an inability to participate in activities that make life enjoyable[103] (81 percent in 1999 and 69 percent in 1998). Worries about money played essentially no role in the patients' decision.[104] There is no evidence that the poor, uneducated, mentally ill, or socially isolated are disproportionately seeking or getting lethal prescriptions of drugs under the Oregon Death with Dignity Act.[105]

Following the Oregon Death with Dignity Act, attempts to legalize assisted suicide were made by many other states, among them Alaska,[106] Arizona, California, Colorado, Connecticut, Illinois, Massachusetts, Michigan, Mississippi, Nebraska, Washington and Wisconsin.[107]

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101. *See* Adam A. Milani, *Better Off Dead Than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?,* 54 WASH. & LEE L. REV. 149, 202 (1997) (discussing the effects that societal prejudice has on the loss of independence); *see also* Brown, *supra* note 98, at A03 (listing loss of independence as one of the reasons for choosing assisted suicide); Frederick P. Parker, Jr., Washington v. Glucksberg *and* Vacco v. Quill: *An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions,* 43 ST. LOUIS U. L.J. 469, 524 (1999) (drawing a correlation between patients' fears about losing their independence and ready acceptance of assisted suicide).

102. *See* Batavia, *supra* note 99, at 302 (challenging opponents' argument on the findings of the first year that the people who chose assisted suicide were much more concerned about autonomy than the other group); Sullivan, *supra* note 98, at 599 (listing loss of autonomy as one of the factors in opting for assisted suicide). *See generally* Victor G. Rosenblum & Clarke D. Forsythe, *The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing?*, 6 ISSUES L. & MED. 3, 20 (1990) (stating that an individual autonomy is an aspect of personal well-being).

103. *See* Robert A. Klinck, *Pain Relief Promotion Act*, 38 HARV. J. ON LEGIS. 249, 252 (2001) (supporting previous findings that patients requesting lethal medications were motivated by fear of loss of the ability to engage in enjoyable aspects of life); *see also* Brown, *supra* note 98, at A03 (noting that one of the factors in the decision to opt for assisted suicide was poor quality of life); Lois Shepherd, *Looking Forward With the Right of Privacy*, 49 U. KAN. L. REV. 251, 314 (2001) (suggesting that having an option of assisted suicide permits one to have an enjoyable, meaningful life because of the ability to control one's own fate).

104. *See* Cohen-Almagor & Hartman, *supra* note 96, at 293 (noting that finances were not critical considerations in the choice of physician-assisted suicide); *see also* Brown, *supra* note 98, at A03 (noting that the studies from Oregon showed that worry about money played no role in decision to opt for assisted suicide). *But see* Elliot N. Dorff, *Assisted Suicide*, 13 J. L. & RELIGION 263, 277 (1999) (arguing that if assisted suicide becomes a constitutionally guaranteed right, patients would feel obligated to resort to it rather than to deplete their family finances).

105. *See* Sullivan, *supra* note 98, at 599 (analyzing a report of the Oregon Health Division listing various factors that contribute to the decision to seek physician-assisted suicide); *see also* Brown, *supra* note 98, at A03 (noting lack of evidence that socially disadvantaged groups would seek assisted suicide more vigorously); Cohen-Almagor & Hartman, *supra* note 96, at 293 (analyzing implications and conclusions of the Oregon Health Division Reports that well-educated patients chose to participate).

106. *See* Sheila Toomey & Ann Potempa, *Court Upholds State Law Barring Assisted Suicide*, ANCHORAGE DAILY NEWS, Sept. 22, 2001, *available at* http://www.and.com/front/story/698559p-740120c.html (noting that in September 2001, the Alaska Supreme Court ruled that Alaskans have no constitutional right to assisted suicide, despite a constitution and courts that strongly uphold individual liberty and personal privacy).

107. *See* Dennis J. Doherty, *Physician-Assisted Suicide: What Constitutes Assistance?*, 65 WIS. LAW 20, 59 (1992) (suggesting that Wisconsin legislators will not be likely to legalize physician-assisted suicide); *see also* Julie Forster, *Legalizing Assisted Suicide Still a Dead Issue, but Political 'Taboo' has been Lifted*, 3-5-96 WEST'S LEGAL NEWS 1025 (1996) (noting that a bill to legalize assisted suicide was introduced in Wisconsin); National Legal Center Staff, *Quarterly Report of the National Legal Center for the Medically Dependent & Disabled, Inc.*, 11 ISSUES L. & MED. 5, 5 (1995) (stating that Wisconsin requested legal analyses of bills to decriminalize assisted suicide).

All attempts were rejected.[108] A bigger setback for assisted suicide advocates came in the summer of 1997, when the U.S. Supreme Court upheld laws in Washington State and New York banning physician-assisted suicides.[109] The Court reversed decisions of the lower courts that held those laws unconstitutional.[110]

In 1994, the United States District Court was asked to rule on the constitutionality of the state of Washington's criminal prohibition against physician-assisted suicide.[111] Specifically, the plaintiffs asserted that the Fourteenth Amendment to the Constitution guarantees mentally competent, terminally ill adults, who act under no undue influence, the right to voluntarily hasten their death by taking a lethal dose of physician-prescribed drugs.[112] Chief Judge Roth-

108. *See National Conference of State Legislatures, Status of Assisted Suicide by State,* THE ASSOCIATED PRESS, Nov. 1997, at A5. Assisted suicide is a crime by statute in the following states: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington and Wisconsin. Common law forbids assisted suicide in: Alabama, Idaho, Massachusetts, Nevada, Vermont and West Virginia. States in which physician-assisted suicide is considered a criminal act through statutes and common law are: Maryland, Michigan and South Carolina. States without common laws or statute laws on assisted suicide are North Carolina, Utah, and Wyoming. In addition, Virginia has no clear case law nor any statute on assisted suicide but does have a state statute that imposes civil sanctions on persons assisting in a suicide. And the Ohio Supreme Court ruled in October 1996 that assisted suicide is not a crime. *Id.* at A5; *see also* Russell Korobkin, *Physician-assisted Suicide Legislation: Issues and Preliminary Responses*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 2, 449–72 (1998) (discussing the legislative attempts to legalize PAS in ten states during 1997).

109. *See* Vacco v. Quill, 521 U.S. 793, 793 (1997) (holding that New York's prohibition on assisting suicide did not violate the Equal Protection Clause of the Fourteenth Amendment), *rev'g* Quill v. Vacco, 80 F.3d 716; *see also* Washington v. Glucksberg, 521 U.S. 702, 702 (1997) (holding that Washington's prohibition against an asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the Due Process Clause), *rev'g* Compassion in Dying v. State of Washington, 850 F. Supp. 1454 (1994); Pratt, *supra* note 83, at 1040–41 (discussing the Supreme Court decisions regarding assisted suicide and how the decision to legalize assisted suicide was left open for state legislatures to address).

110. *See* Compassion in Dying v. State of Washington, 79 F.3d 790, 793–94 (9th Cir. 1995) (holding that the Washington statute that prohibited physicians from prescribing life-ending medication for use by terminally ill patients violates the Due Process Clause of the Fourteenth Amendment); *see also* Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996) (holding that a N.Y. state statute violated the Equal Protection Clause of the Fourteenth Amendment), *rev'd*, 521 U.S. 793 (1997). *See generally* Richard J. Brumbaugh, *The Oregon Death With Dignity Act: Reversal of the Department of Justice's Position on Physician Assisted Suicide and the Ensuing Court Battle*, 21 ST.LOUIS U. PUB. L. REV. 377, 383 (2002) (noting the Supreme Court's rejection of the interpretation that assisted suicide is a constitutionally protected liberty).

111. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454, 1455–56 (W.D. Wash. 1994) (noting that the court was being asked to rule on PAS as a matter of first impression), *rev'd,* 49 F.3d 586 (9th Cir. 1995); *see also* Robert L. Kline, *The Right to Assisted Suicide in Washington and Oregon: The Courts Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 220 (1996) (noting that the U.S. District Court had ruled on Washington's ban on assisted suicide); Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 804–05 (1995) (noting that the U.S. District Court ruled on the constitutionality of the statute).

112. *See Compassion in Dying*, 850 F. Supp. at 1456 (listing the criteria of the individuals who have a Fourteenth Amendment guaranteed right to die); *see also* Kline, *supra* note 111, at 218 (explaining the types of individuals *Compassion in Dying* seeks to counsel and assist); Christopher L. Marzetti, Note, *Compassion in Dying v. Washington*: *Physician-Assisted Suicide—A Constitutional Right to Wholesale Murder?*, 31 GONZ. L. REV. 503, 507–08 (1995) (noting that the challenge to the Washington statute only applied to individuals who met certain criteria).

stein held that such a right for these patients was a liberty interest protected under the Fourteenth Amendment,[113] and that the 140-year-old Washington anti-assisted-suicide statute[114] violated equal protection by prohibiting these patients from seeking physician-assisted suicide but allowing withdrawal of life-support systems.[115]

This judgment was later reversed by the United States Court of Appeals, Ninth Circuit,[116] *per* Judge Noonan, saying that the Washington statute did not deprive patients of a constitutionally protected liberty interest.[117] The panel majority found that the statute prohibiting suicide promotion furthered the interest in denying to physicians "the role of killers of their patients."[118]

However, physicians do not fulfill the role of "killers" by prescribing drugs to hasten the death of patients who voluntarily chose this option more than they do by withdrawing life-support machines.[119] The court clouded an important issue by resorting to this radical language instead of probing the complexities involved and establishing procedures to ensure patients against possible abuse.[120]

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113. *See Compassion in Dying*, 850 F. Supp. at 1467 (holding that the Washington prohibition on assisted suicide violated the Fourteenth Amendment); *see also* Kline, *supra* note 111, at 218 (stating that the holding recognized assisted suicide for the mentally competent as a "protected liberty"); Marzetti, *supra* note 112, at 510 (discussing the reasoning for the court's holding that the right to die was a Fourteenth Amendment protected liberty interest).

114. *See* Wash. Rev. Code § 9A.36.060 (2002). The statute provides in pertinent part:

> Promoting a suicide attempt:
>
> (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.
>
> (2) Promoting a suicide attempt is a class C felony.

115. *See Compassion in Dying*, 850 F. Supp. at 1461–62 (comparing PAS with the withdrawal of life support to find that prohibiting one and not the other was in violation of Equal Protection); *see also* Kline, *supra* note 111, at 219–20 (discussing individual liberty comparisons made by the court in finding the Equal Protection violation); Marzetti, *supra* note 112, at 510 (noting that the court determined that similar persons should be treated similarly).

116. Compassion in Dying v. Washington, 49 F.3d 586, 588 (9th Cir. 1995) (finding that the Washington statute does not violate the Constitution), *rev'g* 850 F. Supp. 1454 (W.D. Wash. 1994).

117. *See Compassion in Dying*, 49 F.3d at 594 (holding that the statute is not in violation of the Constitution); *see also* Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System,* 21 AM. J.L. & MED. 45, 81 n.278 (1995) (emphasizing that no U.S. court of final jurisdiction has recognized a constitutional right to suicide); Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box,* 28 U. MICH J.L. REFORM 799, 827 n.135 (1995) (noting that there does not appear to be judicial interest in promoting PAS).

118. *Compassion in Dying*, 49 F.3d at 592 (examining the medical community's opposition to PAS).

119. *See* Quill v. Vacco, 80 F.3d 716, 730 (2nd Cir. 1996) (finding that a physician's prescribing of drugs to hasten death is the equivalent of disconnecting life-support systems), *rev'd* 521 U.S. 793 (1997); *see also* Tracy J. Edgerton, *Fundamental Rights and Physician-Assisted Suicide: Protecting Personal Autonomy,* 1 J. GENDER RACE & JUST. 283, 287 (1997) (noting that the court finds no distinguishable difference between PAS and life-support withdrawal); Kline, *supra* note 111, at 545 (arguing that life-support withdrawal and PAS should be treated equally).

120. *See* Robert A. Burt, *Self Determination and the Wrongfulness of Death*, 2 J. HEALTH CARE L. & POL'Y 177, 207–08 (1999) (stating that there is a fundamental difference between PAS, which will certainly cause death, and life-support withdrawal, which only causes death with an independent influencing factor); *see also* Robert A. Burt, *Rationality and Injustice in Physician-Assisted Suicide,* 19 W. NEW ENG. L. REV. 353, 359-60 (1997) (characterizing the concept that there is no difference between PAS and the right to refuse treatment as a glib conclusion); Thomas J. Marzen, "*Suicide: A Constitutional Right?"—Reflections Eleven Years Later*, 35 DUQ. L. REV. 261, 271 (1996) (noting that the distinction between PAS and withdrawing life-support systems is much more complex than the Ninth Circuit described, in that the removal of life support is not always done to cause death).

The Ninth Circuit reheard the case, reversed the panel decision, and affirmed the District Court ruling.[121] Circuit Judge Reinhardt opened his judgment with the following thoughtful words, which are quoted in full:

> This case raises an extraordinarily important and difficult issue. It compels us to address questions to which there are no easy or simple answers, at law or otherwise. It requires us to confront the most basic of human concerns—the mortality of self and loved ones—and to balance the interest in preserving human life against the desire to die peacefully and with dignity. People of good will can and do passionately disagree about the proper result, perhaps even more intensely than they part ways over the constitutionality of restricting a woman's right to have an abortion. Heated though the debate may be, we must determine whether and how the United States Constitution applies to the controversy before us, a controversy that may touch more people more profoundly than any other issue the courts will face in the foreseeable future.[122]

The court held that there was a constitutionally protected liberty interest in determining the time and manner of one's own death,[123] an interest that must be weighed against the state's legitimate and countervailing interests,[124] especially those related to the preservation of human life. After balancing the competing interests, the court concluded that insofar as the Washington statute prohibited physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their deaths, it violated the Due Process Clause of the Fourteenth Amendment.[125]

Finally, the Supreme Court, *per* Chief Justice Rehnquist, reversed the judgment.[126] It held that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the Due Process Clause.[127] It further noted that Washington's ban on assisted

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121. *See Compassion in Dying*, 79 F.3d at 793–94 (holding in a rehearing en banc that the Washington statute did violate the Fourteenth Amendment's Due Process Clause), *aff'g* 850 F. Supp. 1454 (W.D. Wash. 1994).

122. *Id.*

123. *Id.* (concluding that the right to chose one's own "time and manner" of death is a constitutionally protected interest); s*ee also* Cara Elkin, Note, *Renewed Compassion for the Dying in Compassion in Dying v. State of Washington*, 26 GOLDEN GATE U. L. REV. 1, 2 (1996) (noting that the court found a constitutionally protected interest in the right to die); Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 482 (1996) (stating that the court relied on the Due Process Clause to conclude that the "time and manner" of deciding and individual's own death was constitutionally protected).

124. *See Compassion in Dying*, 79 F.3d at 793 (concluding that the constitutional interest in choosing one's own "time and manner" of death must be balanced against state interests); *see also* Elkin, *supra* note 123, at 2 (noting that the court weighed the constitutional interest against the state interest in preserving life and that the constitutional interest prevailed); Kamisar, *supra* note 123, at 482 (stating that the constitutional interest must be balanced primarily against the state's interest in preserving life).

125. *See Compassion in Dying*, 79 F.3d at 793.

126. Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

127. *See* Washington v. Glucksberg, 521 U.S. 702, 728 (holding that there is not a constitutionally protected right to assistance in committing suicide under the Due Process Clause); *see also* Pratt, *supra* note 47, at 172–73 (stating that in holding that assistance to die is not a protected right, the Court looked to the long history of law rejecting the right to assisted suicide); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 399 (2000) (stating that the Court concluded that the Due Process Clause does not protect the right to assistance with suicide because it is not a "fundamental liberty interest").

suicide was rationally related to legitimate government interests.[128] These interests included the preservation of human life; the protection of the integrity and ethics of the medical profession; the protection of vulnerable groups from abuse, neglect, and mistake; and the protection of disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and societal indifference.[129]

Interestingly, Chief Justice Rehnquist chose to conclude his opinion by calling on the public to continue the debate in earnest:

> Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.[130]

In 1996, Dr. Timothy Quill and his colleagues appealed to the courts to declare two New York statutes[131] penalizing assistance in suicide unconstitutional in part.[132] The physicians argued that the statutes under examination were invalid to the extent that they prohibited them from acceding to the requests of terminally ill, mentally competent patients for help in hastening death.[133] The court struck down the statutes, finding that they violated the Equal Protection Clause of the Fourteenth Amendment because they were not "rationally related to a legitimate state interest."[134] Quoting a series of precedents from 1914 onward, the court said that the right to refuse medical treatment has long been recognized in New York,[135] holding that physicians who are willing to do so may prescribe drugs to be self-administered by men-

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128. *See Glucksberg*, 521 U.S. at 728 (holding that the state's ban on assisted suicide is clearly related to a legitimate interest of the state government); s*ee also* Frederick R. Parker, Jr., *The Withholding or Withdrawal of Life Sustaining Medical Treatment under Louisiana Law*, 45 LOY. L. REV. 121, 132 (1999) (noting that the Court found that the state's interest in preserving human life was an unqualified interest); Kevin P. Quinn, *Assisted Suicide and Equal Protection: In Defense of the Distinction Between Killing and Letting Die*, 13 ISSUES L. & MED. 145, 169 (1997) (stating that a state's interest in banning assisted suicide is a legitimate government interest).

129. *Glucksberg*, 117 S. Ct. at 2258.

130. *Glucksberg*, 117 S. Ct. at 2275.

131. *See* N.Y. Penal Law § 120.30 (1987); *see also id*. at § 125.15(3) (stating that "[a] person is guilty of manslaughter in the second degree when . . . [h]e intentionally causes or aids another person to commit suicide.").

132. *See* Quill v. Vacco, 80 F.3d 716, 718 (2d Cir. 1996) (involving an action brought by plaintiffs-appellants, all of whom are physicians, to declare unconstitutional in part two New York statutes penalizing assistance in suicide).

133. *Id. (*noting that "[t]he physicians contend that each statute is invalid to the extent that it prohibits them from acceding to the requests of terminally-ill, mentally competent patients for help in hastening death.").

134. *Id*. at 731 ("The New York statutes criminalizing assisted suicide violate the Equal Protection Clause because, to the extent that they prohibit a physician from prescribing medications to be self-administered by a mentally competent, terminally-ill person in the final stages of his terminal illness, they are not rationally related to any legitimate state interest.").

135. *See* Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129 (1914); In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64 (1981); In re Eichner, 52 N.Y.2d 363 (1981); Rivers v. Katz, 67 N.Y.2d 485 (1986) (holding that the right of an adult of sound mind to determine what would be done with their own body and control over the course of their medical treatment extended to mentally ill persons).

tally competent patients who seek to end their lives during the final stages of a terminal illness.[136]

The state appealed to the Supreme Court, which reversed the decision.[137] The Court, *per* Chief Justice Rehnquist, held that New York's prohibition on assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment.[138] The Court maintains that the distinction between letting a patient die and making that patient die is important, logical, rational and well established.[139]

As a result of the two decisions, *Washington v. Glucksberg* and *Vacco v. Quill,* both handed down on June 26, 1997, by a 9-0 vote, the states have responsibility for insuring that the interests of all patients near the end of their lives are not imperiled.[140] In American society there are widely differing values and sharply clashing views on mercy killings, physician-assisted suicide and the right to die with dignity.[141] This article mentioned Measure 16 enacted in Oregon. In Michigan, a special statute was passed in 1993 to stop Dr. Jack Kevorkian from assisting patients to die.[142] However, Dr. Kevorkian stood trial several times and in all instances the juries refused to convict him of violating that statute,[143] although Kevorkian admitted he had

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136. *See* Vacco v. Quill, 521 U.S. 793 (1997); Donald H.J. Hermann, *The Question Remains: Are There Terminally Ill Patients Who Have a Constitutional Right to Physician Assistance in Hastening the Dying Process,* 1 DEPAUL J. HEALTH CARE L. 445, 447 (1997) (noting that a physician may prescribe medications to be self-administered by a mentally competent, terminally ill patient in the final stages of the patient's terminal illness); Kevin P. Quinn, *Assisted Suicide and Equal Protection: In Defense of the Distinction Between Killing and Letting Die*; 13 ISSUES L. & MED. 145, 147–48 (1997) (noting that the act of prescribing drugs by physicians to be self-administered by terminally ill persons is a constitutionally protected act).

137. *See* Vacco V. Quill, 521 U.S. 793.

138. *Id*. (holding that New York's statute outlawing assisted suicide neither infringed upon fundamental rights nor involved suspect classifications and, as such, it was entitled to a strong presumption of validity).

139. *See* Vacco v. Quill, 117 S. Ct. 2293, 2295 (1997) (noting that "[t[he distinction between letting a patient die and making that patient die is important, logical, rational, and well established: It comports with fundamental legal principles of causation . . ."); *see also* Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998) (discussing laws which permit patients to refuse medical treatment); Pratt, *supra* note 83, at 1027 (discussing legalization efforts of physician-assisted suicide in the US).

140. *See Vacco,* 521 U.S. at 799 (stating that "New York's reasons for recognizing and acting on the distinction between refusing treatment and assisting a suicide—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia—are valid and important public interests that easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.").

141. *See* David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, B.C. L. REV. 443, 446 (1997) (analyzing the different arguments used by those who support the legalization of physician assisted suicide and those who support its prohibition); *see also* William Claiborne, *Doctor-Aided Suicide Is Backed in Poll*, WASH. POST, July 30, 1998, at A3 (noting the results of a public opinion poll on physician assisted suicide); Pratt, *supra* note 83, at 1027 (discussing the ongoing debate over physician assisted suicide).

142. *See* Janet M. Branigan, *Michigan Struggle with Assisted Suicide and Related Issues as Illuminated by Current Case Law: An Overview of* People v. Kevorkian, 72 U. DET. MERCY L. REV. 959, 968 (1995) (commenting on the approach taken by Michigan's legislation with respect to euthanasia). *See generally* Personnel Administrator of Mass. v. Fenney, 442 U.S. 256, 271–73 (1979) (noting how "[m]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law").

143. *See* Jack Lessenberry, *Jury Acquits Kevorkian in Common-Law Case*, N.Y. TIMES, May 15, 1996, at 14 (detailing the trial of Dr. Kevorkian); *see also* David Margolik, *Jury Acquits Kevorkian of Illegally Aiding a Suicide*, N.Y. TIMES, May 3, 1994, at 1 (announcing the verdict has been reached in the trial of Dr. Kevorkian); Edward Walsh, *Jury Acquits Kevorkian in Two Suicides*, WASH. POST, Mar. 9, 1996, at A1 (noting that the jury acquitted Dr. Kevorkian).

assisted people to commit suicide.[144] Kevorkian was acquitted on the grounds that his main intent was to relieve pain, not to cause death.[145] In November 1998, he actively performed euthanasia on Thomas Youk,[146] stood trial and was convicted of second-degree murder and of delivering a controlled substance for the purpose of injecting Youk with lethal drugs.[147] Kevorkian was given a jail sentence of 10 to 25 years on the second-degree murder conviction,[148] and 3 to 7 years on the "controlled substance" conviction.[149]

In November 2001 Attorney General John Ashcroft declared that doctors may not prescribe lethal doses of federally controlled substances to terminally ill patients.[150] Overturning the policy adopted by his predecessor, Attorney General Janet Reno, Ashcroft sided with the Drug Enforcement Administration (DEA), which had long argued that doctors who prescribe drugs under Oregon's assisted-suicide law could lose their licenses to write prescriptions.[151]

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144. *See* Lynne Marie Kohm & Britney N. Brigner, *Women and Assisted Suicide: Exposing the Gender Vulnerability to Acquiescent Death*, 4 CARDOZO WOMEN'S L.J. 241, 267 n.137 (1998) (stating that Kevorkian has admitted that he has assisted in 100 suicides); *see also* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 150 (1998) (noting that Kevorkian admits his acts); Victoria L. Helms, *Assisted Suicide: Giving Meaning to the Right to Die*, 6 ST. THOMAS L. REV. 173, 178 n.3 (1993) (noting that Kevorkian admits to merciful killing).

145. *See* Michigan ex rel. Oakland County Prosecutor v. Kevorkian, 451 Mich. 874 (1996) (allowing the case to be appealed); *see also* Orentlicher, *supra* note 141, at 475 (stating that new charges have been filed against Dr. Kevorkian); *Kevorkian Going On Trial for 4th Time in Suicides*, N.Y. TIMES, Mar. 31, 1996, at 29 (announcing that Dr. Kevorkian faces new charges).

146. *See* John Jeter, *With Videotape, Kevorkian Invites a New Charge*, WASH. POST, Nov. 21, 1998, at A5 (noting that recently discovered evidence facilitated the filing of new charges against Dr. Kevorkian); *see also* Debra J. Saunders, *The Circus Comes Darkly to CBS*, S.F. CHRON., Nov. 24, 1998 at A4 (discussing the new developments in the trial of Dr. Kevorkian); Edward Walsh, *Kevorkian Judge Bars Evidence of His Intent; Pathologist Urged to Let Lawyer Handle Case*, WASH. POST, Mar. 24, 1999, at A3 (noting that a crucial piece of evidence was ruled to be inadmissible by the judge).

147. *See* Barry A. Bostrom, *Nota Bene: In the Michigan Court of Appeals: People vs. Jack Kevorkian,* 18 ISSUES L. & MED. 57, 58 (2002) (describing Kevorkian's conviction for second-degree murder in the death of Thomas Youk).

148. *See* People v. Kevorkian, 639 N.W.2d 291, 374 (Mich. Ct. App. 2001) (refusing to conclude that euthanasia was legal and declined to reverse defendant's conviction on constitutional grounds); *see also* Valerie L. Meyers, Comment, *Vacco v. Quill and the Inalienable Right to Life*, 11 REGENT U. L. REV. 373, 396 n.8 (1998) (stating that Kevorkian was sentenced to 10 to 15 years for second-degree murder for assisting the suicide of Thomas Youk); *The Nation; Kevorkian's Murder Conviction Stands*, L.A. TIMES, Nov. 22, 2001, at 42 (stating that Dr. Kevorkian was sentenced to 10-25 years in prison for the second-degree murder of Thomas Youk).

149. *See* Pratt, *supra* note 47, at 178 (writing that in addition to the sentence of 10 to 15 years for second degree murder, Kevorkian was also sentenced to 3 to 7 years for the delivery of a controlled substance). *See generally* Bostrom, *supra* note 147, at 60 (stating that Kevorkian was convicted of delivering a controlled substance and sentenced to seven years).

150. *See* Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2479 (2002) (stating Attorney General John Ashcroft's determination that prescribing controlled substances for the purposes of assisting suicide was "inconsistent with the public interest" under the Controlled Substances Act); *see also* Manzione, *supra* note 68, at 457 (stating that physicians who prescribed lethal doses of medication to terminally ill patients were to have their licenses revoked by order of Attorney General Ashcroft). *See generally* Brumbaugh, *supra* note 110, at 385–86 (stating that state regulation of controlled substances was superceded by federal regulation, thus any physician prescribing lethal medication to assist in suicide would be stripped of their DEA registration).

151. *See* Sam H. Verhovek, *U.S. Acts to Stop Assisted Suicide,* N.Y. TIMES, Nov. 7, 2001, at A20 (describing the policy adopted by Attorney General Ashcroft that assisted suicide is not a legitimate medical purpose under the Controlled Substances Act).

While physicians are licensed by the states to practice medicine,[152] the DEA registers doctors to prescribe drugs and the agency is responsible for enforcing the federal controlled substances law.[153] Ashcroft determined that "assisting suicide is not a 'legitimate medical purpose' within the meaning of [the law] and that prescribing, dispensing or administering federally controlled substances to assist suicide" violates federal law.[154]

The state of Oregon was quick to respond and filed motions in U.S. District Court seeking to temporarily prevent the federal government from implementing the new order barring doctors from prescribing federally controlled substances to hasten the deaths of terminally ill patients.[155] Oregon Attorney General Hardy Myers also filed a lawsuit challenging the authority of U.S. Attorney General Ashcroft to limit the practice of medicine in Oregon by attempting to bar physician-assisted suicides.[156] The battle continues.

While the U.S. struggles with controversy regarding the legality of assisted suicide,[157] the Swiss legal system has condoned the practice for more than sixty years.[158] In contrast to prac-

152. *See* McNaughton v. Johnson, 242 U.S. 344, 348–49 (1917) (stating that a state may regulate the practice of medicine); s*ee also* Reetz v. Michigan, 188 U.S. 505, 506 (1903) (holding that "the power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question."); Dent v. West Virginia, 129 U.S. 114, 122 (asserting the power of the state to prescribe regulations for the public's general welfare and that the states are free to establish the required qualifications for the practice of medicine).

153. Controlled Substances Act of 1970, 21 U.S.C. § 823 (2002); *see also* Action on Application for Registration: Revocation or Suspension of Registration, 21 C.F.R. § 1301.36 (2002) (stating requirements for the creation of guidelines by, among others, the Drug Enforcement Agency and registration requirements for practitioners dispensing controlled substances).

154. *See* James Vicini, *Federal Doctor-Assisted Suicide Policy Reversed*, REUTERS, Nov. 6, 2001, *available at* http://www.worldrtd.org/AshcroftReuters.html (stating that the Oregon Attorney General filed a motion to stop the implementation of Attorney General Ashcroft's policy on assisted suicide); s*ee also* Sam H. Verhovek, *supra* note 151, at A20 (describing the policy adopted by Attorney General Ashcroft that assisted suicide is not a legitimate medical purpose under the Controlled Substances Act and the state of Oregon's reaction).

155. *See* Oregon v. Ashcroft, No. 01-1647-JO, slip op. at 12 (D. Or. 2002) (stating that the state of Oregon filed suit requesting injunctive relief restraining the Attorney General from enforcing his order regarding the Controlled Substances Act and assisted suicide); s*ee also Oregon Sues Over Assisted-Suicide Ban*, WASH. POST, Nov. 8, 2001, at A7 (stating that the state of Oregon sued the U.S. government over Attorney General Ashcroft's directive regarding physician assisted-suicide); *Ashcroft: No Federal Drugs Can Be Used in Assisted Suicide*, Princeton Pro-Life Web page, *available at* http://www.princeton.edu/~prolife/usnews/news2.html (indicating that the state of Oregon would file a lawsuit intended to prohibit Attorney General Ashcroft's order regarding assisted suicide and the Controlled Substances Act).

156. *See* Brad Cain, *Oregon Files Lawsuit Against U.S. Government Over Assisted Suicide*, THE ASSOCIATED PRESS, Nov. 7, 2001, *available at* http://www.cryonet.org/archive/17867 (stating that Oregon Attorney General Hardy filed papers in the lawsuit against the U.S. government regarding Attorney General Ashcroft's directive); *see also Oregon Sues over Ban on Assisted Suicide,* ST. LOUIS POST-DISPATCH, Nov. 8, 2001, at A12 (stating that the state of Oregon sued the United States government and challenged the Attorney General's authority to regulate medical practices within the state by prohibiting physician assisted suicide). *See generally* Sam H. Verhovek, *supra* note 151, at A20 (describing Attorney General Aschcroft's directive regarding the use of controlled substances in assisted suicide and the implementation of the Controlled Substances Act).

157. *See* Jerome Groopman, *Separating Death From Agony,* N.Y. TIMES, Nov. 9, 2001, at A27 (expressing opinion on conflicting policies and sentiments about assisted suicide in the United States); Thomas S. Szasz, M.D., *Assisted Suicide Is Bootleg Suicide*, L.A. TIMES, Nov. 23, 2001, at 17 (discussing conflicting opinions regarding assisted suicide in the United States); Sam H. Verhovek, *supra* note 151, at A20 (illustrating the internal conflict regarding assisted suicide as evidenced by the change in policy on the use of controlled substances to assist in suicide).

158. *See* Derek Humphrey, *Assisted Suicide Laws Around the World* (Aug. 2002) (indicating that assisted suicide has been openly legal in Switzerland since 1941), *at* http://www.authorsden.com/visit/viewarticle.asp?AuthorID=312 (last visited Oct. 25, 2002).

tices in the Netherlands, Australia and the various U.S. proposals where assisted suicide is limited to physician-assisted suicide, Swiss law permits aiding the dying by laypersons.[159] Since 1937, articles 114 and 115 of the Penal Code have governed assistance to suicide.[160] Although under article 114 anyone taking another person's life, even if for honorable motives of compassion and at the request of the sufferer, is liable to imprisonment,[161] still the judge will consider whether the patient is terminal, whether he requested death, and whether the patient acted for noble reasons. This is under article 63 of the Penal Code of l937, which instructs the judge to mete out punishment in accordance with the guilt of the actor, considering the motives, prior life, and personal circumstances of the guilty person.[162] Swiss laws stipulate that persons who assist a suicide must do so for humane reasons with no chance of personal gain.[163] The Swiss Penal Code provides that "assisted suicide is not punishable, provided it is not done for enrichment purposes and that the person [who wishes to commit suicide] carries out the final death act."[164] Swiss law permits passive euthanasia, deliberate renunciation or interruption of measures to preserve life, and active indirect euthanasia, administering of substances to reduce suffering whose secondary effects may reduce the period of the patient's survival.[165]

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159. *See* Clare Klapp, *Swiss Allow Assisted Suicide, But What About Euthanasia?*, 354 THE LANCET 2055, 2059 (1999) (stating that Switzerland is the only country to permit laypersons to aid in assisted suicide).

160. *See* Derek Humphrey, *Swiss Assisted Suicide Branching Out* (indicating that Switzerland has not actively prohibited assisted suicide since 1937), *at* http://www.finalexit.org/swissframe.html (last visited Oct. 25, 2002); Euthanasia Research and Guidance Organization, *World Laws on Assisted Suicide: Continental Europe* (July 11, 2002) (stating that a physician is not required to be involved in an assisted suicide, although a physician is usually involved), *available at* http://www.finalexit.org/lawseuropeframe/html (last visited Oct. 25, 2002).

161. *See The Voluntary Euthanasia Society Factsheets: The World* (describing article 115 of the Swiss Penal Code), *available at* http://www.ves.org.uk/DpFS-Wrld.html (last visited Oct. 25, 2002); interview by The Patient's Network with Dr. Jerome Sobel, President, French-speaking Swiss Association for the Right to Die with Dignity and Dr. Gerrit Kimsma, Associate Professor of Philosophy, Medical Ethics and Family Medicine, Vrije Universiteit (identifying penalty for assisting suicide with "selfish motives"), *available at* http://www.iapo-pts.org.uk/tpn/exit2.html (last visited Oct. 25, 2002); e-mail to Raphael Cohen-Almagor, Chairperson, Library and Information Studies, University of Haifa from EXIT A.D.M.D. Suisse Romande (noting that article 115 of the Swiss Penal Code holds: "Anyone with a selfish motive who incites a person to commit suicide or who helps that person to commit suicide, if the suicide is consummated or attempted, will be punished by a maximum of five years reclusion or imprisonment"), *available at* http://www.bk.admin.ch/ch/f/rs/311_0/index2.html; e-mail from EXIT A.D.M.D Suisse Romande regarding Arthur L. de Munitiz, *Assisted Suicide in Switzerland,* DMD News Bulletin No. 43 (June 1997) (examining how the Swiss Penal Code enables assisted suicide), *available at* http://personal2.redestb.es/admd/dnews-43.html.

162. *See* Jérome Sobel, *Assisted Death*, 121 REVUE MÉDICALE DE LA SUISSE ROMANDE 163–64 (2001) (relating that an initiative proposal of a group of experts from the Federal Assisted Death Commission wishes to add a section to article 114 that would read: "If the perpetrator helps a person, who is in the final stages of an incurable illness, to die in order to end insupportable and incurable suffering, the competent authority will not proceed against this person, will not force him to appear before a court nor inflict a penalty." Note that according to this proposal anybody can provide assisted suicide, not only people of the medical profession).

163. Interview with Dr. Jerome Sobel, President, French-speaking Swiss Association for the Right to Die with Dignity and Dr. Gerrit Kimsma, Associate Professor of Philosophy, Medical Ethics and Family Medicine, Vrije Universiteit (identifying that there is a penalty for assisting suicide with "selfish motives"), *available at* http://www.iapo-pts.org.uk/tpn/exit2.html (last visited Oct. 25, 2002).

164. *See* e-mail to Raphael Cohen-Almagor, Chairperson, Library and Information Studies, University of Haifa from EXIT A.D.M.D. Suisse Romande (documenting article 115 of the Swiss Penal Code as holding: "Anyone with a selfish motive who incites a person to commit suicide or who helps that person to commit suicide, if the suicide is consummated or attempted, will be punished by a maximum of five years reclusion or imprisonment"), *available at* http://www.bk.admin.ch/ch/f/rs/311_0/index2.html; *The Voluntary Euthanasia Society Factsheets: The World* (describing article 115 of the Swiss Penal Code), *available at* http://www.ves.org.uk/DpFS-Wrld.html.

165. *See* DEREK HUMPHREY, THE RIGHT TO DIE (Harper & Row 1986), at 221–222 (summarizing the Swiss Penal Code with regard to assisted suicide), *available at* http://www.finalexit.org/world.fed.html.

Although Swiss law permits physicians and non-medical persons to assist suicides,[166] the Swiss Academy of Medical Sciences, like many medical organizations, including the American Medical Association, opposes doctors helping patients to die.[167]

Today there are no less than four "right-to-die" organizations in a country with a population of seven million.[168] The largest organization is EXIT, the Swiss Society for Human Dying, with 50,000 members, based in Zurich. The other three are much smaller in comparison: EXIT International,[169] Dignitas[170], and EXIT A.D.M.D. Suisse romande.[171] Two of them offer help with hastened death to both terminally ill and chronically ill regardless of whether they are residents or foreigners.[172] One group will even visit a dying patient in another country if there is no alternative.[173] The main organization, EXIT, requires that the applicant wishing to die with EXIT's help be at least eighteen years old, a Swiss resident, mentally competent and suffering from intolerable health problems.[174] He or she must personally apply for the service and convince the administrators of EXIT that there is no coercion or third-party influence

166. *See* Derek Humphrey, *supra* note 160 (commenting on the Swiss practice of assisted suicide), *available at* http://www.finalexit.org/swissframe.html; *see also* Richard C. Parks, Comment, *A Right to Die with Dignity: Using International Perspectives to Formulate a Workable U.S. Policy,* 8 TUL. J. INT'L & COMP. L. 447, 464 (2000) (discussing euthanasia and physician assisted suicide). *See generally* Manzione, *supra* note 68, at 473 (noting the circumstances in which euthanasia is permitted in Switzerland).

167. *See* American Medical Association, *Decisions Near the End of Life* (2002) (taking the view that physicians must not aid in assisted suicide), *available at* http://www.ama-assn.org/apps/pf_online; Derek Humphrey, *supra* note 160 (stating that "the relevant law . . . is interpreted to mean that anybody—doctor, nurse, family, or friend—can assist a suicide of a physically sick person . . . "); Manzione, *supra* note 68, at 473 (stating that "[I]t is not regarded as a crime if a doctor prescribes a lethal medication to be administered"); Parks, *supra* note 166, at 464 (stating that "[I]n Switzerland, one need not necessarily be a physician to assist a suicide").

168. *See* South Australian Voluntary Euthanasia Society (SAVES), THE VE BULLETIN, vol. 17 no. 3, Nov. 2001, (stating that "Today there are several 'right-to-die' organizations in a country with a population of seven million"); Humphrey, *supra* note 160 (noting that "Today there are no less than four 'right-to-die' organizations in a country with a population of seven million").

169. *See* Humphrey, *supra* note 160 (disseminating information about the various "right-to-die" groups).

170. *See id.* (naming Dignitas as a "right-to-die" group).

171. *See* www.exit.ch; http://www.dignitas.ch/; www.exit-geneve.ch; www.dghs.de; www.finalexit.org/pract-swiss.html (citing to Web sites disseminating information about international assisted suicide); Humphrey, *supra* note 160 (naming EXIT A.D.M.D. Suisse Romande as a "right-to-die" organization); SAVES, *supra* note 168 (describing the various "right-to-die" organizations).

172. *See Continental Europe*, ERGO (Oct. 21, 2002) (stating that Switzerland will treat terminally ill foreigners), *available at* http://www.finalexit.org/lawseuropeframe.html; Humphrey, *supra* note 160 (stating that two Swiss organizations offer help to both residents and foreigners); *see also* SAVES, supra note 168 (noting that "Two of them offer help with hastened death to both terminally ill and chronically ill, be they resident or foreigner").

173. *See* Humphrey, *supra* note 160 (stating that one assisted suicide group will visit a dying person outside the country if there is no alternative); SAVES, *supra* note 168 (relaying that two groups will offer aid to both residents and non-residents).

174. *See* Meinrad Schaer, MD, *The Practice of Assisted Suicide in Switzerland* (1996) (listing the requirements for a candidate for assisted suicide), *available at* http://www.finalexit.org/swissframe.html; Clare Kapp, *Assisted Suicide in Zurich*, THE LANCET 9249 (Jan. 2001) (stating that there are "strictly defined circumstances" under which euthanasia may be sought from EXIT); *see also* Voluntary Euthanasia Society: Factsheets, *Voluntary Euthanasia Around the World* (2002) (listing the requirements for a person applying for assisted suicide through EXIT), *available at* http://www.wes.org.uk/DpFS-Wrld.html.

involved in the decision.[175] An EXIT physician considers the application and decides whether or not assistance can be offered.[176] In doubtful cases, a team composed of a lawyer, psychiatrist and a physician will make the decision jointly.[177] Once a decision is made, the patient determines the date for his or her death.[178] A member of EXIT's team of suicide helpers then brings the medication which the patient has to drink by him- or herself.[179] EXIT welcomes the presence of family members or the patient's loved ones.[180] As soon as death is confirmed, the EXIT member calls the police.[181] According to Swiss law every unusual death has to be examined by the police to make sure that no crime was committed.[182]

Between 100 and 120 people are openly helped in this way each year[183] and so far no member of an EXIT team has had to appear before the court for improperly helping a person

175. *See* Schaer, *supra* note 174 (enumerating the requirements for assisted suicide); *see also* Voluntary Euthansia Society, *supra* note 174 (reporting that "Once a person has personally contacted EXIT asking for help in dying, a volunteer from the society visits the patient to establish that this request is the genuine wish of a mentally competent adult, who has not been coerced or influenced by another in any way.").

176. *See* Schaer, *supra* note 174 (listing the requirements for a successful application for assisted suicide); *see also* Voluntary Euthansia Society, *supra* note 174 (stating that "A decision as to whether help in dying can be given to this patient or not is made by a doctor of EXIT . . . ").

177. *See* Schaer, *supra* note 174 (noting that "In doubtful cases, a team composed of a lawyer, psychiatrist and physician will jointly make the decision."); *see also* Voluntary Euthansia Society, *supra* note 174 (noting that "[A] doctor . . . in doubtful cases consults with a lawyer and a psychiatrist.").

178. *See* Raphael Cohen-Almagor, *An Outsider's View of Dutch Euthanasia Policy and Practice*, 17 ISSUES L. & MED. 35, 67 (2001) (stating that the Dutch do not differentiate between euthanasia and physician-assisted suicide); *see also* Thompson, *supra* note 1, at 1037 (discussing voluntary euthanasia in United Kingdom). *See generally* Jonathan E. Brockopp, *Islamic Ethics of Saving Life: A Comparative Perspective*, 21 MED. & L. 225, 235 (2002) (discussing Islamic theological views of life and death).

179. *See* Derek Humphrey, *Euthanasia in Practice* (last visited Sept. 15, 2002) (stating that representatives of EXIT bring the lethal cocktail to the patient but leave before death), *available at* http://www.finalexit.org/swiss.html; *see also* Barry Rosenfeld, *Assisted Suicide, Depression, and the Right to Die*, 6 PSYCHOL. PUB. POL'Y & L.J. 467, 473 (2000) (stating that patients who suffered from depression or had significant functional disabilities were significantly more likely to discuss suicide or euthanasia with their physician). *See generally* Warren L. Wheeler, *Hospice Philosophy: An Alternative to Assisted Suicide*, 20 OHIO N.U. L. REV. 755, 760 (1994) (stating that Final Exit and Dr. Jack Kevorkian enter the scene and point-blank kill the patient).

180. *See* Schaer, *supra* note 174 (stating that a family member may be present when death occurs); *see also* Raphael Cohen-Almagor, *Dutch Perspectives on the British Medical Association's Critique of Euthanasia in the Netherlands*, 20 MED. & L. 613, 623 (2001) (stating that in the Netherlands, 10 percent of nursing home physicians allow the nurse or even the family members to administer the lethal drug). *See generally* Stephanie A. Damiani, *Up With Life and Down With Pain: The Pain Relief Promotion Act: Congressional Attempt to Address the Issue of Physician-Assisted Suicide*, 5 QUINNIPIAC HEALTH L.J. 191, 215 (2002) (stating that legalization of euthanasia in the Netherlands has led to a society in which people feel pressured to choose the euthanasia option).

181. *See* Humphrey, *supra* note 179 (stating that the EXIT team informs the police about the death, which is then recorded as suicide); *see also* Schaer, *supra* note 174 (stating that after the death, officials are notified and visit the scene to make sure that no crime was committed). *See generally* David Orentlicher, *Euthanasia and Law in the Netherlands*, 25 J. HEALTH POL. POL'Y & L. 387, 389 (2000) (stating that if euthanasia were legalized, the courts would want prosecutors and police roaming the hospitals to prevent involuntary euthanasia).

182. *See* Schaer, *supra* note 174 (stating that police visit the scene to establish whether or not a crime was committed). *See generally* Cynthia M. Bumgardner, *Euthanasia and Physician-assisted Suicide in the United States and the Netherlands: Paradigms Compared*, 10 IND. INT'L & COMP. L. REV. 387, 409 (2000) (stating that in 1990, the Minister of Justice of the Netherlands informed prosecutors not to request police investigations of euthanasia unless they had suspicion of noncompliance with set criteria).

183. *See* Humphrey, *supra* note 160 (stating that about 120 people are assisted by Exit); *see also* Humphrey, *supra* note 179 (stating that the organization gets about 300 calls per year, 120 of which get assistance). *See generally* Jonsen, *supra* note 1, at 459 (summarizing the history of the euthanasia debate in the United States and examining the terms of the current debate).

to commit suicide.[184] It is estimated that the four "right-to-die" organizations hasten some 200 deaths each year[185] but no official statistics are kept because it is not an offense.[186]

Belgium has followed the euthanasia path of its Dutch neighbor.[187] For some time there were no formal registration and authorization procedures for end-of-life decisions in medical practice.[188] Although euthanasia was illegal and treated as intentionally causing death under criminal law,[189] prosecutions were exceptional and the practice of euthanasia was tolerated.[190] Since 1996, legalization of euthanasia was intensely discussed, by both the official Advisory Committee on Bioethics and the Belgian Parliament.[191] Proposals to remove euthanasia from

184. *See Assisted Suicide: Kevorkian Conviction Upheld by Mich. App. Ct.* Michigan v. Kevorkian, 9 No. 7 ANDREWS HEALTH L. LITIG. REP. 5, 5 (2002) (stating that the Michigan Court of Appeals rejected Kevorkian's claim that the 1998 lethal injection was a form of euthanasia); Manzione, *supra* note 68, at 470 (stating that the U.S. Supreme Court ruled that the right to die is a matter that should be addressed by the individual states). *See generally* Hendin, *supra* note 4, at 223 (stating that a series of court decisions have legally sanctioned euthanasia in the Netherlands since the early 1970s).

185. *See* Rita L. Marker, Joseph R. Stanton, Mark E. Recznik, & Keith A. Fournier, *Euthanasia: A Historical Overview*, 2 MD. J. CONTEMP. LEGAL ISSUES 257, 278 (1991) (stating that "right-to-die" organizations appear more mainstream and acceptable and are known as advocates of "patient's rights"); *see also* John D. Gorby, *Admissibility and Weighing Evidence of Intent in Right to Die Cases*, 6 ISSUES L. & MED. 33, 52 (1990) (stating that a person's participation in right-to-die organizations may be considered relevant evidence in euthanasia cases). *See generally* Faye J. Girsh, *The Hemlock Society: What We Are, What We Aren't, and Why*, 12 ST. JOHN'S J. LEGAL COMMENT. 689, 689 (1997) (stating that a survey indicates that Americans favor the right to die by about three to one).

186. Fact sheet based on a paper by Professor Meinrad Schaer (Dec. 16, 1996) (noting that the data was verified by Derek Humphrey (personal correspondence on Jan. 4, 1999), who said that there has never been a prosecution for abuse of the law), *available at* http://www.saves.asn.au/resources/facts/fs20.htm.

187. *See Euthanasia Debate After Dutch Decision*, CNN NEWS (Apr. 11, 2001) (stating that Belgium has been closely following the events in the Netherlands and could be the next country to legalize euthanasia), *available at* http://www.cnn.com/2001/WORLD/europe/04/11/netherlands.debate.03?s=10; *see also* Raphael Cohen-Almagor, 30 J.L. MED. & ETHICS 95, 101 (2002) (stating that the Netherlands, with the exception of Belgium, is the only country that generally accepts the policy and practice of both euthanasia and physician-assisted suicide). *See generally* Parks, *supra* note 166, at 466 (stating that although there were recent right-to-die-with-dignity advancements in the Netherlands, Belgium, and Colombia, there remain many opponents on the international scene).

188. *See Issues in Law & Medicine, An Open Letter of the Dutch Physicians' League*, 15 ISSUES L. & MED. 325, 325–26 (2000) (stating that in the Netherlands euthanasia is viewed as an acceptable medical practice); Nelson Lund, *Two Principles, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia*, 24 HASTINGS CONST. L.Q. 903, 922 (1997) (stating that in the Netherlands there are at least 1,000 cases of active non-voluntary euthanasia performed without the patient's knowledge or consent). *See generally* Cohen-Almagor, *supra* note 178, at 67 (stating that in 1990, 30 percent of the general practitioners interviewed in the Netherlands said they had performed a life-terminating act at some time without explicit request).

189. *See Doctors 'Help Kill One In 10 Belgians'*, BBC NEWS (Nov. 24, 2000) (stating that euthanasia is illegal in Belgium), *available at* http://news.bbc.co.uk/1/hi/health/1037381.stm. *See generally* Damiani, *supra* note 180, at 214 (stating that euthanasia was illegal in Holland until it was accepted by the public).

190. *See* Bumgardner, *supra* note 182, at 407 (stating that the Dutch courts began to tolerate physician-assisted suicide and euthanasia for competent terminally ill patients in the 1970s); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 680 (2000) (stating that in the Netherlands euthanasia is legally tolerated). *See generally* Manzione, *supra* note 68, at 473 (stating that euthanasia is tolerated in number of cantons in Switzerland under strict regulations).

191. *See* Tony Sheldon, *Belgium Considers Legalizing Euthanasia*, THE INT'L MED. STUDENTS' J. (last visited Sept. 15, 2002) (stating that doctors in Belgium were angry since they were not consulted about legalization of euthanasia), *available at* http://www.studentbmj.com/back_issues/0200/news/10b.html; *see also* Luc Deliens, Freddy Mortier & Johan Bilsen, *End-of-life Decisions in Medical Practice in Flanders, Belgium: A Nationwide Survey*, LANCET, vol. 356, at 1806–11 (Nov. 25, 2000). *See generally* Thompson, *supra* note 1, at 1035 (arguing that the Parliament of the United Kingdom should have legalized physician-assisted suicide if carried out under well-defined guidelines and safeguards).

the criminal law had angered doctors, who claimed they had not been properly consulted.[192] Dr. Marc Moens, chairperson of the Belgian Association of Doctors Syndicates (BVAS), which comprises two thirds of the country's 40,000 doctors,[193] argued that abolishing the law on euthanasia would do nothing to prevent abuses but would make "[t]he exception the rule."[194] A study conducted in Flanders showed that the frequency of deaths preceded by an end-of-life decision is similar to that in the Netherlands, but lower than that in Australia.[195] However, in Flanders, the rate of administration of lethal drugs to patients without their explicit request is similar to Australia, and significantly higher than that in the Netherlands.[196]

On January 20, 2001, the euthanasia commission of Belgium's upper house, the Senate, voted in favor of proposed euthanasia legislation.[197] This would make euthanasia no longer punishable by law, provided certain requirements are met.[198] Nine months later, on October 25, Belgium's Senate approved the law proposal.[199] On March 20, 2001, it was adopted by the

192. *See* Thompson, *supra* note 1, at 1051 (stating that according to the Voluntary Euthanasia Society, voluntary euthanasia in Britain takes place in the criminal underworld where doctors cannot seek the advice of their colleagues). *See generally* Cohen-Almagor, *supra* note 178, at 45 (stating that it is estimated that 10 percent of physicians in the Netherlands oppose the practice of euthanasia).

193. *See* Derrick Augustus Carter, *Knight in the Duel with Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL. L. REV. 663, 680 (1996) (stating that unsuccessful efforts to legitimize assisted suicide and euthanasia were initiated in Europe and America before World War II); *see also* Herbert Hendin, *Seduced by Death: Doctors, Patients, and the Dutch Cure*, 10 ISSUES L. & MED. 123, 159 (1994) (stating that physicians in Europe were highly critical of Dutch euthanasia policies). *See generally Issues in Law and Medicine*, *European Court of Human Rights: Case of Pretty v. The United Kingdom*, 18 ISSUES L. & MED. 67, 73 (2002) (stating that in Belgium 3.1 percent of deaths were a result of non-voluntary euthanasia).

194. *See* Sheldon, *supra* note 40, at 1433; *Belgian Docs Unhappy About Proposed Euthanasia Law*, REUTERS HEALTH (May 16, 2002) (stating the discontent physicians in Belgium are feeling in regard to the euthanasia bill that has recently been passed); *Belgium: The Euthanasia Law* (May 16, 2002) (referring to the law that had been passed in Belgium), *available at* http://www.worldrtd.org/BelgiumLaw/Transl.html.

195. *See* SAVES Fact Sheet No. 21, *Did You Know? Voluntary Euthanasia in Australia, the Netherlands and Belgium* (Jan. 2002) (giving the exact numbers of the study referred to by the author), *available at* http://www.saves.asn.au/resources/facts/fs21.htm (last visited Oct. 25, 2002); *see also Lethal Jabs Study Fuels Belgian Euthanasia Debate* (Nov. 24, 2000) (mentioning the study once more in regard to the years it was done in Australia and the Netherlands and when it was done in Belgium), *available at* http://www.worldrtd.org/Belgium1.html (last visited Oct. 25, 2002). *See generally Doctors 'Help Kill One in 10 Belgians'*, *supra* note 189 (mentioning the various studies in Australia, Netherlands and Belgium).

196. *See* Deliens, Mortier & Bilsen, *supra* note 191, at 1806; *see also Lethal Jabs Study Fuels Belgian Euthanasia Debate, supra* note 189 (mentioning the study once more first, in regards to the years it was conducted in Australia and Netherlands and then when it was conducted in Belgium). *See generally Doctors 'Help Kill One in 10 Belgians,' supra* note 195 (mentioning the various studies in Australia, Netherlands and Belgium).

197. *See Belgium, supra* note 194 (referring to the Senate passing the bill and then putting it before the Parliament to decide the issue); *see also The Federal Parliament of Belgium* (explaining that Senate must first propose legislation that can then possibly be approved in the future), *available at* http://www.lachambre.be/en2.html (last visited Oct. 25, 2002); *Belgium Improves Bill on Euthanasia*, HEALTH REUTERS, May 16, 2002 (mentioning the passing of the bill as a whole).

198. *See* Wim Weber, *Belgian Euthanasia Bill Gains Momentum*, 357 THE LANCET 370 (Feb. 3, 2001); *Belgium*, *supra* note 194 (stating the parameters of the euthanasia legislation); *see also Belgium Approves Euthanasia Bill,* HEALTH REUTERS, May 16, 2002 (defining the elements necessary to qualify for the euthanasia legislation). *See generally Belgium Legalizes Euthanasia*, BBC NEWS, May 16, 2002 (referring to the restrictions established in Belgium's euthanasia legislation), *at* http://news.bbc.co.uk/1/hi/world/europe/1992018.stm.

199. *See Belgium Legalizes Euthanasia*, *supra* note 198 (stating that Senate approved of the euthanasia legislation in October 2001 and referring to the restrictions established in Belgium's euthanasia legislation); *see also Belgium to Legalize Euthanasia* (May 18, 2002), *available at* http://english.pravda.ru/main/2002/05/18/28933.htm (stating when the Senate had passed euthanasia legislation).

joint commissions of Justice and Social Affairs by a significant majority: 44 for, 23 against, 2 abstentions and two senators who failed to register a vote.[200] It was clear beforehand that there was general support among all six parties in the ruling coalition of Socialists, Liberals and Ecologists.[201] In society at large, most people were behind the change.[202] An opinion survey in April showed that three-quarters of those asked were broadly in favor of legalizing euthanasia,[203] but the law still requires the approval of the chamber of deputies.[204]

In determining how to end the lives of terminally ill patients, the legislation lays out the terms for doctors.[205] For those doctors operating an informal system of euthanasia, though, no immediate or radical changes are expected in the way they function in Belgium.[206] Patients must be at least 18 years old and have made specific, voluntary and repeated requests that their lives be ended.[207] Furthermore, they must put this in writing,[208] and requests will only be approved if the patient is terminally ill, in constant suffering and of sound mind.[209] At least

200. *See Belgium Legalizes Euthanasia*, *supra* note 198 (stating that Parliament passed the legislation regarding euthanasia and the number of votes that were necessary to enact such legislation); *Belgium Ready to Vote on Euthanasia Law*, HEALTH REUTERS, Mar. 21, 2002, (stating the vote passed Mar. 20, 2002, regarding the euthanasia legislation); *Belgium, supra* note 197 (referring to the law that had been passed in Belgium by the Parliament).

201. *See Belgium Ready to Vote on Euthanasia Law, supra* note 200 (stating the Labor, Green and Socialist parties were behind the legislation); *see also Lethal Jabs Study Fuels Belgian Euthanasia Debate, supra* note 195 (stating the parties which were in support of the euthanasia legislation); *Belgium Approves Euthanasia Bill*, *supra* note 198 (supporting parties mentioned in this article).

202. *See Belgium to Legalise Euthanasia, supra* note 199 (mentioning that 72 percent of the population is in support of the legislation); *Belgium, supra* note 194 (referring to the law that had been passed in Belgium by the Parliament); *Belgium Approves Euthanasia Bill*, *supra* note 198 (defining the elements necessary to qualify for the euthanasia legislation).

203. *See* Andrew Osborn, *Belgians Follow Dutch by Legalising Euthanasia,* THE GUARDIAN (Oct. 26, 2001); *Belgium to Legalise Euthanasia, supra* note 199 (referring to the fact that almost three-quarters of the population was in support of the euthanasia legislation); *Belgium*, *supra* note 194 (mentioning the law that is being referred to in the current discussion).

204. *See The Federal Parliament of Belgium, supra* note 197 (explaining the steps necessary in order to pass a bill); *Belgium, supra* note 194 (referring to the law that had been passed in Belgium); *Belgium Approves Euthanasia Bill*, *supra* note 198 (explaining the euthanasia bill's components).

205. *See Belgium Approves Euthanasia Bill*, *supra* note 198 (defining the euthanasia bill's components); *Belgium Ready to Vote on Euthanasia Law, supra* note 200 (stating the boundaries of the bill); *see also Belgium Legalizes Euthanasia*, *supra* note 198 (referring to the restrictions established in Belgium's euthanasia legislation).

206. *See* SAVES Fact Sheet, *supra* note 195 (giving statistics on the rates of physician assisted suicide that took place before the bill was a reality); *see also Lethal Jabs Study Fuels Belgian Euthanasia Debate, supra* note 195 (referring to the number of physician-assisted suicides that occurred before the bill had been passed). *See generally Doctors 'Help Kill One in 10 Belgians,' supra* note 189 (referring to doctors assisting patients with suicide when terminally ill before the euthanasia bill has been passed).

207. *See Belgium*, *supra* note 194 (listing the restrictions within the euthanasia bill passed in Belgium); *Belgium Approves Euthanasia Bill*, *supra* note 198 (defining the scope of the euthanasia bill); *Belgium Legalizes Euthanasia*, *supra* note 198 (enumerating the restrictions established in Belgium's euthanasia legislation).

208. *See Belgium*, *supra* note 194 (stating that one of the necessary components within the euthanasia bill is for the request to be made in writing); *Belgium Approves Euthanasia Bill*, *supra* note 198 (explaining that the request for physician assisted suicide must be made in writing); *Belgium Legalizes Euthanasia*, *supra* note 198 (noting that the writing requirement serves as yet another restriction upon the practice of euthanasia).

209. *See Belgium*, *supra* note 194 (providing The World Federation of Right to Die Societies' unofficial translation of the recently passed Belgian euthanasia law); *Second Country Set to Legalise Mercy Killing*, *at* http://old.smh.com.au/news/0110/27/world/world23.html (last visited on Sept. 16, 2002) (giving an overview of the proposed Belgian bill on euthanasia). *See generally* Cohen-Almagor, *supra* note 178, at 35 (summarizing Dutch euthanasia policy and practice and controversial aspects of euthanasia legislation).

one month must elapse between the written request and the mercy killing,[210] which can be made by a designated adult if the patient is incapable of writing.[211] An independent physician must be consulted and is required to inspect the medical file, examine the patient and verify the enduring and unbearable physical or mental suffering.[212] After the consultation is completed, the physician is required to write a report of his findings.[213] If a nursing team has regular contact with the patient, the physician must discuss the request of the patient with the team.[214] If the patient wishes, the physician must discuss the request with the proxies indicated by the patient.[215] There is also a controversial provision for patients who are not in the final phases of a terminal illness to opt for euthanasia.[216] Such a request requires a further authorization by a psychiatrist or a specialist in the disease.[217] The consultant must be independent of the patient,

210. *See Belgium*, *supra* note 194 (providing an unofficial translation of Belgian euthanasia law passed by the Belgian Senate on May 16, 2002); *Belgium Considering Legal Assisted Suicide Bill* (giving an overview of the proposed Belgian bill on euthanasia), *at* http://www.euthanasiaprevention.on.ca/newsletters/newsletter2/belgium.htm (last visited on Sept. 16, 2002). *See generally* Cohen-Almagor, *supra* note 178, at 35 (providing a critical analysis of Dutch euthanasia policy and practice and describing the possible issues that could arise with the legalization of euthanasia).

211. *See Belgium, supra* note 194 (providing The World Federation of Right to Die Societies' unofficial translation of the recently passed Belgian euthanasia law); *Second Country Set to Legalise Mercy Killing*, *supra* note 209 (giving an overview of the proposed Belgian bill on euthanasia). *See generally* Cohen-Almagor, *supra* note 178, at 35 (summarizing Dutch euthanasia policy and practice and controversial aspects of euthanasia legislation).

212. *See* Weber, *supra* note 198 (summarizing the course of legislation that led to the legalization of euthanasia in Belgium); *Belgium, supra* note 194 (summarizing and translating Belgian euthanasia law into English); *see also* Brian Johnston, *Belgium Goes Over the Brink: Belgian Lawmakers OK Assisted Suicide Bill* (giving an overview of the Belgian bill on euthanasia), *at* http://www.nrlc.org/news/2002/NRL06/belgium.html.

213. *See Second Country Set to Legalise Mercy Killing*, *supra* note 209 (giving an overview of proposed Belgian euthanasia law and discussing opposing viewpoints from various Belgian organizations); *Belgium*, *supra* note 194 (detailing the rules for physicians under the Belgian euthanasia law); *The Belgium Euthanasia Law* (translating Dutch text of euthanasia law passed by Belgium on May 16, 2002), *at* http://www.vesv.org.au/docs/belgium.htm (last visited Oct. 3, 2002).

214. *See World Laws on Assisted Suicide* (summarizing current status of euthanasia laws throughout the world), *at* http://www.finalexit.org/worldlaws.html (last visited Oct. 25, 2002); *Belgium*, *supra* note 194 (providing that a physician must discuss patient requests with members of a nursing team who has regular contact with the patient); *The Belgium Euthanasia Law, supra* note 213 (providing regulations that physicians must follow to comply with euthanasia law in Belgium).

215. *See Belgium, supra* note 194 (providing that a physician must discuss request of patient with relatives or other people indicated by the patient upon the patient's demand); *Belgium Approves Euthanasia Bill*, *supra* note 198 (discussing use of a party designated by the patient to make a written request for euthanasia on the patient's behalf); *The Belgium Euthanasia Law, supra* note 213 (summarizing regulations in Belgian euthanasia, including the provision for the use of proxies at the request of the patient).

216. *See Belgium Legalizes Euthanasia*, *supra* note 198 (summarizing Belgian euthanasia legislation); *Belgium*, *supra* note 194 (translating Belgian euthanasia law originally found in Dutch or French on Web site of the Belgian Senate). *See generally* Cohen-Almagor, *supra* note 178, at 35 (providing a comparative analysis including the pros and cons of Dutch euthanasia policies).

217. *See Lawmakers Define Limits of Euthanasia Bill* (providing an update on draft of Article Three of the euthanasia bill in Belgium which discusses the circumstances in which patients with illnesses such as cancer have the right to request euthanasia), *at* http://www.rights.org/deathnet/News/Wnews_0101.shtml (last visited on Oct. 2, 2002); *Belgium, supra* note 194 (translating Belgian euthanasia law originally found in Dutch and French on Web site of the Belgian Senate); *The Belgium Euthanasia Law, supra* note 213 (summarizing procedure allowing patients not in terminal stages of their illnesses to request euthanasia).

the physician, and the first consultant.[218] Each euthanasia case is to be registered at a special national commission that is charged with ensuring that doctors follow the rules.[219]

For its part, English criminal law does not recognize active euthanasia as a defense in a murder charge.[220] Lord Devlin directed the jury in *R. v. Adams*[221] that no doctor, nor any man, no more in the case of the dying than of the healthy, has the right to deliberately cut the thread of life.[222] This argument was restated in *R. v. Cox*.[223] At the same time, it is established that passive euthanasia may be allowed in certain circumstances.[224] Precedents prescribe withholding medical care if such a course of action represents good medical practice,[225] and if it is done "in the best interests of the patient."[226] This reasoning, which accentuates the best interests of

218. *See Belgium, supra* note 194 (providing the rules that physicians must follow in order to avoid criminal penalties under the Belgian euthanasia law); *The Belgium Euthanasia Law, supra* note 213 (summarizing procedure allowing patients not in terminal stages of their illnesses to request euthanasia); Weber, *supra* note 198 (acknowledging a series of independent physician consultations required by Belgian euthanasia bill).

219. *See* Chapter II (Conditions and procedure), art. 3, §§ 2, 3 of law proposal no. 2-244/23, *available at* http://www.senat.be (Web site of the Belgian Senate) (last visited Oct. 25, 2002); *Belgium Legalizes Euthanasia*, *supra* note 198 (summarizing Belgian euthanasia legislation); *Belgium, supra* note 194 (providing the rules that physicians must follow in order to avoid criminal penalties under the Belgian euthanasia law).

220. *See* Regina (Pretty) v. Director of Public Prosecutions, [2001] UKHL 61 (House of Lords 2001) (discussing treatment of euthanasia in English criminal law); *see also* Anne Morris, *Easing The Passing: End Of Life Decisions And The Medical Treatment (Prevention Of Euthanasia) Bill*, 300 MED. LAW REV. 2000.8; *Voluntary Euthanasia Society: The Law—Factsheet* (summarizing English law on euthanasia), *at* http://www.ves.org.uk/DpLaw_LawFS.html.

221. R. v. Adams, CRIM. LAW REV., at 365–77 (1957).

222. *Id.* at 365–77 (1957); R.A. Roberts, *The Ending of Life: An Evaluation of Some Legal and Social Issues in the Treatment of Incompetent Patients*, *at* http://www.wlv.ac.uk/sls/resources/articles/roberts.html; *see also* Alexander McCall Smith, *Euthanasia: The Strengths Of The Middle Ground*, 194 MED. LAW REV. 1999.7 (summarizing status of euthanasia law in the United Kingdom).

223. R. v. Adams, CRIMINAL LAW REV., at 365–77 (1957); R. v. Cox, 12 BMLR 38 (Crown Court at Winchester 1992) (finding a British doctor guilty of attempted murder for the administration of a lethal dose of potassium chloride to a dying patient); *GMC Tempers Justice with Mercy in Cox Case*, 305 BRIT. MED. J. 1311.

224. *See* Airedale N.H.S. Trust v. Bland, [1993] App. Cas. 789, 789–90 (H.L. 1993) (granting permission to doctors to withhold life-sustaining treatment and other beneficial medical measures from a patient who had been in a persistent vegetative state for over three years with no hope of recovery and existing in the persistent vegetative state was of no benefit to the patient); Frenchay Healthcare N.H.S. Trust v. S, 1994 P. 118, 118 (Eng. C.A.) (concluding that it was not necessary to review doctor's decision to refrain from reinserting a gastrostomy tube in a persistent vegetative state patient with no hope of recovery when the best interests of the patient were considered and the doctor's conclusions were not disputed by medical opinion); *In re J. (A Minor) (Wardship: Med. Treatment)*, [1991] Fam. 33, 34 (C.A.) (holding that doctors did not have to administer life-saving treatment to a severely brain-damaged infant if the infant experienced convulsions which required resuscitation).

225. *See* F. v. W. Berkshire Health Auth., [1990] 2 App. Cas. 1 (H.L. 1989) (applying *Bolam,* the court affirmed that doctors must act in the best interests of a mentally incompetent patient and "must act in accordance with a responsible and competent body of relevant professional opinion"); Bolam v. Friern Hosp. Mgmt. Comm., [1957] 1 W.L.R. 582 (Q.B. 1957) (holding that withholding relaxant drugs from a patient undergoing electroconvulsive therapy was not negligent as long as the doctor had acted according to a well-established school of medical thought); *see also* Kathy Doyle & Alex Carroll, *The Slippery Slope*, 146 NEW L.J. 759 (1996) (explaining that the *F. v. W. Berkshire* decision "as to whether such treatment was in the best interests of the patient depended upon the *Bolam* test").

226. *See Berkshire Health Auth.*, 2 App. Cas. at 1 (holding that doctors must act in the best interests of a mentally incompetent patient and "must act in accordance with a responsible and competent body of relevant professional opinion"); *Bolam*, 1 W.L.R. at 582 (finding that a doctor will not be held negligent for not giving relaxant drugs to a patient undergoing electroconvilsive therapy as long as the doctor had acted according to a well established school of medical thought); *see also* Carroll, *supra* note 225, at 759 (explaining that the *F. v. W. Berkshire* decision relied on the *Bolam* test in determining what was in the best interests of the patient).

the patient, has been reiterated in several court decisions and has become a cornerstone in English law.[227] When determining these interests, the court balances the benefit of continued treatment against the pain and suffering of the patient concerned.[228] In *In re J.*,[229] Lord Donaldson of the Court of Appeal delivered an opinion against resuscitating a severely brain-damaged child because the pain and suffering likely to be experienced exceeded any benefit accruing from prolonging his life.[230] Lord Donaldson argued that there are cases "in which the answer must be that it is not in the interests of the child to subject it to treatment which will cause increased suffering and produce no commensurate benefit, giving the fullest possible weight to the child's, and mankind's, desire to survive."[231]

All requests for withdrawal of tube feeding in England must go through the courts.[232] In the *Airedale NHS Trust v. Bland*[233] case involving a football fan who was severely injured in the

227. *See Frenchay Healthcare,* 1994 P. at 118 (finding that the best interests of the patient must be taken into account when determining whether to refrain from reinserting a feeding tube); Airedale N.H.S. Trust v. Bland, [1993] App. Cas. 789, 867–68 (H.L. 1993) (discussing at length the patient's best interests when considering whether to withhold life-sustaining treatment); *see also* John Hodgson, *Rights of the Terminally Ill Patient*, 5 ANNALS HEALTH L. 169, 177–78 (noting that "[t]he English approach . . . is indeed the outwardly objective best interests test").

228. *See* Airedale N.H.S. Trust v. Bland, [1993] App. Cas. 789, 870 (H.L. 1993) (Lord Goff discussed that the patient's pain and suffering and the doctor's skills are major considerations in determining to withhold treatment from a PVS patient); *In re J. (A Minor)* (Wardship: Med. Treatment), [1991] Fam. 33, 55 (C.A.) (Lord Taylor noted that he considered the correct approach in deciding to withhold life-sustaining treatment of an infant to be for "the court to judge the quality of life the child would have to endure if given the treatment and decide whether in all the circumstances such a life would be so afflicted as to be intolerable to that child"); *see also* Moira M. McQueen & James L. Walsh, *The House of Lords and the Discontinuation of Artificial Nutrition and Hydration: An Ethical Analysis of the Tony Bland Case*, 35 CATH. LAW. 363, 374–75 (1994) (explaining that English case law has held that doctors, in the best interests of their patients, are under no obligation to continue treatment of a patient when treatment of that patient is futile).

229. *In re J. (A Minor) (Wardship: Med. Treatment)*, [1991] Fam. 33 (C.A.) (holding that life-sustaining treatment may be withheld from a child if the withholding is in the best interests of the child).

230. *See In re J.* [1991] Fam. at 46 (C.A.) (Lord Donaldson stated: "There is without doubt a very strong presumption in favour of a course of action which will prolong life, but, even excepting the "cabbage" case to which special considerations may well apply, it is not irrebuttable . . . [A]ccount has to be taken of the pain and suffering and quality of life which the child will experience if life is prolonged. Account has also to be taken of the pain and suffering involved in the proposed treatment itself."); *see also* Anthony Jackson, *Wrongful Life and Wrongful Birth: The English Conception*, 17 J. L. MED. 349, 356 (1996) (explaining that in Lord Donaldson's opinion that it was in the best interests of the child not to administer life-saving measures when his breathing fails again, Lord Donaldson "illustrat[ed] the capability of the courts to weigh life against non-life"); Sabine Michalowski, *Is it in the Best Interests of a Child to Have a Life-Saving Liver Transplantation?*, 9.2 CHILD & FAM. L. Q. 179 (1997) (discussing the criteria Lord Donaldson considered in determining the best interests of the infant patient in reaching his conclusion).

231. *See In re J.* [1991] Fam. at 47 (C.A.) (explaining how the best interests of a child are weighed against life-sustaining medical treatment).

232. *See Practice Note (Official Solicitor Vegetative State)*, 146 NEW L.J. 1585 (1996) (presenting the practice and procedure for procuring the required sanction from the High Court to terminate artificial feeding and hydration of vegetative state patients); *see also* Stephen Irwin QC & Jonathan Glasson, *Declaration of Life and Death*, 147 NEW L.J. 1389 (1997) (explaining that applications for withdrawal of life-sustaining treatment should be made to the court and many cases are heard on short notice); *Vegetative State Patients*, 146 NEW L.J. 1579 (1996) (stating that "in virtually all cases, it will be necessary to seek the prior sanction of a High Court judge before withdrawing feeding and hydration from a patient in a vegetative state").

233. *See* Airedale N.H.S. Trust v. Bland, [1993] App. Cas. 789 (H.L. 1993) (holding that withholding treatment from a patient in a persistent vegetative state was not illegal when medical opinion held that existing in such a state was of no benefit to the patient).

Hillsborough stadium disaster of April 1989,[234] both the Court of Appeal and the House of Lords upheld a declaratory judgment by the Family Division of the High Court that withdrawing artificial nutrition and hydration from a patient in a severe, persistent vegetative state (PVS)[235] did not constitute an unlawful act.[236] The court held that artificial feeding and the administration of antibiotic drugs could lawfully be withheld from an insensate patient who had no hope of recovery when it was believed that the result would be that the patient would die shortly thereafter.[237] It was also emphasized that by virtue of his condition, a PVS patient would not suffer as a result of being deprived of food and hydration,[238] and that the major consideration in determining the best interests of the patient are medical: the opinion of the physicians decides the course of the treatment.[239] The court explained that relevant considerations for deciding the best interests of PVS patients include the avoidance of invasive and undignified procedures, which would have an adverse effect upon the way such patients would be remembered by their loved ones.[240] Lord Goff saw no reason to maintain medical treatment simply to prolong a patient's life when such treatment had no therapeutic purpose of any kind, "as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition."[241] Lord Mustill argued that Anthony Bland had no best interests

234. *See* Steve Lohr, *93 Are Dead After a Crush at Soccer Game in England*, N.Y. TIMES, Apr. 16, 1989, at 12 (relating how ninety-three people were crushed and suffocated to death and 180 injured when unticketed soccer fans rushed into the Hillsborough stadium in Sheffield, England); *see also* Craig Seton, *How Disaster Struck When Luck Finally Ran Out Hillsborough Football Disaster Inquiry*, TIMES (London), July 15, 1989 (reporting that 95 people ultimately died resulting from injuries at the Hillsborough stadium).

235. *See* Raphael Cohen-Almagor, *Language and Reality at the End of Life*, 28 J.L. MED. & ETHICS 267-78 (Fall 2000).

236. *See* Airedale N.H.S. Trust v. Bland, [1993] App. Cas. 789, 866 (H.L. 1993) (Lord Goff noted that withholding treatment from a PVS patient was not an omission and thus unlawful unless the doctor did not act according to good medical practice); *see also* Hodgson, *supra* note 227, at 177 (explaining that the Family Division, the Court of Appeal and the House of Lords all found that removal of life-sustaining feeding tube treatment from a persistent vegetative state patient was not unlawful); John Keown, *The Legal Revolution: From "Sanctity of Life" to "Quality of Life" and "Autonomy,"* 14 J. CONTEMP. HEALTH L. & POL'Y 253, 254 (indicating that the House of Lords in *Bland* held it was lawful for a doctor to withdraw the feeding tube from a patient who was in a persistent vegetative state).

237. *See Airedale*, [1993] App. Cas. at 870 (Lord Goff noted that Mr. Bland's death would occur one to two weeks after cessation of artificial feeding and hydration); *see also* Norman L. Cantor, *The Permanently Unconscious Patient, Non-Feeding and Euthanasia*, 15 AM. J.L. & MED. 381, 393 (1989) (noting that death may occur days or weeks after life-sustaining treatement is withtheld). *But see* Hazel Biggs, *Euthanasia and Death with Dignity: Still Poised on the Fulcrum of Homicide*, 1996 CRIM. L. REV. 878 (1996) (noting that a PVS patient will die from slow starvation).

238. *See Airedale*, [1993] App. Cas. at 870 (Lord Goff states that Mr. Bland would not feel any effects of starvation if removed from life support because Mr. Bland can feel nothing); *see also* McQueen, *supra* note 228, at 371–72 (describing that the court in *Bland,* in holding that treatment was futile, relied on the fact that Mr. Bland could not experience anything—"he was insensate"). *See generally* Glasson, *supra* note 232, at 1389 (defining persistent vegetative state as "'a clinical condition of unawareness of self and environment.'" (quoting 29 J. OF THE ROYAL C. OF PHYSICIANS, No. 5 (1995)).

239. *See Airedale*, [1993] App. Cas. at 867 (in addition to the patient's best interests, the physician's opinion will decide the course of the treatment); *see also* Hodgson, *supra* note 227, at 178 (noting the holding in the *Bland* case that the doctor decides the best interests of their patient when the patient is incompetent); Julie Stone, *Withholding Life—Sustaining Treatment*, 145 NEW L.J. 354 (1995) (explaining that the *Bland* court determined that the patient's doctor primarily decided what the patient's best interests were).

240. *See Airedale*, [1993] App. Cas. at 869 (Lord Goff noting that account must be take of the stress caused to family members when a PVS patient's life is prolonged by invasive means); *see also* Hodgson, *supra* note 227, at 179 (mentioning the holding in the *Bland* case that the doctor decides the best interests of his patient when the patient is incompetent).

241. *Airedale*, [1993] App. Cas. at 869.

because the loss of all cognitive functions meant that he had "no best interests of any kind."[242] Because the patient had no interest in staying alive, no legal justification existed for any invasive life-supporting treatment.[243]

In October 2000, the courts reiterated the same rationale while citing for the first time to the Human Rights Act of 1998, which incorporates the European Convention on Human Rights into UK law.[244] The courts ruled in the cases of *NHS Trust A v. M*[245] and *NHS Trust B v. H*[246] that it was lawful to withdraw artificial nutrition and hydration from two patients.[247] Four consultants in one case, and five in the other, had diagnosed the condition.[248] The Official Solicitor did not challenged the diagnosis since it fell within the guidelines established by the Royal College of Physicians for the determination of PVS.[249] Therefore, "the continuation of artificially supplying nutrition and hydration to both patients was not in their best interest and could be withdrawn subject to being lawful within the provisions of the European Convention on Human Rights, as incorporated into the domestic law of England and Wales by the Human Rights Act 1998, on 2 October 2000."[250] Article 2 of that Act protects the right to life, but the court held that existing practice in the United Kingdom, of withdrawing artificial nutrition and hydration, was in compliance with the provisions of article 2 and was compatible with the values of democratic societies across the world.[251]

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242. *See id.* at 897.

243. *Airedale*, [1993] App. Cas. at 894; Law Hospital NHS Trust v. Lord Advocate and Others, Court of Session: Inner House (First Division) (22 Mar. 1996), Inner House Cases; Joan Loughrey, *Medical Decision Making and the Human Rights Act 1998*, Proceedings of the 13th World Congress on Medical Law (Helsinki, Aug. 6-10, 2000), vol. II at 687–95.

244. *See* K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ALBERTA L. REV. 708, 732 (2000) (discussing the United Kingdom's progress in modernizing their democratic principles, and the use of the Human Rights Act of 1998 to assist in that goal). *See generally* Alliance and Leicester plc. v. Slyford and another, 150 N.J.L. 1590 (C.A. 2000) (relying on section of the Human Rights Act of 1998 in its holding).

245. *NHS Trust A v. M*, 2 W.L.R. 942 (Fam. Div'l Ct. 2000).

246. *Id.* at 51.

247. *See id.* at 51, stating in pertinent part: "I am entirely satisfied on the facts and on the law that it is in the best interests of Mrs. M and of Mrs. H not to continue the artificial nutrition and hydration and that it is lawful for the Trusts withdraw that artificial nutrition and hydration." *Id.*

248. *See id.* (noting that in both A v. M and B. v. H doctors had diagnosed patients with PVS).

249. *See generally In re D*, 1 F.L.R. 411 (Fam. Div'l Ct. 1997); *B. v. H*, 2 W.L.R. 942, 11 (noting "In April 1996 the Royal College of Physicians defined the vegetative state as: 'A clinical condition of unawareness of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and eye opening which may simulate sleep and waking. This may be a transient stage in the recovery from coma or it may persist until death. The continuing vegetative state: When the vegetative state continues for more than four weeks it becomes increasingly unlikely that the condition is part of a recovery phase from coma and the diagnosis of a continuing vegetative state can be made. The permanent vegetative state: A patient in a continuing vegetative state will enter a permanent vegetative state when the diagnosis of irreversibility can be established with a high degree of clinical certainty. It is a diagnosis which is not absolute but based on probabilities. Nevertheless, it may reasonably be made when a patient has been in a continuing vegetative state following head injury for more than twelve months or following other causes of brain damage for more than six months"). *Id.*

250. *See* Chris Docker, *Press Release from Liberty and The Voluntary Euthanasia Society* (Aug. 17, 2001), *available at* http://www.finalexit.org; *In re D*, 1 F.L.R. 411 (Fam. Div'l Ct. 1997) (quoting the provision); *see also B. v. H*, 2 W.L.R. 942 (Fam. Div'l Ct. 2000) (relying on article 2 of the act in its holding).

251. *See* Docker, *supra* note 250.

In August 2001, the High Court in London granted a woman who suffers from amyotrophic lateral sclerosis (ALS) permission to seek judicial review of the Director of Public Prosecutions' (DPP) refusal to allow her husband of 25 years to end her life.[252] Diane Pretty, 47, was paralyzed from the neck down, had to be fed by tube, and had no decipherable speech, though her intellect was unimpaired.[253] She claimed her quality of life had become so low that she had the right under human rights legislation to choose to end her life.[254] She had exhausted all medical alternatives and had accessed palliative care services.[255] However, knowing the inevitable progression of her disease, and the further distress it would cause her, she had decided that she wanted to die immediately.[256] Mrs. Pretty's plea was supported by the Voluntary Euthanasia Society and the civil rights group Liberty.[257] Liberty asked the DPP, David Calvert-Smith, to guarantee her husband would not be prosecuted for aiding and abetting a suicide under section 2 of the Suicide Act if he tried to help her.[258]

In October 2001, Mrs. Pretty argued in the High Court that the blanket legal ban on assisting a suicide denied her the right to "die with dignity" and breached the European convention on human rights.[259] Her Queen's Counsel, Philip Havers, told the judges that she was close to death and "frightened and distressed" at the suffering and indignity she would have to endure if the disease ran its course.[260] Her condition meant she was physically unable to kill herself, hence she wanted her husband to help her when the time came.[261] Lord Justice Tuckey,

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252. *See* Pretty v. United Kingdom, 2 F.L.R. 45, ¶ 7 (Eur. Ct. H.R. 2002) (stating the facts surrounding Mrs. Pretty's wish to be euthanized); Cooley v. Granholm, 291 F.3d 880 (6th Cir. 2002) (describing the *Pretty* case as "an interesting case holding that a terminally ill, mentally competent woman suffering irremediable pain with motor neuron disease has no constitutional right to assisted suicide under the European Convention for the Protection of Human Rights and Fundamental Freedoms"); Clare Dyer, *Dying Wife Loses 'Suicide Aid' Case*, THE GUARDIAN (Oct. 19, 2001), at A1 (describing the nature and extent of Mrs. Pretty's wish to be euthanized).

253. *See Pretty,* 2 F.L.R. at 45, ¶ 7.

254. *See Pretty,* 2 F.L.R. at 45, ¶ 7 (stating the facts surrounding Mrs. Pretty's wish to be euthanized); Registry of the European Court of Human Rights, *available at* http://www.echr.coe.int (describing the facts of the case as well as the court's rationale in its holding) (last visited Oct. 25, 2002).

255. *See Pretty,* 2 F.L.R. at 45, ¶ 9 (stating the facts surrounding Mrs. Pretty's wish to be euthanized); Dyer, *supra* note 252, at A1 (noting that her disease is degenerative in nature and medical alternatives are moot); s*ee also* Registry of the European Court of Human Rights, *supra* note 254.

256. *See Pretty,* 2 F.L.R. at 45, ¶ 9 (explaining, "she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity"); Dyer, *supra* note 252, at A1 (describing the nature and extent of Mrs. Pretty's wish to be euthanized).

257. *See Pretty,* 2 F.L.R. at 45 ¶ 25–28; *see also* Registry of the European Court of Human Rights, *supra* note 254 (furthering the proposition that people should have the right to die with dignity and arguing that forcing a person to suffer unbearably through the last legs of a terminal illness is a direct violation of article 3 of the Convention); Dyer, *supra* note 252, at A1 (describing the nature and extent of Mrs. Pretty's wish to be euthanized).

258. *See Head to Head: Assisted Suicide, and Court Rules for 'Right to Die' Woman*, BBC NEWS (Aug. 31, 2001), *available at* http://news.bbc.co.uk/hi/english/uk/newsid_1518000/1518583.stm; *see also* Dyer, *supra* note 252.

259. R (on the application of Pretty) v. Dir. of Pub. Prosecutions, 2001 EWHC Admin 788, 63 BMLR 1, at ¶ 35 (Queens Bench Div. Oct. 18, 2001); Guardian Unlimited, *Dying Wife Loses 'Suicide Aid' Case* (Oct. 19, 2001), *at* http://www.guardian.co.uk/uk_news/story/0,3604,576787,00.html; *Diane Pretty: The Fight Continues*, BBC NEWS (Nov. 29, 2001), *at* http://news.bbc.co.uk/2/hi/health/1682321.stm.

260. R (on the application of Pretty), 63 BMLR 1, at ¶ 5; Guardian Unlimited, *supra* note 259, *at* http://www.guardian.co.uk/uk_news/story/0,3604,576787,00.html; *Court Rules for 'Right To Die' Woman*, BBC NEWS (Aug. 31, 2001), *at* http://www.news.bbc.co.uk/2/hi/health/1518636.stm.

261. R (on the application of Pretty), 63 BMLR 1, at ¶ 5; Guardian Unlimited, *supra* note 259, *at* http://www.guardian.co.uk.uk_news/story/ 03,604,576787,00.html; BBC NEWS, *supra* note 259, *at* http://www.news.bbc.co.uk/2/hi/health/1518636.stm.

Lady Justice Hale and Mr. Justice Silber ruled that Parliament had given the DPP no power to rule out a prosecution in advance,[262] and that the prohibition on assisting someone to commit suicide did not contravene the European convention.[263] Lord Justice Tuckey rightly said: "We are being asked to allow a family member to help a loved one die, in circumstances of which we know nothing, in a way of which we know nothing, and with no continuing scrutiny by any outside person."[264] Assisted suicide should not be carried out by family members but rather by qualified physicians.

Mrs. Pretty appealed to the highest court without much success.[265] The unanimous decision by five law lords denied her the right to appeal a decision by the DPP.[266] Lord Bingham said the European Convention on Human Rights, incorporated in the UK Human Rights Act, did not guarantee assisted suicide.[267] Furthermore, he stated that Mrs. Pretty could not establish that her rights had been infringed by the DPP's refusal to waive legal action against her husband.[268] Lord Bingham rejected the argument that the right to life protected the right to

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262. R (on the application of Pretty), 63 BMLR 1, at ¶ 23; Guardian Unlimited, *supra* note 259, *at* http://www.guardian.co.uk/uk_news/story/ 0,3604,576787,00html; Christian Medical Fellowship, *Diane Pretty* (Jan. 2002) (explaining that the High Court rejected Mrs. Pretty's appeal because the Director of Public Prosecutions cannot grant a pardon in advance), *at* http://www.cmf.org.uk/pubs/nucleus/nucjan02/pretty.htm (last visited Oct. 26, 2002).

263. *See* R (on the application of Pretty), 63 BMLR 1, at ¶¶ 64–67 (explaining that section of the Suicide Act making assisted suicide illegal does not conflict with Mrs. Pretty's rights under the Human Rights Act and that she is not being discriminated against in receiving these rights due to her illness); Guardian Unlimited, *supra* note 259, *at* http://www.guardian.co.uk/uk_news/ story/0,30604,576787,00.html; s*ee also* BBC NEWS, *supra* note 259, *at* http://news.bbc.co.uk/2/hi/health/1682321.stm (noting that arguments made concerning the human rights of the European Convention were incompatible with the legislation's purpose of protecting life).

264. *See* Dyer, *supra* note 252, at 1.

265. *See* Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/health/story/0,7890,609123,00.html (stating that five law lords made a unanimous decision denying Mrs. Pretty the right to appeal the decision of the Director of Public Prosecutions); *see also Diane Pretty: The Fight Continues*, *supra* note 259 (noting that five law lords unanimously dismissed Mrs. Pretty's appeal). *See generally* Regina (Pretty) v. Dir. Of Pub. Prosecutions (Secretary of State for the Home Dept. intervening), 2001 UKHL 61, 2002 1 AC 800 (House of Lords Nov. 29, 2001) (stating individual opinions of the law lords each in favor of dismissal).

266. *See Regina (Pretty)*, 2001 UKHL 61, at ¶¶ 39–40 (stating each law lord's decision not to grant Mrs. Pretty the right to appeal); Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/health/story/ 0,7890,609123,00.html; Christian Medical Fellowship, *supra* note 262, *at* http://www.cmf.org.uk/pubs/ nucleus/nucjan02/pretty.htm (explaining that the House of Lords upheld the previous decision of the High Court, denying Mrs. Pretty's appeal).

267. *See Regina (Pretty)*, 2001 UKHL 61, at ¶ 5 (stating that purpose of the act is to protect the right to life and therefore cannot be interpreted as giving someone the right to ask for the help of another in bringing about their own death); Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/health/story/0,7890,609123,00.html; *Diane Pretty: The Fight Continues*, *supra* note 259, *at* http://news.bbc.co.uk/2/hi/health/1682723.stm (explaining that assisted suicide is against the law).

268. *See Regina (Pretty)*, 2001 UKHL 61, at ¶ 15 (asserting that the United Kingdom could not assure that a person solicited to help another in committing suicide would not be subject to prosecution); Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/health/ story/0,7890,609123,00.html; *UK Woman Loses Right-to-Die Case* (Nov. 29, 2001) (stating that the law lords ruled that the Human Rights Act does not affect the decision of the Director of Public Prosecutions not to guarantee Mr. Pretty will be free from prosecution), *at* http:// www.cnn.com/2001/ WORLD/europe/11/29/pretty.court/?related.

self-determination over life and death.[269] On the right of freedom of thought, Lord Bingham said that Mrs. Pretty might have a sincere belief in the virtue of assisted suicide and was free to express that view.[270] Regardless, it could not mean there was a requirement that her husband should be absolved from the consequences of conduct which was against the law.[271]

Immediately after the hearing Mrs. Pretty said: "I want to go on. I feel I have no rights. The law lords don't want to admit that the law is wrong."[272] The Prettys vowed to fight on in the European Court of Human Rights in Strasbourg.[273]

The French Penal Code distinguishes between "active" and "passive" euthanasia.[274] The former involves direct intervention to cause the death of a patient;[275] the latter refers to the forgoing of life-sustaining treatment for terminally ill people.[276] Active euthanasia is regarded as murder while passive euthanasia is considered an offense against a French law,[277] which makes

269. *See* Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk.html; *Regina* (Pretty), 2001 UKHL 61, at ¶ 5 (explaining that if the act conferred a right to self-determination over death, any terminally ill person who could not bring about their own death would have the right to be killed by a third party and the state would not be able to interfere); *British Woman Declined Right to Assisted Suicide*, REUTERS, (Nov. 28, 2001) (stating that the judges of the House of Lords upheld the decision that human rights were meant to protect the right to live and not a right to die), *at* http://www.prolifeinfo.org/euth016.html (last visited Oct. 26, 2002).

270. *Regina (Pretty)*, 2001 UKHL 61, at ¶ 31; Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/ health/ story/0,7890,609123,00.html.

271. *Regina (Pretty)*, 2001 UKHL 61, at ¶ 31; Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/ health/ story/0,7890,609123,00.html. *See generally* Manzione, *supra* note 68, *at* 473 (noting that the House of Lords ruled a man who wished to assist his wife's suicide could not be given a guarantee that he would not be prosecuted).

272. *See Diane Pretty: The Fight Continues*, *supra* note 259, *at* http://news.bbc.co.uk/2/hi/health/1682723.stm (stating that Mrs. Pretty was angry after the ruling and told her husband that she felt as if she had no rights); *Ethics: UK Woman's Suicide Help Appeal Rejected*, MEDSERV MEDICAL NEWS, (Nov. 29, 2001) (noting that after the ruling Mrs. Pretty said that she felt as if she had no rights), *at* http://www.medserv.dk/modules.php?name=News&file; REUTERS, *supra* note 269, *at* http://www.prolifeinfo.org/euth016.html (asserting that Mrs. Pretty wrote that she felt she had no rights on the computer screen attached to her wheelchair).

273. *See* Guardian Unlimited, *supra* note 259, *at* http://society.guardian.co.uk/health/story/ 0,7890,609123,00.html; *Diane Pretty: The Fight Continues*, *supra* note 259, *at* http://news.bbc.co.uk/2/hi/ health/1682321.stm; Manzione, *supra* note 68, at 473.

274. *See generally Arbitation Committee Acquits Doctor*, SAVES (Mar. 1999) (noting the distinction between active and passive euthanasia under French law), *at* http://www.saves.asn.au/resources/newsletter/mar1999afrance.htm; *French Minister Admits to Mercy Killings*, BBC NEWS, (July 24, 2001) (stating an exclusive definition for passive euthanasia), *at* http://www.news.bbc.co.uk/ 2 /hi/world/europe/1455521.stm; Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 373 n.94 (1954) (noting that failure to assist a person in danger is a crime under the French penal code that can be equated with assisting suicide).

275. *See* Brendan A. Thompson, *supra* note 1, at 1039 (discussing active euthanasia as defined in the United Kingdom); Lev, *supra* note 33, at 298 (stating that active euthanasia is "the deliberate killing of the patient"). *See generally* Funk, *supra* note 34, at 151 (elaborating on the distinction between active euthanasia and physician assisted suicide).

276. *See* Lev, *supra* note 33, at 298 (defining passive euthanasia); *see also* Thompson, *supra* note 1, at 1038 (asserting that passive euthanasia is defined as "the shortening of human life by the non-commencement or withdrawal of treatment or life support"). *See generally* Funk, *supra* note 34, at 151 (giving a definition of physician assisted suicide).

277. *See Mercy Killings Around the World: How it Works* (Apr. 2, 2002) (noting the distinction between active and passive euthanasia and the fact that active euthanasia is regarded as murder in France), *available at* http:// www.inq7.net/nat/2002/apr/02/nat_8-1.htm (last visited Oct. 26, 2002). *See generally* Henri Caillavet, *The Right To Die With Dignity Is No Ordinary Right* (Sept. 15, 2002) (giving a general discussion of the right to die and the stance taken by France on the issue), *available at* http://www.perso.club-internet.fr/admd/pdtah.htm; Thompson, *supra* note 1, *at* 1038–39 (discussing the fact that under current English law active euthanasia is murder).

it a crime not to help a person in danger.[278] Recent studies said that almost half the deaths recorded as taking place in intensive care units in France resulted from a decision to stop treatment and could be classed as acts of "passive" euthanasia. Edouard Ferrand and colleagues expressed concern that that there are no guidelines to govern and justify the withholding or withdrawal of life-saving treatments.[279] They explained this by saying that the relationship between patient and physician is limited in France to a traditional paternalism, based on the principle of beneficence.[280] Only 42 peercent of decisions were notified in the medical record,[281] which may reflect the reluctance of physicians to record their decisions in the French legal circumstances.[282]

In 2000, France's National Ethics Committee said that euthanasia may be allowed in certain circumstances.[283] "The Committee underscored that this does not mean euthanasia should be decriminalized."[284] In one report, the committee mentions that there is need for compassion, especially in cases where therapy has failed and the patients ask to be relieved of the unbearable suffering that they are going through.[285] "If there is no other solution, if palliative

278. *See* Edouard Ferrand, Rene Robert, Pierre Ingrand & Francois Lemaire, *Withholding and Withdrawal of Life Support in Intensive-Care Units in France: A Prospective Survey*, 357 THE LANCET 9249 (Jan. 6, 2001) (stating "of 1,175 deaths in ICU, 628 (53%) were preceded by a decision to limit life-supporting therapies"), *available at* http://www.thelancet.com (last visited Oct. 26, 2002). *See generally* Compassionate Healthcare Network, *Assisted Suicide in Zurich* (Sept. 14, 2002) (asserting that only 54 percent of the passive euthanasia cases involved the nursing staff at the intensive care unit in question), *available at* http://www.chninternational.com/belgian_zurich_eu_htm; Thompson, *supra* note 1, at 1038–39 (discussing the historical background of passive euthanasia).

279. *See* Edouard Ferrand et al., *supra* note 278 (emphasizing that the lack of guidelines may influence French physicians). *See generally* Lev, *supra* note 33, at 298 (asserting that even though the criminal aspect of euthanasia is ignored in the Netherlands, vague language by the Dutch court left the boundaries of euthanasia unshaped); French National Ethics Committee, *End of Life, Ending Life, Euthanasia* 3 (Jan. 27, 2000) (discussing the issues with euthanasia by looking at "borderline" cases), *available at* http://www.ccne-ethique.org/english/avis/a_063.htm (last visited Oct. 26, 2002).

280. *See* Edouard Ferrand et al., *supra* note 278 (stating no such guidelines exist in France that limit the relationship between the patient and physician to a paternalism based on beneficence).

281. *See* Edouard Ferrand et al., *supra* note 278 (reporting the percentage of decisions that were recorded in the record); *see also Assisted Suicide in Zurich*, *supra* note 278 (dictating the number of decisions notified in the medical record). *See generally* French National Ethics Committee, *supra* note 279 (generally discussing the problems facing ICU physicians in reporting their decisions for medical record).

282. *See* Edouard Ferrand et al., *supra* note 278 (discussing the procedures used by intensive care unit physicians in recording their decisions); *Assisted Suicide in Zurich*, supra note 278 (noting the number of physicians who took it upon themselves to limit care in the ICU).

283. *See* French National Ethics Committee, *supra* note 279 (giving examples of cases that would be deemed exceptional and requiring special attention); *see also France: Euthanasia may be 'tolerated'*, BBC NEWS (Mar. 3, 2000) (reporting on statements made by France's National Ethics Committee that "euthanasia may be allowed in certain circumstances"), *available at* http://bbc.co.uk/1/hi/world/europe/665372.stm (last visited Oct. 26, 2002); *French Committee Opens the Door to Euthanasia*, CORNELL LIFELINES, (1999-2000 Issue No. 2) (noting that France's National Ethics Committee "opened the door" to euthanasia when there were exceptional circumstances), *available at* http://www.rso.cornell.edu/ccfl/lifelines/spoo-1.pdf.

284. *See Euthanasia may be 'tolerated'*, *supra* note 283 (reporting that the committee did not want euthanasia decriminalized); *see also French Committee Opens the Door to Euthanasia*, *supra* note 283 (discussing the committee's position that euthanasia should remain a crime); French National Ethics Committee, *supra* note 279 (asserting that the committee condemns euthanasia without a request being made or consent being given by a concerned party).

285. *See Euthanasia may be 'tolerated'*, *supra* note 283 (quoting Ethics Committee President Dr. Didier Sicard); *see also* French National Ethics Committee, *supra* note 279 (noting that when hope of alleviation is lost and suffering becomes intolerable a human being "transcends rules" and the only remaining route may be to "face the inevitable in a spirit of solidarity").

care and pain-killers are ineffective, if all treatment or therapy has failed, if there is unanimous agreement that the situation has become intolerable, then one can envisage euthanasia."[286] "It marks a turnaround in the committee's thinking and its first recommendations on euthanasia for nine years."[287] Then, in 1991, a proposal by the European Parliament that euthanasia be carried out in hospitals and care centers was rejected by the committee.[288] One member had estimated that there are about 2,000 clandestine acts of assisted suicide in France each year.[289]

In July 2001, the French Health Minister, Bernard Kouchner, admitted he practiced euthanasia during his career when he served as a doctor in the war zones of Vietnam and Lebanon.[290] Mr. Kouchner, a founding member of the Paris-based medical aid agency, Medecins sans Frontieres (MSF) (Doctors without Frontiers), also acknowledged that passive euthanasia, where doctors suspend treatment of dying patients, occurs frequently in France.[291] However,

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286. *See Euthanasia may be 'tolerated'*, *supra* note 283 (quoting the statement of Dr. Didier Sicard); *see also French Committee Opens the Door to Euthanasia*, *supra* note 283. *See generally* French National Ethics Committee, *supra* note 279 (discussing palliative care and its relation to euthanasia).

287. *See Euthanasia may be 'tolerated'*, *supra* note 283 (stating that the decision denotes a definite change of position on the part of the committee); *French Committee Opens the Door to Euthanasia*, *supra* note 283 (noting that the committee's decision was markedly different from its previous stance); *see also* French National Ethics Committee, *supra* note 279 (expressing the committee's new stance on euthanasia).

288. *See* French National Ethics Committee, *Opinion* (June 24, 1991) (posting an opinion concerning a draft resolution on assistance to the dying adopted on April 25, 1991, by the Committee on the Environment, Public Health and Consumer Protection of the European Parliament and stating that the Committee does not approve of regulations that legitimize euthanasia), *available at* http://www.ccn-ethique.org/english/avis/a_026.htm; *see also Euthanasia may be 'tolerated'*, *supra* note 283 (discussing the rejection of the proposal by the European parliament).

289. *See French Report on Euthanasia*, BBC NEWS (Mar. 3. 2000) (summarizing the National Ethics Committee's recommendations regarding the status of the practice of euthanasia in France), *available at* http://news.bbc.co.uk/1/hi/world/europe/665450.stm; *Euthanasia may be 'tolerated'*, *supra* note 283 (discussing the consultative powers of France's National Ethics Committee and the reality of euthanasia in France); John S. Dearing, *Euthanasia—Home and Abroad* (Jan. 2002) (referring to one National Ethics Committee member's estimation of the number of assisted suicides in France each year), *available at* http://css.peak.org/newsletter/2002/jan02/css_pres.html (last visited Oct. 26, 2002).

290. *See French Minister Admits Mercy Killings*, BBC NEWS (July 24, 2001) (relaying Kouchner's admission to a Dutch magazine that he had practiced euthanasia), *available at* http://www.news.bbc.co.uk/hi/english/europe/newsid_1455000/145521.stm; *see also* Paul Gallagher, REUTERS ENGLISH NEWS SERVICE, *Netherlands: French Health Minister Admits to Mercy Killings* (July 24, 2001) (offering a more detailed account in Kouchner's own words about how he actually helped his patients die), *available at* http://www.worldrtd.org/FrenchHealth1.html; *U.N. Human Rights Panel Wary of Euthanasia Law*, ZENIT NEWS AGENCY (July 29, 2001) (indicating the seemingly inconsistent notion that Kouchner would not push for the legalization of euthanasia despite having practiced it himself), *available at* http://www.zenit.org/english/archive/0107/ZE010729.htm (last visited Oct. 26, 2002).

291. *See French Minister Admits Mercy Killings*, *supra* note 290 (highlighting Kouchner's personal experience with and knowledge of the practice of euthanasia); *see also* Gallagher, *supra* note 290 (providing a glimpse of Kouchner's background). *See generally* The Internet Encyclopedia of Philosophy, *Euthanasia* (2001) (undertaking to provide a comprehensive discussion of euthanasia, including an explanation of what may constitute passive euthanasia), *available at* http://www.utm.edu/research.iep/e/euthanas.htm.

although opinion polls showed wide support for the euthanasia practice in certain cases,[292] Mr. Kouchner said he had no plans to legalize euthanasia. [293]

In Canada, Parliament debated a private member's bill (C-261) to legalize active euthanasia.[294] The bill was not adopted, but legislators became aware that physician-assisted suicide had widespread support in Canada.[295] About three quarters of Canadians (77 percent) believe that doctors should be allowed to end the life of a patient whose life is immediately threatened by a disease that causes the patient great suffering.[296] Canadians are less likely to support physician-assisted suicide if the patient is suffering from a disease that is not immediately life threatening, such as a chronically debilitating illness.[297] Still, 57 percent of Canadians believe that

292. *See* The Voluntary Euthanasia Society, *Fact Sheets: Public Opinion—France*, (citing an IFOP public opinion poll from April 2001 in which 88 percent of those surveyed supported euthanasia in certain circumstances, with 38 precent supporting it under any circumstances), *available at* http://www.ves.org.uk/DpFS_PubOp.html; *French Official Proposes Euthanasia Law*, CATHOLIC WORLD NEWS (Apr. 16, 2001) (indicating the results of a survey that showed that 50 percent of those surveyed would support euthanasia in certain circumstances), *available at* http://www.cwnews.com/Browse/2001/04/15296.htm.

293. *See* CNN World News, *Kouchner Rules Out Mercy Killing Law* (July 25, 2001) (reiterating what Kouchner told a French radio station, specifically that euthanasia legislation was not currently an issue), *available at* http://europe.cnn.com/2001/WORLD/europe/07/25/french.euthanasia/?related; *see also French Minister Admits Mercy Killings*, *supra* note 290 (acknowledging the sensitive nature of the issue and noting that Kouchner did not intend to introduce laws allowing the practice of euthanasia); Gallagher, *supra* note 290 (reporting that Kouchner had no plans to legalize euthanasia in France).

294. *See* H.C. OF CAN. C-261, 37th Parliament (2001) (pronouncing the bill as proposed by Mr. Thompson and including a summary and the full text). *See generally* Marilynne Seguin, *A Gentle Death* (1996) (discussing the bill as previously introduced by a member of Parliament), *available at* http://www.dyingwithdignity.ca/canlaw.html (updated Sept. 19, 2000); B.A. Robinson, *Physician Assisted Suicide Outside the U.S.* (last updated Nov. 29, 2000) (reviewing similar bills that have been introduced, but not enacted by Parliament and anticipating the introduction of the current bill), *available at* http://www.religioustolerance.org/euth_wld.htm (last visited Oct. 26, 2002).

295. *See* James V. Lavery et al., *Bioethics For Clinicians: Euthanasia and Assisted Suicide*, 156 CAN. MED. ASS'N J. 1405, 1407 (1997) (pointing out that more than 75 percent of Canadians support euthanasia and assisted suicide in certain instances and conceding that 78 percent of Canadians oppose the practice of euthanasia when the patient is afflicted with a reversible disease); *see also* Angus Reid Group, Inc., *Canadians' Views on Euthanasia* (Nov. 6, 1997) (highlighting a survey that showed that 76 percent supported the "right to die" for those suffering from a terminal illness), *available at* http://www.web.apc.org/dwd/angus.html (last visited Oct. 26, 2002).

296. *See* Lavery, *supra* note 295 (noting that more than 75 percent of Canadians generally support euthanasia and assisted suicide when the patient's recovery is not likely); *see also* Angus Reid Group, *supra* note 295 (supporting earlier findings that three-quarters of Canadians support euthanasia for the terminally ill); Focus on the Family (Canada) Association, *What Do Canadians Really Think of Euthanasia?* (July 6, 2001) (referring to a Leger Marketing poll that reported that 75.5 percent of Canadians do not think those assisting terminally ill loved ones to commit suicide should be prosecuted), *available at* http://www.fotf.ca/familyfacts/tfn/2001/070601.html (last visited Oct. 26, 2002); Angus Reid Group, *supra* note 295 (supporting earlier findings that three-quarters of Canadians support euthanasia for the terminally ill).

297. *See* Gallup Canada, Inc., *Canadians Voice Their Opinions on Doctor-Assisted Suicide* (1995) (observing that the difference in support for assisted suicide correlates with whether the patient has an immediately life-threatening illness), *available at* http://www.dyingwithdignity.ca/gallup.html; *see also* Lavery, *supra* note 295 (recognizing that support for euthanasia shifts to opposition when the patient is not suffering from an immediately life-threatening illness); *Euthanasia Prevention Coalition Responds to Leger Marketing Poll*, CANADA NEWS WIRE, (July 3, 2001) (suggesting that Canadians' support for euthanasia is a result of the lack of adequate pain management and palliative care and that such support would diminish if better pain management and social services were available), *available at* http://www.newswire.ca/releases/July2001/03/c9446.html.

doctors should be allowed, by law, to end the life of a patient who suffers from a disease that does not immediately threaten his or her life.[298] This figure has not changed since 1995.[299]

Two of the Canadian court cases should be mentioned. One concerns Nancy B., a 25-year-old woman who had had generalized polyneuropathy for two and a half years as a result of Guillain-Barré syndrome. She initiated a legal action for an injunction permitting her physicians to withdraw the respirator.[300] The Quebec Superior Court granted the injunction, her respirator was withdrawn and Nancy died.[301] In Justice Dufour's opinion, Nancy B.'s refusal of treatment was not an attempt to commit suicide but rather an attempt merely to allow a disease to take its natural course.[302]

The best known death-with-dignity case in Canada concerns Sue Rodriguez, who was dying from ALS,[303] which causes progressive paralysis of the muscles (muscles of the face, the tongue, the throat, the respiratory system, the shoulders, hands and legs).[304] In its final stages

298. *See* Gallup Canada, *supra* note 297 (differentiating between support for immediately life threatening and non-immediately life-threatening cases of euthanasia); *see also* Lavery, *supra* note 295 (stating that only about 22 percent of Canadians support voluntary euthanasia and assisted suicide when it is possible for the patient to recover); Euthanasia Prevention Coalition, *Canada vs. Euthanasia: A Brief to Members of Parliament* (1998) (noting that there is not a clear consensus in favor of the legalization of euthanasia and that there is a majority that think that those contemplating suicide should not be helped to die by assisted suicide), *available at* http://www.epc.bc.ca/briefto.htm1#6 (last visited Oct. 26, 2002).

299. *See* Gallup Canada, *supra* note 297 (referring to the stability of the statistic regarding support for assisted suicide in cases where the patient has an immediately life-threatening disease).

300. *See* Nancy B. v. Hotel-Dieu de Quebec, 86 D.L.R. (4th) 385 (Que. Sup. Ct. 1992) (holding that Nancy B. was entitled to the injunction and the assistance of the hospital because the respirator is a form of treatment and the patient is entitled to refuse such treatment); *see also* Bernard M. Dickens, *Medically Assisted Death: Nancy B. v. Hotel-Dieu de Quebec*, 38 MCGILL L.J. 1053, 1055 (1993) (commenting on Nancy B.'s legal fight to secure permission for her doctor to disconnect her respirator and allow her to die); John F. Burns, *Woman's Plea to Die Stirs Debate in Canada*, N.Y. TIMES, Dec. 1, 1991, § 1, at 11 (providing context for the rousing debate in Canada on the legal status of assisted suicide and euthanasia).

301. Nancy B. v. Hotel-Dieu de Quebec, 86 D.L.R. (4th) 385 (Que. Sup. Ct. 1992); Dickens, *supra* note 300, at 1053–70, no. 4.

302. *See Nancy B.*, 86 D.L.R. (4th) at 385 (holding that Nancy B. was entitled to the injunction and the assistance of the hospital because the respirator is a form of treatment and the patient is entitled to refuse such treatment); *see also* Arthur Fish & Peter A. Singer, *Nancy B.: The Criminal Code and Decisions to Forgo Life-sustaining Treatment*, 147 CAN. MED. ASS'N J. 637, 642). *But see* Dickens, *supra* note 300, at 1055 (1993) (stating that the judge did not grant the injunction, but instead merely gave a judgment permitting the disconnection of the respirator).

303. *See* Rodriguez v. British Columbia (Attorney General), 17 C.R.R. (2d) 193 (1993) (holding that the prohibition against assisted suicide does not violate the patient's rights and dismissed her appeal). *See generally* Seguin, *supra* note 294 (giving a brief synopsis of the facts, judgment, and implications of the *Rodriguez* case); *A Brave Debate About Death: Dutch Law on Assisted Suicide Begs Action Here Too*, THE OTTAWA CITIZEN, Dec. 2, 2000, at A18 (offering the *Rodriguez* case as one with which most Canadians are familiar).

304. *See generally* ALS Association, *Understanding ALS* (last visited Sept. 15, 2002) (listing some of the initial symptoms of the disease), *available at* http://www.also.org/als/symtoms.ctm; *see also* Anne D. Walling, *Amyotrophic Lateral Sclerosis: Lou Gehrig's Disease* (Mar. 15, 1999) (presenting a thorough discussion of the disease, its symptoms and treatment), *available at* http://www.aafp.org/afp/990315ap/1489.html (last visited Oct. 26, 2002); National Institute of Neurological Disorders and Stroke, *Amyotrophic Lateral Sclerosis Fact Sheet* (July 1, 2001) (discussing what ALS is generally and what the common symptoms are), *available at* http://www.ninds.nih.gov/health_and_medical/pubs/als.htm (last visited Oct. 26, 2002).

the patient cannot swallow, speak, cough, or use his respiratory muscles.[305] One specialist described this situation as "a living hell."[306] As her condition deteriorated, Ms. Rodriguez publicly expressed a wish to have a physician assist her in ending her life at a time of her choosing, when she herself would be unable to do so, rather than waiting helplessly to die by suffocation or choking.[307] Ms. Rodriguez sought to challenge the Criminal Code of Canada prohibition on assisted suicide, on the grounds that it violated the Charter of Rights and Freedoms.[308] The specific section of the Criminal Code is 241(b): "Everyone who aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years".[309]

On appeal, the decision was rejected in a five (Sopinka, La Forest, Gonthier, Iacobucci and Major) to four (McLachlin, L'Heureaux-Dube, Lamer and Cory) landmark decision.[310] The court did not want to intervene in this delicate public matter, thinking that it is up to the legislature to change the law if such a change was deemed necessary.[311] This writer discussed

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305. *See* Rodriguez v. British Columbia [1993] 3 S.C.R. 519, 531 (Can.) (discussing the symptoms of ALS in regard to plaintiff as consisting of losing her "ability to swallow, speak, walk and move her body without assistance); *see also* L.P. Rowland, *Assisted Suicide and Alternatives in Amyotrophic Lateral Sclerosis*, 339 NEW ENG. J. MED. 14 (Oct. 1, 1998) (giving a general discussion concerning the progressive neuro-muscular disease amyotrophic lateral sclerosis (ALS) and assisted suicide), *available at* http://www.nejm.org; The ALS Reporter, *What is ALS (Lou Gehrig's Disease)?* (2002) (describing the symptoms of amyotrophic lateral sclerosis), *available at* http://www.tapacom.net/alsreporter/whatis.html (last visited Sept. 9, 2002).

306. *See* (T.A.) 1141/90, Benjamin Eyal v. Dr. Nachman Willensky and Others, 51(3) P.M. 187, 192 (considering the case of Benjamin Eyal, who suffered from amyotrophic lateral sclerosis and wished to be detached from a respiratory machine).

307. *See Rodriguez*, [1993] 3 S.C.R. at 531 (discussing plaintiff's application for an order declaring a section of the Criminal Code denying her right to physician assisted suicide invalid). *See generally Sue Rodriguez and the Right to Die*, CBC NEWSWORLD (1993) (providing details of the *Rodriguez* case and information from and interview with Sue Rodriguez), *available at* http://www.newsworld.cbc.ca/flashback/1993/sue2.html (last visited Sept. 9, 2002); Dick Sobsey, *An Illusion of Autonomy: Questioning Physician-Assisted Suicide and Euthanasia* (Sept. 30, 1994) (exploring the doctrine of euthanasia in Canada and discussing the facts of the *Rodriguez* case via a brief submitted to The Special Senate Committee on Euthanasia and Assisted Suicide in Winnipeg, Manitoba), *available at* http://www.normemma.com/arsenate.htm.

308. *See Rodriguez*, [1993] 3 S.C.R. at 531 (stating that Ms. Rodriguez applied to the Supreme Court of British Columbia for an order to declare the provision of the Criminal Code in violation of the Canadian Charter of Rights and Freedoms); *see also* Beverly Mclachlin, *Charter Myths*, 33 U.B.C. L. REV 23, 32 (1999) (discussing Sue Rodriguez's petition to the Supreme Court to rule that provisions of the Criminal Code violated her rights under the Charter). *See generally* R. v. Kipling [2002] 53 W.C.B.2d 37, 47 (Can.) (considering the *Rodriguez* decision in its analysis).

309. Criminal Code, R.S.C., 1985, ch. C-46, § 241(b).

310. *See Rodriguez*, [1993] 3 S.C.R. at 520 (listing the way the Justices held); Wakeford v. Canada, 81 C.R.R.2d 342, 349 (2001) (Can.) (discussing the holding of *Rodriguez* in considering the case at hand by stating that the court in *Rodriguez* upheld the validity of the Criminal Code provision in a 5-4 decision); *see also* Joseph M. Boyle, Ph.D., Bernard M. Dickens, Ph.D., James A. Lavery, M.Sc. & Peter A Singer, M.D., M.P.H., *Bioethics for Clinicians: Euthanasia and Assisted Suicide*, C.M.A.J. (1997) (considering the *Rodriguez* case while discussing euthanasia) *available at* http://www.cma.ca/cmaj/series/bio-palm/bioethics11.htm#what (last visited Sept. 10, 2002).

311. *See* Lorraine Eisenstat Weinrib, *The Body and the Body Politic: Assisted Suicide under the Canadian Charter of Rights and Freedoms*, 39 Mcgill L.J. 618, 619-44 (1994) (examining assisted suicide in Canada); Jerome E. Bickenbach, *Disability and Life-Ending Decisions*, PHYSICIAN ASSISTED SUICIDE (Margaret P. Battin et al. eds., 1998). *See generally* Canada's Parliament, The Special Senate Committee on Euthanasia and Assisted Suicide, *Of Life and Death: Final Report* (June 1995) (considering the Rodriguez decision and the opinions of the Supreme Court Justices), available at http://www.parl.gc.ca (last visited Sept. 16, 2002).

the case with three of the justices in the Canadian Supreme Court. One of them said that this was the toughest decision she/he had ever made in her/his life, and that the court might overturn the decision if the legislature failed to address the issue adequately and another case came up.[312]

IV. Conclusion

Patients in a devastating situation who wish to cease living, if helped by a physician, are helped to relieve their suffering. The motivation is to assist one's fellow by providing relief from enduring suffering. The decision to perform physician-assisted suicide is first and foremost a *moral* decision. The physician who provides the assistance is convinced that this act is justified not only medically but also morally, otherwise he or she would not have agreed to assist the patient in the first place.

This essay surveys the attempts that have been made around the democratic world to facilitate "death with dignity." In the United States, ten states during the past five years have passed bills making euthanasia or PAS illegal, and bills are pending in five more.[313] Oregon's Measure 16 that allows assisted suicide is facing a challenge.[314] In Australia, the Northern Territory Act that allowed terminally ill patients to commit suicide with a doctor's help was declared void.[315] The legislatures of England and Canada resist attempts to legalize assisted suicide and euthanasia.[316] Switzerland condones the practice of assisted suicide but not of euthanasia.[317] The Neth-

312. *See* Barney Sneiderman, *The Case of Robert Latimer: A Commentary on Crime and Punishment*, 37 ALBERTA L. REV. 1017 (1999) (discussing the case of Robert Lattimer, who was convicted of second-degree murder for the mercy killing of his severely disabled daughter); *see also* Barney Sneiderman, *Latimer in the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing*, 64 SASK L. REV. 511 (2001) (expressing the need to critique euthanasia policies).

313. *See* Ezekiel J. Emanuel, *Euthanasia: Where the Netherlands Leads Will the World Follow?*, 322 BRIT. MED. J. 1376, 1376–77 (2001); *Maine Voters Face Decision on Doctor-Assisted Suicide: The Controversy Over Physician-Assisted Suicide Comes Home to Maine Physicians As Both Sides Turn Up the Volume of Debate in Preparation for a November Referendum*, AM. MED. NEWS (May 22/29, 2000) (providing chart for where states stand with respect to euthanasia laws), *available at* http://www.ama-assn.org/sci-pubs/amnews/pick_00/prsb0522.htm (last visited Sept. 11, 2002); N.Y. PUB. HEALTH LAW § 2989 (illustrating an example of a state law that prohibits euthanasia and assisted suicide).

314. *See* Or. Rev. Stat. § 127.805 (codifying the legalization of physician-assisted suicide when suffering from a terminal disease); Lee v. Oregon, 107 F.3d 1382, 1386 (9th Cir. 1997) (considering the validity of Oregon's Death With Dignity Act); *see also* Sam Howe Verhovek, *U.S. Acts to Stop Assisted Suicides*, N.Y. TIMES, Nov. 7, 2001 (discussing Attorney General John Ashcroft's measures against physician-assisted suicide).

315. *See* The Voluntary Euthanasia Society, *Federal Opposition to the Law: The Andrews Bill* (last visited Sept. 11, 2002) (discussing the "Euthanasia Laws Bill" that was drafted to take away the powers of the legislative assemblies of the Northern Territory in making laws permitting euthanasia), *available at* http://www.ves.org.uk/DpFS_Aust.html; Pratt, *supra* note 47, at 172 (stating that euthanasia or physician-assisted suicide was legal in the Northern Territory of Australia from July 1, 1996, to Mar. 24, 1997); *see also* ACT Right to Life Association, *Andrews Bill Passes in Senate* (March-May 1997) (providing news that the Euthanasia Laws Bill 1996 was passed, thereby repealing the Rights of the Terminally Ill Act 1995), *available at* http://www.actrtla.org.au/newslett/aut97.htm (last visited Sept. 11, 2002).

316. *See* Pretty v. United Kingdom, 2 F.L.R. 45 (Eng. 2002) (denying plaintiff the right to have her husband assist her to die when suffering from a degenerative disease); Rodriguez v. British Columbia [1993] 3 S.C.R. 519, 531 (Can.) (upholding decision to disallow plaintiff right to assisted suicide). *But see* Wakeford v. Canada, 81 C.R.R.2d 342 (2001) (holding that a man can no longer use marijuana to control his suffering from AIDS).

317. *See* Pretty v. United Kingdom, 2 F.L.R. 45 (Eng. 2002) (mentioning that Switzerland has abolished the offense of assisted suicide); *Switzerland*, (last visited Sept. 11, 2002) (providing detailed information on the current status of euthanasia in Switzerland) *available at* http://www.ves.org.uk/DpFS-Wrld.html; *see also* Widmer v. Switzerland, No. 20527/92 (Switzerland 1993) (holding that passive euthanasia is no longer a distinction).

erlands and Belgium are the only countries in the liberal world that accept the policy and practice of both euthanasia and physician-assisted suicide, without seeing much difference between the two.[318] The legalization process of euthanasia in the Netherlands and Belgium during the year of 2001 may give fresh impetus to campaigns for legal mercy killing elsewhere in Europe—especially in Britain and France, where significant movements are pressing for it.[319]

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318. *See* Jurriaan De Haan, *The New Dutch Law on Euthanasia*, 57 MED. L. REV. 2002.10 (discussing the legality of euthanasia in the Netherlands); *see also* Herman Nys, *Physician Involvement in a Patient's Death: A Continental European Perspective*, 208 MED. L. REV. 1999.7 (describing Belgium's adoption of a definition of euthanasia similar to that of the Dutch).

319. *See Dutch Legalize Euthanasia*, CNN WORLDNEWS (Nov. 28, 2000) (reporting that the Dutch parliament passed legislation allowing mercy killings), *available at* http://europe.cnn.com/2000/WORLD/europe/11/28/holland.euthanasia/.

Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations

By Susan H. Shin*

Comparing the WTO's Dispute Settlement Procedures with the Inter-American System

I. Introduction

The World Trade Organization (WTO) stands at the intersection of public and private international law.[1] While the WTO originates from treaty law,[2] its members directly affect the individual components of private international law.[3] Interests ranging from the trade of textiles

1. *See* John D. Blum, *Role of Law in Global E-Health: A Tool for Development and Equity in a Digitally Divided World*, 46 ST. LOUIS L.J. 85, 86 (2002) (stating that traditionally the WTO is a public law entity, but recently it has increasingly been turning to private bodies for assistance); *see also* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach,* 94 AM. J. INT'L L. 335, 340 (2000) (explaining that the WTO is traditionally thought of as within the sphere of private law, but that the time has come to view the WTO as a multilateral construct providing legal rules to public goods); Antonio F. Perez, *International Recognition of Judgments: The Debate Between Private and Public Law Solutions,* 19 BERKELEY J. INT'L L. 44, 50 (2001) (stating that "the WTO serves the purpose of mediating between the state-centric, private law conception . . . and the public law conception . . . ").

2. *See* Annie Petsonk, *Integrating Environmental Market Commodities into the World Trading Order: The Kyoto Protocol and the WTO: Integrating Greenhouse Gas Emissions Allowance Trading into the Global Marketplace*, 10 DUKE ENV. L. & POL'Y F. 185, 206 (1999) (including the WTO among international treaty law and internal group-wide treaties); *see also* Don Wallace, Jr., *Competing Competition Laws: Do We Need a Global Standard?: Panel Three: Is Reconciliation Possible?: An International Common Law of Antitrust*, 34 NEW ENG. L. REV. 113, 120 (1999) (stating that WTO law is treaty law); Spencer Weber Waller, *Competing Competition Laws: Do We Need a Global Standard?: Panel Three: Is Reconciliation Possible?: An International Common Law of Antitrust*, 34 NEW ENG. L. REV. 163, 167 (1999) (recognizing that there is substantial treaty law within the WTO).

3. *See* Charles R. McManis, *Taking Trips on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207, 227 (1996) (stating that where earlier conventions merely established a system of private international law, the TRIPS agreement established civil and criminal enforcement standards that are to be adhered to by individual WTO members); *see also* Paulsen K. Vandevert, *The Uruguay Round and the World Trade Organization: A New Era Dawns in The Private Law of International Customs And Trade*, 31 CASE W. RES. J. INT'L L. 107, 123 (1999) (claiming that there has not been much discussion on the impact of the WTO in the arena of private international law but that its impact should increase); Raquel Xalabarder, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 ANN. SURV. INT'L & COMP. L. 79, 93 (2002) (claiming that three professors are working on a draft convention, at an academic level, to deal only with jurisdiction and recognition of judgments in intellectual property matters and that such a convention could be adopted through the WTO).

* **Associate, Kelley Drye & Warren, LLP (Chicago); Georgetown University Law Center, J.D; undergraduate degree from University of Maryland; M.A.L.D. Candidate 2002: Fletcher School of Law & Diplomacy, Tufts University (to be completed summer 2003).** **The author wishes to thank Professors John H. Jackson, William J. Davey and Christopher Parlin for their help with this article.**

and agricultural products to telecommunications services and intellectual property are involved.[4] The multi-jurisdictional nature of trade is directly linked to issues of power and the push-and-pull forces of globalism.[5]

The area of human rights is also multi-jurisdictional in nature.[6] Physical, political and/or social forces influence most forms of private international law, which can result in violations of public international law.[7] Threats to national security from mass migration, and atrocities including ethnic cleansing, biological terrorism and warfare are problems that the WTO may

4. *See* Blum, *supra* note 1, at 90 (stating "the United States has assumed a leading role in persuading the WTO members to include telecommunications . . . in the organization's mandates"); *see also* Donald Buckingham, *World Production Update: Why Agricultural Lawyers Need to Know About International Trade Law*, 4 DRAKE J. AGRIC. L. 5, 35 (1999) (citing statistics reflecting the amount of WTO disputes occurring over agricultural products); Patrick M. Moore, *Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317, 321 (1996) (discussing the WTO Textiles Agreement).

5. *See* Arthur E. Appleton, *Linkage as Phenomenon: An Interdisciplinary Approach: Article: Telecommunications Trade: Reach out and Touch Someone?*, 19 U. PA. J. INT'L ECON. L. 209, 209 (1998) (claiming that trade policy is being utilized by the U.S. and the E.U. to influence the domestic policies of other states as well as social policy issues such as human rights and the environment); *see also* Frank J. Garcia, *Linkage as Phenomenon: An Interdisciplinary Approach: Article: Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT'L ECON. L. 391, 393 (1998) (stating that international economic law is increasing in scope and effect and will become increasingly important); David W. Leebron, *Boundaries of the WTO: Linkages*, 96 AM. J. INT'L L. 5, 6 (2002) (discussing the increasing number of areas that are subject to international coordinated action and how this relates to concerns for the welfare of those in other nations).

6. *See* Michael Byers, *State Immunity and the Violation of Human Rights. By Jurgen Brohmer*, 92 AM. J. INT'L L. 165, 265 (1998) (discussing the use of the Alien Tort Statute to remedy human rights violations committed outside the U.S., and the results of cases brought directly against foreign states in U.S. courts over human rights violations); *see also* Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 183 (2000) (claiming that global society is obliged to combat human rights violations); Mary C. Daly, *Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1240–1246 (1998) (discussing globalization and how the purpose of study-abroad programs should now be to encourage the addition of international human rights laws in countries that either do not have them or do not use them).

7. *See* Herbert N. Ramy, *International Law: Alien Tort Claims Act: Official Torture as a Violation of the Law of Nations Under the Alien Tort Claims Act, In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993), 17 SUFFOLK TRANSNAT'L L. REV. 578, 578 (1994) (discussing *In Re Estate of Ferdinand E. Marcos* human rights litigation and whether torture was a violation of the law of nations); *see also* Davor Sopf, *Temporary Protection in Europe After 1990: The "Right to Remain" of Genuine Convention Refugees*, 6 WASH. U. J.L. & POL'Y 109, 115 (2001) (discussing the mass migrations from the former Yugoslavia caused by Serbian nationalists and that the acts which caused this displacement were deemed crimes against humanity).

confront.[8] Countries invade each other for resources and political control, which are contrary to the forces of globalism promoted by the WTO.[9]

While the WTO codified rules governing the behavior of economic trade relations,[10] the question remains whether such a system can be created in human rights. Although economic trade and human rights each have international repercussions,[11] the formal adjudication of trade disputes differs from the international treatment of human rights disputes in one key respect—the ceding of sovereignty.[12]

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8. *See* Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 464 (2001) (discussing threats to security interests such as a nuclear attack, mass migration and biological weapons); *see also* Susan Martin, Andy Schoenholtz & Deborah Waller Meyers, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 565 (1998) (explaining that quick-impact projects provided resources to communities where there were mass migrations due to warfare); Sopf, *supra* note 7, at 115 (stating that in Croatia, during the terror campaigns run by the Serbs, there was large-scale displacement of the population which forced thousands of people to seek refuge in other countries).

9. *See* Laura Forest, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country's Diamond Resources*, 11 IND. INT'L & COMP. L. REV. 633, 633 (2001) (stating that Sierra Leone was invaded by the Revolutionary United Front (RUF) from Liberia and that the RUF immediately sought control over the country's richest resource—diamonds); *see also* Davis P. Goodman, *Need for Fundamental Change in The Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1592 (1985) (claiming that modern conflicts, such as the U.S. invasion of Grenada, often have as their purpose a change in the territories' social, legal, or political structures); Bernard A. Weintraub, *Environmental Security, Environmental Management, and Environmental Justice*, 12 PACE ENVTL. L. REV. 533, 601–02 (1995) (discussing the Iraq invasion of Iran, the U.S.'s intervention and the role of natural resources (oil) in the conflict).

10. *See* Frederick M. Abbott, *Prevention and Settlement of Economic Disputes Between Japan and the United States: Part III: Dispute Avoidance and Dispute Settlement: Incomplete Rule Systems, System Incompatibilities and Suboptimal Solutions: Changing the Dymamic of Dispute Settlement and Avoidance in Trade Relations Between Japan and the United States*, 16 ARIZ. J. INT'L & COMP. LAW 185, 194–99 (1999) (discussing the relationship between the WTO and the GATT and how the WTO codified the GATT dispute settlement system); C. Todd Piczak, *Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 310 (1999) (stating that "the WTO dispute settlement process was meant to improve upon the GATT procedure by codifying the system of rules and procedures . . . "); David T. Shapiro, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT'L L. & ECON. 97, 105 (1997) (discussing the shortcomings in the GATT dispute resolution system and how it was improved after being codified by the WTO).

11. *See* Padideh Ala'I, *Global Trade Issues in the New Millennium: A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537, 538–39 (2001) (discusssing trade in general and the subject of international coordinated action and multilateral agreements); Garcia, *supra* note 5, at 391 (commenting on the importance of globalization in defining the quality of human existence and its effect on human rights); Leebron, *supra* note 5, at 5 (discussing the relationship between international trade and other aspects of social concern and its impact globally).

12. *See* Raj Bhala, *Interfaces: From International Trade to International Economic Law: Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1525 (2000) (stating that the Chinese government will have to cede sovereignty in order to join the WTO); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 322 (2001) (using the WTO as an example of international law to which nations must cede sovereignty); Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 L. REV. M.S.U.-D.C.L. 355, 355 (2001) (commenting on the United States-European Union economic sovereignty contest and instances in which ceding sovereignty is found and issues in which it is not).

A detailed outline of the WTO Agreements illustrates a power structure of mechanisms for nations to seek redress within the trade adjudication system.[13] However, this occurs only after a national government yields some of its sovereignty.[14] In contrast, the Inter-American Court (IAC) lacks the many clear definitions of violations and procedures readily found in the WTO due to the member nations' refusal to transfer authority to an international or regional criminal court.[15] Thus, it can be argued that the more stringent the procedural requirements, the greater the ceding of national sovereignty to supra-national adjudication, which ultimately leads to less abuse of local law.[16] Rule-based adjudicative structures favor less manipulation than political/power-based adjudicative systems.[17]

This article will outline the dispute settlement procedures of the WTO, followed by a description of the procedures of the Inter-American Court. The WTO dispute resolution mechanisms apply primarily to trade issues. The Inter-American System of dispute resolution focuses on human rights. Similarities and differences will be discussed, illustrating the benefits and drawbacks of each system. Lastly, this article will analyze the two different structures to illustrate how two supra-national judicial systems struggle with the issues of governance and allocation of power in relation to public international law.

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13. *See* Michael A. Asaro, *Iran & Libya Sanctions Act of 1996: A Thorn in the Side of the World Trading System*, 23 BROOKLYN J. INT'L L. 505, 539 (1997) (stating that any member may seek redress through the WTO dispute resolution mechanism); Nadia Natasha Seeratan, *Negative Impact of Intellectual Property Patent Rights on Developing Countries: An Examination of the Indian Pharmaceutical Industry*, 3 SCHOLAR 339, 361 (1991) (explaining that "ideally, any member of the WTO may seek redress against another member through the use of its dispute resolution panel."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 848–53 (1995) (discussing in detail the WTO trade adjudication system).

14. *See* Symposium, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 452–53 (2001) (stating that the WTO strips power away from states and that the dispute resolution mimics a form of hierarchical supremacy); Jeffery Atik, *Linkage as Phenomenon: An Interdisciplinary Approach: Article: Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 230 (1998) (discussing how the WTO sets bounds on the permissible range of national decisional autonomy and discussing loss of sovereignty associated with joining the WTO); Henry W. McGee, Jr. & Timothy W. Woolsey, *Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano's "The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000),* 20 UCLA J. ENVTL. L. & POL'Y 109, 120 (2002) (noting that "under the WTO, Member States yield a great deal of sovereignty in the name of free trade").

15. *See* William J. Davey, *International Economic Conflict and Resolution: The World Trade Organization's Dispute Settlement System*, 42 S. TEX. L. REV. 1199, 1201 (2001) (stating that the WTO member nations refuse to transfer authority to an international court). *See generally* Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements at The World Trade Organization*, 23 CAN.-U.S. L.J. 261, 269 (1997) (noting that the Inter-American Court lacks clear definitions of violations); Benjamin Simmons, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 417 (1999) (discussing the organization of the Inter-American Court).

16. *See* Abbott, *supra* note 10, at 194–99 (discussing the benefits of procedural requirements in the context of national sovereignty); *see also* Ala'I, *supra* note 11, at 538–39 (presenting the benefits of the national adjudication). *See generally* McGee, *supra* note 14, at 115 (noting how easy it is to abuse local law).

17. *See* Pauwelyn, *supra* note 1, at 336–37 (illustrating the benefits of the new WTO systems as compared to the GATT system); *see also* Robert E. Hudec, New WTO *Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 6 n.9 (1999) (stating various benefits to a rule-based system, such as being the most resource-efficient way to resolve international disputes); Kim Van der Borght, *Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1224 (1999) (discussing how the enactment of the WTO led to a change to a rule-based system to combat the problems of the old political/power-based system).

II. The World Trade Organization

The WTO dispute settlement system incorporates many of the existing dispute settlement procedures of its predecessor, GATT.[18] The Uruguay Round of 1994 created for the first time an Appellate Body of the WTO.[19] After a brief history, this section will outline the process from panel formulation to the appellate proceedings, identify potential remedies, and conclude with the present debate on the recommendations to reform the WTO dispute settlement procedure.

A. Brief History

From the remnants of the failed 1948 International Trade Organization process,[20] the GATT found itself accidentally standing as the sole organized trade dispute settlement mechanism in the world.[21] Originally termed "a diplomat's jurisprudence,"[22] the GATT dispute settlement system functioned in its early years as the written transcription of trade procedures

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18. *See* Bryan Schwartz, *Lawyers and the Emerging World Constitution*, 1 ASPER REV. INT'L BUS. & TRADE L. 1, 4 (2001) (noting that at the Uruguay Round of GATT negotiations the WTO was created); *see also* Dukgeun Ahn, *Long Road Ahead: Dispute Settlement in the GATT/WTO*, 20 MICH. J. INT'L L. 413, 420 (1999) (illustrating how the most important achievement of the Uruguay Round was the development of the new dispute settlement system); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 502 (2001) (discussing how the WTO dispute settlement proceedings derive from the original GATT scheme).

19. *See* Schwartz, *supra* note 18, at 4 (stating that an appellate body was created out of the new WTO to hear and decide appeals from panels); *see also* Jose E. Alvarez*, Boundaries of the WTO: The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 148 (2001) (discussing how since the establishment of a binding dispute settlement system there has been compliance); Hudec, *supra* note 17, at 2 (explaining how the creating of the new dispute settlement system was one of the most important features of the new WTO).

20. *See* Leebron, *supra* note 5, at 19 (noting that the failed Charter for an International Trade Organization contained several provisions that eventually became the GATT); *see also* Hudec, *supra* note 17, at 4 (stating that the GATT agreement came about "from the ashes of the failed 1946-1948 negotiations to create an International Trade Organization"); Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 478 (1994) (illustrating how after the International Trade Organization was not approved by the U.S. Congress, the GATT had to build up staff and develop committees to fill the void).

21. *See* Judith H. Bello, *Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations. By John Jackson*. 95 AM. J. INT'L L. 984, 985 (2001) (discussing how the "birth defects" of the GATT were primarily a result of having to fill in for the areas which the International Trade Organization was supposed to address); *see also* Hudec, *supra* note 17, at 4–5 (noting that after the failure of the International Trade Organization, the GATT "found itself standing alone, forced to administer its code of legal obligations with only a very primitive organizational structure."); Uri Litvak, *Regional Integration and the Dispute Resolution System of the World Trade Organization After the Uruguay Round: A Proposal for the Future*, 26 U. MIAMI INTER-AM. L. REV. 561, 569 (1995) (stating that the GATT "was forced to fill the institutional role" that was originally intended for the International Trade Organization).

22. *See* Hudec, *supra* note 17, at 4 (noting that due to the "artful ambiguity of the early GATT procedure" the term "A Diplomat's Jurisprudence" was created); *see also* Robert E. Hudec, *"Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 215–16 (1987) (discussing how the GATT's law was simply neither strong enough nor clear enough to compel any changes in governmental actions); John H. Jackson, *WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62 (1992) (discussing how at the outset the GATT dispute settlement procedures were both minimal and ambiguous).

understood only by a small cadre of trade specialists.[23] Yet, as the global economy was transformed, necessitating a far more formal structure of rule-based legal obligations over power/political based obligations, the GATT procedure morphed into a more judicial system.[24] "The development of these legal powers and their general acceptance by GATT governments laid the essential foundation for the even stronger legal powers that followed under the WTO."[25] The veto power remained the key obstacle between the old procedures of GATT and the new structures of the WTO.[26] Due to the voluntary nature of membership in GATT, a nation's ability to block the operation of the GATT dispute settlement procedure at any moment was viewed as a potential threat to its viability.[27] However, the member governments' political will to maintain a functioning legal order for trade propelled the fragile structure forward.[28] The threats intensified in the late 1980s, when the United States, through its Section 301 and Super 301 laws,[29] sometimes applied unilateral trade sanctions against other GATT nations whose conduct was

23. *See* Litvak, *supra* note 21, at 577 (noting how panels composed of representatives of nations not parties to the dispute investigated and gave recommendations that were "an elusive diplomatic vagueness."); *see also* Hudec, *supra* note 17, at 5–6 (stating that in the early 1950s, dispute panels were made of a small group of "like-minded trade policy officials. . . . "); Dr. Arie Reich, *Institutions for International Economic Integration: From Diplomacy to Law: The Juridicization of International Trade*, 17 NW. J. INT'L L. & BUS. 775, 795–96 (1997) (discussing how in the 1950s there was a distinct flavor of diplomacy in the decision-making process of the dispute panels).

24. *See* Hudec, *supra* note 17, at 4 (stating that after 1980 the dispute settlement procedure was transformed into an institution based on the authority of legal obligation. As a result this laid the foundation for even stronger legal powers under the WTO); Pauwelyn, *supra* note 1, at 336–37 (noting that the adoption of a more rule-based system of arbitration led to a "legal revolution" for the WTO); Van der Borght, *supra* note 17, at 1225 (discussing the change from a diplomatic/power-based procedure to a legalized/rule-based procedure that led to a variety of new features to deal with the dispute system of the past).

25. *See* Hudec, *supra* note 17, at 4 (noting that transforming itself into an institution based primarily on the authority of legal obligation led to an expansion of the role of the dispute settlement system).

26. *See* Bello, *supra* note 21, at 986 (arguing that under the new WTO Dispute Settlement Understanding, the elimination of the delays as a result of the veto power under the GATT system increased its efficiency and effectiveness); *see also* David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 14–15 (1995) (discussing the drawbacks to the veto power under the old GATT procedures); David Palmeter, *WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 458–59 (2000) (describing the old GATT veto system as rendering "Article XXIII(2)'s apparent compulsory jurisdiction largely illusory").

27. *See* Pauwelyn, *supra* note 1, at 336 (discussing that the dispute system under the new WTO increased the efficiency of reaching a resolution without the consensus of all WTO members); *see also* Hudec, *supra* note 17, at 8–9 (noting that by allowing the defendant the right to veto at every step of the proceeding proved to be a "glaring weakness in the GATT disputes procedure."); Leebron, *supra* note 26, at 14–15 (noting that the veto power delayed the legal effect of the panels ruling, thus undermining the power of the dispute resolution system).

28. *See* Hudec, *supra* note 17, at 7–8 (discussing how the reception by various governments of well-reasoned legal rulings led to an increase in the caseload and the development of reliable case law); *see also* Litvak, *supra* note 21, at 578 (clarifying how as a result of governmental concern over international trade relations, the Tokyo Round renovated the legal system to deal with the increase demand); Palmeter, *supra* note 26, at 469 (discussing how the unified dispute system provided a more uniform legal ruling which provided for more stable international trade relations).

29. *See* Leebron, *supra* note 26, at 16 n.18 (stating that "Under these provisions, the United States Trade Representative would identify and single out certain trading partners of the United States and trade practices that were deemed to be unfair, that is in violation of international agreements or otherwise unjustifiable, unreasonable or discriminatory, and to burden or restrict United States trade. The United States would then insist that the party enter into negotiations over those practices, under the threat of unilateral sanctions."); *see also* Hudec, *supra* note 17, at 13–14 (discussing how certain trade laws were instrumental in the "vigilante justice" that was pursued by the U.S. government); Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 89 AM. J. INT'L L. 663, 664 (1995) (arguing that section 301 was an example of how the rules of the GATT/WTO had grown too complex, which adversely affected trade disputes).

viewed as violating U.S. trade obligations.[30] The member states' political desire for an international trade system, nonetheless, was intensified by their fear of such unilateral activity affecting trade.[31] Therefore, tighter dispute settlement procedures were implemented, as were sanctions against unilateral actions, all of which strengthen the WTO structure.[32]

B. WTO Dispute Settlement Procedures

1. Consultations

The primary aim of the GATT dispute settlement mechanism "is to secure a positive solution to a dispute."[33] Article XXIII of GATT embodies the procedures of the WTO's dispute settlement process, which are handled by "panels."[34] While the text of Article XXIII is decep-

30. *See* Hudec, *supra* note 29, at 664 (arguing that the increasingly complex case law has resulted in resentment by several governments and led to the U.S. enforcing the GATT rules unilaterally); *see also* Hudec, *supra* note 17, at 13 (illustrating that the United States' argument was based on the fact that it viewed the GATT dispute settlement as "too slow and too weak to offer adequate protection of the United States trade interests"); Leebron, *supra* note 26, at 16–17 (defining "unilateralism" as actions by the United States under section 301 and Super 301).

31. *See* Hudec, *supra* note 17, at 13 (discussing how other members of the GATT viewed section 301 as "extremely threatening."); *see also* Hudec, *supra* note 29, at 665 (noting that the settlement of trade disputes hung in the balance as a result of the United States' threats and imposition of unilateral actions); Lowenfeld, *supra* note 20, at 481 (discussing how the negative impact of "aggressive unilateralism" by the United States needed immediate addressing to deter acts of defiance and violations).

32. *See* Leebron, *supra* note 26, at 16–17 (discussing how Article 23 of the Dispute Settlement Understanding addressed the issues of unilateral actions, by prohibiting such conduct); see also Hudec, *supra* note 29, at 665 (noting that although there was increasing tension as a result of the United States' actions under section 301, the result was the introduction of more effective mandatory procedures that could not be frustrated); Lowenfeld, *supra* note 20, at 481 (noting how Article 23 of the Understanding was enacted to ensure that unilateralism would be deterred).

33. *See* GATT Secretariat, *Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 INT'L LEGAL MATERIALS 1125, 1227 (Apr. 15, 1994) (noting that not only must the dispute settlement body ensure that the action brought before it is "fruitful," but its aim is also to provide a "solution mutually acceptable to the parties").

34. *See* William J. Davey, *International Economic Conflict and Resolution: The World Trade Organization's Dispute Settlement System*, 42 S. TEX. L. REV. 1199, 1999 (2001) (noting that the Dispute Settlement Understanding is effectively an interpretation and elaboration of GATT Article XXII); *see also* Hudec, *supra* note 17, at 5 (stating that GATT Article XXIII provided the basis for third-party adjudication through panels). GATT Article XXIII: NULLIFICATION OR IMPAIRMENT, providing in pertinent part:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of this Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them, and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. . . . If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in circumstances. . . .

See GATT, *supra* note 33, at Art. XXIII.

tively short, its density outweighs its brevity, laying the foundation for panel operations as a result of its definition of nullification and impairment.[35] The article initially addresses the concern of when a WTO member feels a benefit under the agreement is either directly or indirectly being nullified or impaired by breach of the agreement or otherwise. The complaining member party may call for consultations with the offending party.[36] A complainant must submit its complaint to the Dispute Settlement Body (DSB), and the defendant has ten days within which to reply,[37] after which both parties must enter good-faith consultations, under the auspices and good offices of the Director General, if necessary.[38] If consultations should fail to resolve the dispute within sixty days after the date of request for consultation, the complainant can then call for a panel.[39] The present system now enforces a reverse consensus rule, whereby a panel is established unless a majority opposes panel formation, thus preventing a single member from vetoing panel creation.[40] Third parties that have a "substantial trade interest" in consultation being held may notify the DSB within ten days after the date of circulation of request for consultation to join the consultation.[41] The defendant must agree that the "substantial interest" test is met.[42] If the third party is not accepted, then it may initiate its own independent consultation proceedings.[43]

2. First Panel

While Article 6.1 of the GATT Agreement grants members the right to establish panels, the Director General ultimately can select the panel's three members if members do not come

35. *See* Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements at The World Trade Organization*, 23 CAN.-U.S. L.J. 261, 285–87 (1997) (describing the nullification and impairment benefit with respect to GATT dispute settlements); *see also* Hannes L. Schloemann & Stephan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L .L. 424, 439–40 (1999) (stating that Article 23 requires members to address issues of nullification or impairment before the DSU). *See generally* Michael Patrick Tkacik, *Post-Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weaknesses, and Causes for Concern*, 9 INT'L LEGAL PERSP. 169 (1997) (describing the general concepts of GATT).

36. *See* GATT, *supra* note 33, at art. XXIII (1).

37. *Id*. at art. XXIII (2)(12).

38. *Id*. at art. XXIII (2)(9).

39. *Id*. at art. XXIII (2).

40. *See* Tkacik, *supra* note 35, at 181–82 (describing the reverse consensus rule as being relevant "not only for adopting reports, but also for establishing panels, in the adoption of appellate reports, and finally, in granting the authorization to suspend concessions."); *see also* Chi Charmody, *Of Substantial Interest: Third Parties Under GATT*, 18 MICH. J. INT'L L. 615, 634–36 (1997) (explaining that "reports are adopted unless there is a consensus against them"); Susan Vastano Vaughan, *Compulsory Licensing of Pharmaceuticals under TRIPS: What Standard of Compensation?*, 25 HASTINGS INT'L & COMP. L. REV. 87, 95 (2001) (stating that consensus is required to prevent resolution of the dispute).

41. *See* GATT, *supra* note 33, at art. XXIII (2)(15).

42. *Id*. at art. XXIII (2)(15); *see also* Charmody, supra note 40, at 625 (specifying the rights of each party with respect to their interests at stake); Graeme B. Dinwoodie, *Development and Incorporation Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 771 (2001) (stating that "third countries can participate as a matter of right only where they have a substantial trade interest in the dispute in question.").

43. *See* GATT, *supra* note 33, at art. XXIII (2).

to agreement on the panelists.[44] A provision allows developing countries to request that one panelist be chosen from another developing country, should the dispute include a developed nation.[45] In addition, panelists cannot be selected from the nations that are parties to the dispute.[46] Once a panel is created, a report is expected within six months.[47] Before the final report, the rules require that an interim report be issued to the parties for review before publication of the final document.[48] If no objections are raised, the interim report becomes the final report.[49] Otherwise, the panel issues the final report, dealing with any objections of the parties.[50] The final report may be considered for adoption by the DSB twenty days after it is circulated among WTO members.[51] Again, final reports are adopted by reverse consensus that assumes adoption unless there exists agreement against its passage.[52] The entire process remains closed to the public, although the reports are made public when they are circulated to WTO members.[53]

3. Appeals Process

One of the Uruguay Round's crowning achievements was the creation of a formal Appellate Body in contrast to the GATT's previous "spontaneous combustion" theory of panel for-

44. *See* Hudec, *supra* note 17, at 34–39 (describing the procedure of panel member selection); *see also* David M. Schwarz, *WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest*, 10 AM. U. J. INT'L L. & POL'Y 955, 972–74 (1995) (listing the role of the Director-General with respect to panel selection); Stein, *supra* note 18, at 534 n.65 (explaining the procedure of selecting panel members); GATT, *supra* note 33, at art. 6.1.

45. *See* Kendall W. Stiles, *New WTO Regime: The Victory of Pragmatism*, 4 D.C.L. J. INT'L L. & PRAC. 3, 21 (2000) (discussing the special treatment awarded to developing countries).

46. *See* GATT, *supra* note 33, at art. XXIII(2)(11); *see also* Lowenfeld, *supra* note 20, at 483 (stating that "citizens of parties to a dispute will not be permitted to serve on panels hearing that dispute"); Ian J. Popick, *Are There Really Plenty of Fish in the Sea? The World Trade Organization's Attempts to Conserve the Chilean Sea Bass*, 50 EMORY L.J. 939, 947 (2001) (noting that panelists are chosen "with no influence from the disputing nations").

47. *See* GATT, *supra* note 33, at art. XIV; *see also* Tkacik, *supra* note 35, at 182 (stating that the "panel must provide an interim report to the parties for review within six months of the panel's formation").

48. *See* GATT, *supra* note 33, at art. XXIII(2)(18); *see also* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L. REV. 1025, 1053–55 (1999) (describing the DSU reporting requirement); William R. Sprance, *World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L. L REV. 1225 n.178 (1998) (stating that "the panel submits an interim report to the parties").

49. *See* GATT, *supra* note 33, at art. XXIII (2).

50. *Id*. at art. XXIII (2).

51. *Id*. at art. XXIII (2).

52. *Id*. at art. XXIII (2); *see also* John H. Jackson, *Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 176 (1997) (describing the reverse consensus); Arun Venkataraman, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 601 (1999) (stating that "panel decisions are automatically adopted by the DSB, unless it decides by consensus not to adopt a panel's decision").

53. *See* GATT, *supra* note 33, at art. XXIII (2)(15); *see also* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 829 (2001) (reporting that reports are made public at the time they are given to all WTO members); Gantz, *supra* note 48, at 1052–53 (stating that "the entire panel process remains closed to the public").

mation.[54] A standing body of seven members sits on rotating panels of three to adjudicate appeals.[55] The Appellate Body members are appointed for four-year terms, renewable one time only.[56] Although opinions are written anonymously, there is a sense of collegiality since all seven members discuss the ruling before its release, therefore giving an appearance of unanimity.[57] Reports must be issued ninety days from the date of formal notification of appeal.[58] The scope of the report should be limited to issues of law within the panel report and legal interpretations developed by the panel.[59] The precedential value of Appellate Body decisions is not based solely on stare decisis principles, but they do have a de facto, persuasive affect.[60] Once a panel report has been adopted, the DSB monitors whether recommendations to bring offending members into conformity with the rules have been implemented.[61] The onus remains on the losing party to implement a ruling within a "reasonable period of time," normally not to exceed fifteen months.[62]

4. Potential Remedies

A three-tier hierarchy of remedies exists: withdrawal, compensation, and suspension, with preference given to withdrawal of violations.[63]

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54. *See* Benjamin Simmons, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413 n.38 (1999) (emphasizing that the Uruguay Round resulted in the creation of a new appellate review system); *see also* Andreas F. Lowenfeld, *A First Look at Some Institutional Innovations*, AM SOC'Y OF INT'L L. INSIGHT No. 2, at 2 (1994) (describing the responsibilities of the Appellate Body); Thomas J. Schoenbaum, *Concept of Market Contestability and the New Agenda of the Multilateral Trading System*, 11 AM. SOC'Y OF INT'L L. INSIGHT 1, 2 (1996) (stating that the first case the Appellate Body will consider concerns a reformulated gasoline program).

55. *See* GATT, *supra* note 33, at art. 17.1; Lowenfeld, *supra* note 20, at 492 (noting that the Appellate Body consists of seven members and sits on rotating panels of three); Tkacik, *supra* note 35, at 169 (illustrating how the appellate process works).

56. *See* GATT, *supra* note 33, at art. 17.2.

57. *See* Hudec, *supra* note 17, at 28 (stating that there is unanimity because all seven members discuss the ruling before its release).

58. *See* GATT, *supra* note 33, at art. 17.5.

59. *See id*. at art. 17; *see also* Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 492 (1994) (stating that the appellate review is limited to points of law); Taunya McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?*, 9 FLA. J. INT'L L. 241, 250 (1994) (noting that the standard for review is limited to issues of law).

60. *See* Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171, 179 (1998) (discussing the persuasive value of the Appellate Body decisions).

61. *See* GATT, *supra* note 33, at art. 17.14; *see also* Lowenfeld, *supra* note 20, at, 492 (stating that the DSB monitors whether the losing party brings itself into conformity with the rules); Tkacik, *supra* note 35, at 176 (clarifying that the DSB monitors whether the offending party corrects its problems).

62. *See* GATT, *supra* note 33, at art. 21.3 (1994) (stating that the reasonable period of time is normally not to exceed fifteen months, but it may exceed fifteen months if both parties agree).

63. *See* Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 163 (1996) (stating that the three possible remedies are withdrawal, compensation, and suspension; with withdrawal being the preferred remedy); Lowenfeld, *supra* note 20, at 492 (mentioning that compensation and suspension are remedies that can only be used in limited circumstances); *see also* Tkacik, *supra* note 35, at 176 (noting the three different remedies).

First, primary efforts are focused on withdrawing measures found inconsistent with the agreements.[64] Within thirty days of the report's adoption by the DSB, the offending member must inform the DSB of its intention to implement the report's recommendations and rulings.[65] Each situation varies: if immediate implementation is not practical, the losing party is entitled to a reasonable period of time in which to implement the recommendations.[66] The time frame is to be set by agreement or, if necessary, arbitration that must not exceed fifteen months from the date of adoption by either the panel or Appellate Body report.[67] While responsibility for implementation remains with the losing party, the DSB monitors implementation activity by allowing members to record such activities on its agenda at DSB meetings until there is a resolution.[68]

The second remedy is compensation.[69] This is used strictly as a temporary measure, and only if a member fails to implement the recommendations within the "reasonable period of time."[70]

The third remedy, suspension of concessions or other obligations under the covered agreement, is the most severe remedy afforded to members.[71] Such concessions are implemented in a deliberately discriminatory manner, subject to DSB authorization.[72] If non-implementation

64. *See* Forabosco, *supra* note 63, at 168 (stating that the three possible remedies are withdrawal, compensation, and suspension; with withdrawal being the preferred remedy); *see also* Lowenfeld, *supra* note 20, at 492 (mentioning that compensation and suspension are not used as much as withdrawal); Tkacik, *supra* note 35, at 176 (noting withdrawal as a remedy).

65. *See* GATT, *supra* note 33, at art. 21.3; see also Lowenfeld, *supra* note 20, at 492 (stating that the losing party has thirty days to inform the DSB of whether it is going to adhere to the rulings); Tkacik, *supra* note 35, at 175 (stating that the losing party must tell the DSB what it is going to do within thirty days of the report's adoption by the DSB).

66. *See* GATT, *supra* note 33, at art. 21.3; *see also* Lowenfeld, *supra* note 20, at 492 (saying that the losing party is entitled to a reasonable time to implement the rulings); Tkacik, *supra* note 35, at 177 (mentioning that if it is impractical to implement the rulings right away, then the losing party has a reasonable time to implement the rulings).

67. *See* GATT, *supra* note 33, at art. 21; *see also* Forabosco, *supra* note 63, at 165 (stating that the reasonable time is not to exceed fifteen months).

68. *See* Lowenfeld, *supra* note 20, at 491 (stating that the DSB monitors implementation of the rulings by the losing party); *see also* Tkacik, *supra* note 35, at 177 (mentioning that the DSB would monitor implementation).

69. *See* Forabosco, *supra* note 63, at 184 (mentioning compensation as a remedy); *see also* Lowenfeld, *supra* note 20, at 491 (discussing compensation as a remedy); Tkacik, *supra* note 35, at 176 (stating that compensation is an available remedy).

70. *See* Forabosco, *supra* note 63, at 171 (discussing that compensation is a limited remedy); Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 230 (1995) (discussing that compensation is only available if the deadlines are not complied with); *see also* Tkacik, *supra* note 35, at 187 (stating that compensation is one of three available remedies).

71. *See* GATT, *supra* note 33, at 1227 (describing suspension as the most severe remedy and thus the most difficult remedy to obtain); *see also* Scott McBride, *Dispute Settlement in the WTO: Backbone of the Global Trading System or Delegation of Awesome Power?*, 32 LAW & POL'Y INT'L BUS. 643, 648 (2001) (discussing suspension as an available remedy only if all other remedies cannot be obtained); Pauwelyn, *supra* note 1, at 335 (mentioning that suspension has the most severe penalties of all the remedies).

72. *See* GATT, *supra* note 33, at 1227 (stating that all remedies must first be authorized by the DSB before they may be implemented); *see also* Robert Garran, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295 n.409 (1994) (describing the remedies as being dependent upon DSB approval); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 590–91 (1996) (mentioning that DSB approval is required before the concessions may be implemented).

continues for twenty days after the expiration of the "reasonable period of time" and no compensation is agreed upon, the party invoking the dispute may request retaliatory suspension.[73] The schedule of retaliatory measures is quite explicit in the WTO.[74] Suspensions must first target concessions or other obligations within the same sector of the violation.[75] If inapplicable, concessions must then stem from other sectors of the same agreement.[76] After exhausting the first two procedures, retaliation can be used.[77] Again, if parties cannot agree on the level of concessions to be suspended, binding arbitration shall determine whether the level of retaliation is equivalent to the nullification and impairment of the original violation.[78] Special deference is paid to developing countries when considering suspension and concession requirements.[79]

C. Debate of WTO Reform

The detailed procedures of the WTO that emerged in 1994 were a curious experiment.[80] While building upon the loose documentation of the GATT of 1947, the Uruguay Round

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73. *See* GATT, *supra* note 33, at 1239 (declaring that if non-implementation continues for twenty days after the expiration of the "reasonable period of time," and there is no agreed-on compensation, the party may ask for retaliatory suspension); *see also* Carolyn B. Gleason & Pamela D. Walther, *PART 1: REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU): Panel 1 D: Stage IV—Operation of the Implementation Process: The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 732 (2000) (discussing how suspension rights are only accorded following the expiration of a reasonable period of time); Lowenfeld, *supra* note 20, at 486–87 (stating that if there is no agreement on compensation within twenty days of the expiration of the "reasonable period," the prevailing party may, upon authorization by the DSB, retaliate through suspension of concessions or other obligations).

74. *See* GATT, *supra* note 33, at 1239 (stating the schedule of retaliatory measures); *see also* Charnovitz, *supra* note 53, at 807 (mentioning the schedule of retaliatory measures); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 722–23 (1999) (describing the schedule of retaliatory measures).

75. *See* Charnovitz, *supra* note 53, at 807 (mentioning that the suspension must start off in the same sector of the violation); GATT, *supra* note 33, at 1239 (saying that the suspension must first start off in the same sector of the violation); Schneider, *supra* note 74, at 722–23 (stating that the harmed state must first retaliate in the same sector of trade).

76. *See* GATT, *supra* note 33, at 1239 (declaring that once retaliation has proven inapplicable within the same sector, then concessions can come from other sectors); *see also* Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 1011 n.237 (1996) (mentioning that suspension from other sectors is only possible if same-sector suspension is impractical or ineffective); Schneider, *supra* note 74, at 722–23 (stating that if same-sector retaliation is ineffective, then cross-sector retaliation is allowed).

77. *See* GATT, *supra* note 33, at 1239 (stating that retaliation can only be used if the other remedies have failed); *see also* Kim, *supra* note 76, at 1011 n.237 (mentioning that suspension from another agreement is only allowed if the other remedies have proven impractical); McLarty, *supra* note 59, at 266 (saying that retaliation can be authorized within a different agreement if the other remedies are not possible).

78. *See* GATT, *supra* note 33, at 1240 (declaring that if the level of suspensions cannot be agreed on by the parties, then there will be binding arbitration to settle the matter); *see also* Charnovitz, *supra* note 53, at 813 (mentioning that arbitration is used if the parties cannot agree on the level of suspensions); Lowenfeld, *supra* note 20, at 488 (stating that if a party objects to the level of suspension proposed, arbitration is the prescribed answer).

79. *See* GATT, *supra* note 33, at 1242 (stating the special deference that is paid to developing countries); *see also* Zsolt K. Bessko, *Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding On Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265, 298 (1996) (citing the provisions where special consideration is given to developing countries); Jonathan C. Spierer, *Dispute Settlement Understanding: Developing a Firm Foundation for Implementation of the World Trade Organization*, 22 SUFFOLK TRANSNAT'L L. REV. 63, 81 (1998) (discussing the special consideration given to the least developed countries).

80. *See generally* GATT, *supra* note 33 (stating the detailed procedures of the GATT).

deliberately took steps to unify and entrench a framework for an international economic legal order.[81] The nuts and bolts that remained to be affixed and joined were the nation-states, with their cooperation essential for linking the system together.[82] Embedded within its text, the new WTO procedures required a review of its procedures three years later.[83] The nascent organization has proactively taken steps to respond to potential changes, acknowledging the possible discrepancies between theory and practice.[84] Three areas in particular experienced WTO reform: panel procedure legitimacy, relationship with nation-state sovereignty, and transparency.[85]

1. Panel Procedure Legitimacy

The binding nature of WTO panel reports directly increases the level of accountability of these reports—the relationship is directly proportional.[86] The addition of the Appellate Body consequently increased not only the legitimacy of panel rulings, but also heightened the demand for the panel's ability to handle more complex issues.[87] As the WTO has gained in

81. *See* Thomas J. Dillon, Jr., *World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 350 (1995) (describing the various accomplishments of the Uruguay Round); Lowenfeld, *supra* note 20, at 478–79 (mentioning that if the bold approach used at the Uruguay Round is successful, then there will be uniformity in the law of international trade); Shell, *supra* note 13, at 831 (discussing the improvements of the 1994 agreement from the 1947 agreement).

82. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 193 (1996) (mentioning how essential it is that the nations cooperate); Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1195 (1998) (implying that the success of the Uruguay Round depends on the cooperation of the nation states); Lowenfeld, *supra* note 59, at 478–79 (discussing the variables that will determine the success of the 1994 agreement).

83. *See* GATT, *supra* note 33, at 1259 (stating that the new WTO procedures call for an internal review); *see also* Palmeter, *supra* note 26, at 478 (noting the strength of the new WTO procedures); Van der Borght, *supra* note 17, at 1225 (describing the new procedural requirements of the WTO).

84. *See* Rene E. Browne, *Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405, 417–20 (1997) (stating that the WTO takes steps to respond to potential changes); *see also* Kim Rubenstein & Jenny Schultz, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO*, 11 ST. JOHN'S J. LEGAL COMMENT. 271, 280–83 (1996) (showing that there may be numerous discrepancies between theory and practice); Van der Borght, *supra* note 17, at 1225 (presenting an overview of the WTO reform).

85. *See* John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1205 (1999) (focusing on the areas addressed by the WTO reform); *see also* Lawrence L. Herman, *Sovereignty Revisited: Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 121, 123–24 (1998) (illustrating the highlights of the WTO reform); Hudec, *supra* note 17, at 43 (discussing the WTO reform).

86. *See* Browne, *supra* note 84, at 431–32 (noting the strengths of the reports issued by the Appellate Body); Hudec, *supra* note 17, at 32–33 (stating the rulings of the Appellate Body are slowly gaining international recognition); Van der Borght, *supra* note 17, at 1225 (illustrating the nuts and bolts of the appellate procedure).

87. *See* Hudec, *supra* note 17, at 32 (stating there is a burden that is increased when governments submit increasingly complex cases to be adjudicated); *see also* Regine Neugebauer, *Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case*, 31 LAW & POL'Y INT'L BUS. 1255, 1256 (2000) (identifying an increase in legitimacy and demand and an example of complex litigation); John A. Ragosta, *Part I: Review of the Dispute Settlement Understanding (DSU): Panel 1 E: Unmasking the WTO: Access to the System: Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live up to the Moniker "World Trade Court"?*, 31 LAW & POL'Y INT'L BUS. 739, 765 (2000) (denoting the Appellate Body as the crown jewel of the DSU protecting rights and integrity of the process).

strength and legitimacy, the number of cases has also increased significantly.[88] Demands on staff and panel members have increased as well.[89] While the Appellate Body stands armed with a full-time body of judges,[90] first-level panels are staffed with part-time experts in the arena of international trade.[91] Debate has arisen into whether qualified diplomats, well-versed in trade policy, are adequately prepared for the judicial analysis required for trade adjudication.[92] Often, the Secretariat's office of legal counsel is given de facto authority as a result of its persuasive influence with panel judges,[93] yet it has no official mandate for its quasi-decision-making role.[94] In addition, the number of available and qualified panel members is further limited by

88. *See* Hudec, *supra* note 87, at 15–16 (noting an increase in caseload); *see also* Jackson, Davey & Parlin, *Overview of the State-of-Play of WTO Disputes*, WTO, (June 19, 2000), Supplemental Materials, International Trade Seminar, Georgetown Univ. Law Center (Fall 2000) (arguing that the international recognition may be responsible for increasing the WTO caseload); Jessica C. Pearlman, *Participation by Private Counsel in World Trade Organization Dispute Settlement Proceedings*, 30 LAW & POL'Y INT'L BUS. 399, 400 (1999) (stating that the WTO caseload is increasing and is expected to continue with this trend).

89. *See* Hudec, *supra* note 87, at 32–33 (listing the demands that may considerably increase pressure on the panels); *see also* Neugebauer *supra* note 87, at 1256 (suggesting that even in the midst of satisfactory proceedings, the Appellate Body is viewed as incapable of dealing with complex cases); Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT'L L. 417, 422 (2001) (suggesting some suggestions after reviewing the DSB).

90. *See* Reich, *supra* note 23, at 804–05 (describing the Appellate Body as a standing body); *see also* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 849 (1995) (inferring that there is a full-time standing body from the facts that the Appellate Body is a permanent body with judges appointed for four-year terms even though the judges themselves are not required to serve full-time); Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563, 571 (2000) (describing the Appellate Body as full-time and permanent).

91. *See* Wofford, *supra* note 90, at 571 (contrasting the lower panel with the Appellate Body as being part-time); *see also* Candace Carmichael, *Foreign Sales Corporations—Subsidies, Sanctions, and Trade Wars*, 35 VAND. J. TRANSNAT'L L. 151, 210 n.25 (2002) (noting that panels are staffed with experts, but these panels are part-time in that panels are formed in an almost ad hoc fashion on a case-by-case basis). *See generally* Sprance, *supra* note 48, at 1225 (denoting expertise required in the lower panel).

92. *See* Shell, *supra* note 90, at 833 (outlining the debate over whether diplomats or judges are suited for trade adjudication); *see also* Alan Wm. Wolff, *Part III: Operation of the WTO Agreements in the Context of Global Commerce and Competition, Investment and Labor Markets: Panel III C: Operation of the WTO in Context of Overall U.S. Trade Policy Objectives: America's Ability to Achieve Its Commercial Objectives and the Operation of the WTO*, 31 LAW & POL'Y INT'L BUS. 1013, 1031 (2000) (positing the question of balance between diplomacy and litigation). *See generally* Reich, *supra* note 90, at 830–31 (explaining the abandonment of the diplomatic model of trade settlement for a litigation model).

93. *See* Wofford, *supra* note 90, at 571 n.50 (stating that panels tend to rely on the advice of the Secretariat*); see also* Shell, *supra* note 90, at 842 (explaining that the Secretariat has influence in selecting the panel members to hear a case); Wolff, *supra* note 89, at 423–24 (indicating that the Secretariat's office of legal counsel has overwhelming influence with appellate judges).

94. *See* Hudec, *supra* note 87, at 35 (noting that although the Secretariat has no formal decision-making powers, it plays a role in many decisions by exerting pressure on the Appellate Body); *see also* Gregory C. Shaffer, *World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 55–61 (2001) (explaining the methods and theories of unmandated Secretariat influence in the WTO). *See generally* Wolff, *supra* note 89, at 420–24 (criticizing the role of the Secretariat in the WTO).

the neutrality requirement of judicial panels,[95] prohibiting judges from being affiliated with the members in dispute.[96]

These staffing issues lead to the second procedural reform issue: Does the addition of the Appellate Body erode the legitimacy or need for first-level panel adjudication? Hudec contends that the panel system is a vestige of the former GATT system when the Appellate Body did not exist.[97] Hudec posits that a panel in the two-tiered system has become merely perfunctory,[98] as its function and necessity have diminished.[99] The first tier is merely mechanical,[100] with lower levels of expectation by complaining parties.[101] It essentially serves as an introduction to the Appellate Body proceedings.[102] In addition, while an interim report is necessary in NAFTA proceedings, its importance has yet to carry over to the WTO, where the Appellate Body's rulings obviate the need for this attempt to overcome weak discovery procedures.[103] Others still

95. *See* Carmichael, *supra* note 91, at 157 (illustrating how difficult it is to appoint neutral judges); *see also* Wolff, *supra* note 92, at 1027 (stating that some of the WTO judges may have hidden agendas). *See generally* Sprance, *supra* note 48, at 1229 (noting the demands for neutrality of panel members).

96. *See* Carmichael, *supra* note 91, at 157 (noting that the WTO takes active steps to ensure the neutrality of its appellate panel); *see also* Wolff, *supra* note 92, at 1027 (noting that the WTO prohibits its judges from being affiliated with the members in dispute). *See generally* Sprance, *supra* note 48, at 1227 (stating the neutrality requirements of judges).

97. *See* Hudec, *supra* note 87, at 33–36 (arguing that the new panel system originated from the former GATT system); *see also* Reich, *supra* note 90, at 801 (noting that the former GATT system had an analogous Appellate Body). *See generally* Konstantin J. Joergens, *True Appellate Procedure or Only a Two Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding*, 30 LAW & POL'Y INT'L BUS. 193, 227 (1999) (questioning whether the appellate procedure in the DSU is just a two-stage process).

98. *See generally* Hudec, *supra* note 87, at 33–37 (explaining how the first tier has become merely a formality and a routine).

99. *See* Wofford, *supra* note 90, at 571 n.50 (noting Hudec's characterization of the first-tier panel as perfunctory); *see also* Ragosta, *supra* note 87, at 765 (stating that the role of the Appellate Body should be expanded in examining the reports and decisions of the first-tier panel). *See generally* Hudec, *supra* note 87, at 33–37 (illustrating the purpose of a two-tiered system).

100. *See generally* Hudec, *supra* note 87, at 33–37 (noting the routine and somewhat redundant nature of the first-tier panels).

101. *See* Wofford, *supra* note 90, at 571 n.50 (noting Hudec's characterization of the first-tier panel as perfunctory); Wolff, *supra* note 89, at 422 (claiming that the panels are incompetent with the task of trade adjudication). *See generally* Hudec, *supra* note 87, at 33–37 (denoting the setup of the Appellate Body and first-tier panel and positing criticism of the first-tier panel).

102. *See* Ragosta, *supra* note 87, at 765 (inferring that there would be a reduction in authority and importance of first-tier panel decisions from his suggested remand powers, and expansion of the Appellate Body relegating the panel to an introductory position); Wofford, *supra* note 90, at 571 n.50 (noting that Hudec questions whether first-tier panels are necessary). *See generally* Hudec, *supra* note 87, at 33–37 (characterizing the first tier panel as an institution that clears away the "underbrush" before the case reaches the Appellate Body).

103. *See* Hudec, *supra* note 17, at 42–43 (noting that WTO governments have been unable to prevent interim reports from being immediately transmitted to the press of the winning party); *see also* Abbott, *supra* note 10, at 200 (noting that the Appellate Body's ruling will always be adopted because there is little chance that a consensus will successfully mount against adoption of the report); Gantz, *supra* note 48, at 1054 (stating that the proceedings before the Appellate Body are usually very quick; most are completed within 60 days).

believe that the first-level panel proceedings themselves grant the legitimacy for the Appellate Body and the WTO as a whole to perform.[104]

2. Nation-State Sovereignty

The increased legitimacy of the WTO dispute settlement procedure relates directly to the areas of influence of its constituent nation-states.[105] Since the WTO remains a voluntary arrangement,[106] the very fabric of its composition is threatened by rebellion of only one nation-state.[107] As Croley and Jackson eloquently articulated:

> The observations that national authorities . . . are not accountable to the membership at large speaks to the very purpose of the dispute settlement process, indeed the GATT/WTO Agreement itself—an agreement that, at

104. *See* Professor C. Christopher Parlin, Law and Policy of International Economic Relations Seminar, LAW L/G-285-08, Georgetown University Law Center (Oct. 17, 2000), *available at* http://data.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=506 (last visited Oct. 9, 2002); *see also* Symposium, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87, 88 (2001) (explaining that a proper analysis of the legitimacy of the WTO entails considering the intent of the WTO drafters with regard to environmental, cultural, and social issues, and whether civil society has accepted the expansion of the WTO); Ryan L. Winter, Note, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?* 11 COLO. J. INT'L ENVTL. L. & POL'Y 223, 251 (2000) (noting that in adjudication of trade and environmental disputes, such advisory panels have been created to make complicated factual findings with regard to scientific and technical matters).

105. *See* Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT'L. L. 403, 409 (2001) (discussing two types of sovereignty, Westphalian sovereignty and interdependence, that are relevant to the U.S.'s participation in the WTO); *see also* Symposium, *Boundaries of the WTO: Afterword: The Linkage Problem—Comments on Five Texts*, 96 AM. J. INT'L L. 118, 124 (2002) (explaining how an international framework will be needed to respond to issues that nation-states cannot handle); Symposium, *Globalization and Sovereignty: Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st Century Economy*, 50 KAN. L. REV. 731, 736 (2002) (noting how nation-states have increasingly "surrendered crucial elements of national authority—over the use of force, over economic and financial policy-making, and over the treatment of their own nationals and their own environmental resources").

106. *See World Trade Organization: Membership, Alliances and Bureaucracy*, *available at* http://www.wto.org/english/thewto e/whatis e/tif elorg3 e.htm (noting that the WTO already had 144 members and 30 pending members called "observers" by 1992); *see also* Sean P. Feeney, Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, 2 PEPP. DISP. RESOL. L.J. 99, 108 (2002) (explaining that among the members of the WTO, there is a wide disparity in terms of sophistication which results in disparities in bargaining power); Peter D. Sutherland, Concluding the Uruguay Round—Creating the New Architecture of Trade for the Global Economy, 24 FORDHAM INT'L L.J. 15, 16–17 (2000) (noting the voluntary membership of WTO when WTO first took over for GATT).

107. *See* Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 152 (2001) (discussing the WTO's ruling in the banana dispute, authorizing U.S. sanctions against the EU as retaliation for the EU's failure to comply with previous WTO rulings); *see also* John H. Jackson, *Chapter 2: Constitutional Question: Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results* 36 COLUM. J. TRANSNAT'L L. 157, 175 (1997) (explaining how nation-states may not have wanted to conform to international dispute settlement procedures out of fear that it may compromise their national objectives); G. Richard Shell, *Participation of Nongovernmental Parties in the World Trade Organization: The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 366–67 (1996) (viewing the WTO legal system through the 'Regime Management Model,' where both the potential gains to be had and the losses to be suffered for states are "sufficient inducements to assure compliance with the WTO, even though international law lacks a centralized police").

> bottom, seeks to overcome the significant coordination or collective action problems that its membership otherwise faces. Absent the Agreement (or one like it), individual members have an incentive to erect trade barriers that may 'benefit' them individually, to the greater detriment of other members. Furthermore, absent some dispute settlement process for keeping members faithful to the Agreement, members have similar incentives to apply the Agreement in ways "advantageous" to them. Further still, absent a standard of review for legal questions that prohibits self-serving intentions of the Agreement that arguably but not persuasively faithful to the text, members have an incentive to erode the Agreement through interpretation.[108]

Various forms of analysis have attempted to legally rationalize the deference to the WTO structure, including analogies to the U.S. *Chevron* doctrine.[109] While the comparison was made in reaction to an Article VI antidumping violation,[110] the underlying analysis was both compelling and deterring.[111] Under *Chevron*, a two-step procedure grants agency interpretation more weight when Congress' silence or ambiguity leaves the agency's statutory interpretation

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108. Croley, *supra* note 82, at 209.

109. *See* Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984) (holding that the EPA's interpretation of the Clean Air Act Amendments of 1977 was entitled to deference despite the fact that the legislative history was silent on the issue); *see also* United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999) (applying *Chevron* analysis in asserting that the agency must use its discretion in cases where statutes are ambiguous); Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045, 2051–52 (2002) (explaining that the U.S. Supreme Court followed *Chevron* doctrine to conclude that the Equal Employment Opportunity Commission (EEOC) regulation was permissible under the ADA since Congress "makes sense of the statutory defense for qualification standards that are 'job-related and consistent with business necessity'").

110. *See* Jeffrey S. Beckington, *World Trade Organization's Dispute Settlement Resolution in United States—Anti-Dumping Act of 1916*, 34 VAND. J. TRANSNAT'L L. 199 202–03 (2001) (noting that a single division of the WTO's Appellate Body heard and decided appeals from both the EC and Japan, and then recommended that the U.S. bring the 1916 Act into conformity with Article VI of the GATT 1994 and the Antidumping agreement, Article 17.6); *see also* Dianne M. Keppler, *Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act violates the WTO Antidumping Agreement*, 32 GEO. WASH. J. INT'L L. & ECON. 293, 303–10 (1999) (concluding that Congress must repeal the 1916 Act to spare the U.S. from continued violations of international trade obligations and from being subjected to the WTO dispute process); Lei Yu, *Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 293, 307 (2002) (explaining that Article VI of the GATT 1947 allowed contracting parties to institute antidumping measures).

111. *See* Paul C. Rosenthal & Robert T.C. Vermylen, *Part II: Review of Key Substantive Agreements: Panel II E: Antidumping Agreement (AD) and Agreement on Subsidies and Countervailing Measures (SCM): The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?*, 31 LAW & POL'Y INT'L BUS. 871, 878 (2000) (noting that toward the end of the Uruguay Round negotiations, the United States attempted to incorporate the *Chevron* doctrine's deference to agency decision-making into the WTO Agreements, but the GATT panels did not afford much deference to the administering authorities); Venkataraman, *supra* note 52, at 598–99 (stating that before Article 17.6 had been dealt with by the WTO panel, some commentators felt that states would not be afforded the flexibility of *Chevron* in interpreting certain provisions of the WTO Agreements); *see also* Kevin P. Cummins, *Trade Secrets: How the Charming Betsy Canon May Do More to Weaken U.S. Environmental Laws Than the WTO's Trade Rules*, 12 FORDHAM ENVTL. LAW J. 141, 145 (2000) (explaining that while some U.S. courts interpreted regulations under *Chevron*, other courts began using the "Charming Betsy" canon, which urges Congress not to construe an act in a manner contrary to international law).

reasonable.[112] But do parallels to agency deference in statutory analysis compare with trade policy analysis between the WTO and nation-states? Croley and Jackson maintain that it does not,[113] due to the difference in wording between the reasonable and permissive standards,[114] and the different environment of customary international law compared wirh congressional statutory interpretation.[115]

How much deference should be granted, then, to judicial interpretation of the WTO? Judicial activism by panel members is rather limited at the WTO.[116] The legitimacy of an

112. *See* Levi Strauss & Co. v. United States, 133 F. Supp. 2d 693 (Ct. Int'l Tr. 2001) (discussing the effect of *Chevron* as a limitation on the concept of judicial review as espoused in Marbury v. Madison); *see also* Croley, *supra* note 82, at 203 (stating that when the court determines the agency's interpretation to be reasonable, then they will defer to that interpretation despite the fact that the court may have interpreted it differently itself); Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1536 (2001) (noting that the rationale for this deference to agency interpretation lies in the courts' realization that justices are not members of either political branch of government, so it is appropriate for the political branch to delegate such authority to the agencies to resolve the competing interests which Congress did not resolve).

113. *See* Croley, *supra* note 82, at 205–06.

114. *See id*. at 203 (noting that the *Chevron* court repeatedly used both words); *see also* Joost Pauwelyn, *Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 572–73 (2001) (explaining that the Appellate Body of the WTO confirmed that interpretation should neither encompass reducing clauses of a treaty to redundancy nor impute words into a treaty that are not there to find concepts that are not there); Michael F. Williams, *Charming Betsy, Chevron, and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law*, 32 LAW & POL'Y INT'L BUS. 677, 702–03 (noting that the "Charming Betsy" canon will generally prevent federal agencies from violating international law because the statutory construction under the canon adheres to the "permissible" standard for interpreting its responsibilities).

115. *See* Croley, *supra* note 82, at 206 (explaining that the U.S. realizes that statutory construction may either aid or complicate statutory ambiguities, while under Articles 31 and 32 of the Vienna Convention, all facial ambiguities are investigated); *see also* Daniel H. Joyner, *A Normative Model for the Integration of Customary International Law into United States Law*, 11 DUKE J. COMP. & INT'L L. 133, 151–52 (2001) (noting that it may be appropriate to apply the *Chevron* doctrine to customary international law and any abuse of discretion could be policed on appeal); Eric J. Pan, *Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes*, 38 HARV. INT'L L.J. 517–18 (1997) (asserting that having an internal, non-adjudicatory authoritative interpretation mechanism will result in greater speed and clarification).

116. *See* Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?* 11 ST. JOHN'S J. LEGAL COMMENT. 307, 328 (1996) (noting that while it is less likely that panels will engage in judicial activism at the same level under GATT, the interim review process and appeals stage serve as checks against any abuse of discretion); *see also* Gaffney, *supra* note 85, at 1193 (stating that Article 3(2) of the DSU has been viewed as a cautionary measure for panel members because it explicitly specifies that the panel cannot add to or diminish the rights and obligations of the members under WTO Agreements); Symposium, *Intellectual Property Law in the International Marketplace: Trade-Related Aspects of Intellectual Property Rights: Enforcement and Dispute Resolution: Comment: Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 365 (1997) (explaining that panel members are fact finders and must not exceed their mandate, as the agreements of government negotiators must be respected and interpreted, not re-written).

international legal order extends only as far as the neutrality it establishes.[117] Again, the voluntary membership of participants requires utmost neutrality of its judicial panels.[118]

> Panels should be cautious adopting "activist" postures in the GATT/WTO context. For one thing, the international system and its dispute settlement procedures, in stark contrast to most national systems, depend heavily on voluntary compliance by participating members. Inappropriate panel "activism" could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself. Relatedly, panels should recognize that voluntary compliance with panel reports is grounded in the perception that panel decisions are fair, unbiased and rationally articulated.[119]

The Appellate Body appears to be heeding the warning, as it has identified legal errors in panels' supporting analysis,[120] but has rarely reversed the ultimate holding of the first panel trade disputes.[121] But the lack of stare decisis for Appellate Body reports may check judicial activism in the long run.[122]

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117. *See* Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence and Free Trade Practice, Global Economics and their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 750 (2001) (stating that legitimacy is premised on the notion of all the states putting trust in tacit agreements under the WTO); *see also* Heinz Hauser & Sacha Wunsch-Vincent, *A Call for a WTO E-Commerce Initiative*, 6 INT'L J. COMM. L. & POL'Y 1, 7 (2001) (explaining the potential for the WTO to advance electronic commerce due to its neutral technology and market openness). *See generally* Symposium, *supra* note 14, at 454 (discussing ways to further democratize the WTO to enhance its legitimacy).

118. *See* Symposium, *supra* note 104, at 107 (discussing the difference between WTO panel members and Supreme Court Justices in that the panel members are appointed ad hoc, do not have life tenures, and may be subject to influences of interest groups); *see also* Browne, *supra* note 84, at 428 (suggesting that appointments are needed to ensure neutrality among the panel members); Thaddeus McBride, *Rejuvenating the WTO: Why the U.S. Must Assist Developing Countries in Trade Disputes*, 11 INT'L LEGAL PERSP. 65, 91–92 (1999) (discussing how an Advisory Centre on WTO Law would help monitor neutrality by panel members).

119. *See* Croley, *supra* note 82, at 212.

120. *See* Mark Clough QC, *WTO Dispute Settlement—A Practitioner's (?) Perspective*, 24 FORDHAM INT'L L.J. 252, 264 (2000) (noting that the majority of disputes are settled before the panel stage); *see also* Sue Ann Mota, *World Trade Organization: An Analysis of Disputes*, 25 N.C. J. INT'L L. & COM. REG. 75, 94 (1999) (noting that the Appellate Body reversed panel findings in disputes over the United States' prohibition over importation of shrimp products where the panel had accepted briefs from non-state parties); David Palmeter & Petros C. Mavroidis, *WTO Legal System: Sources of Law*, 92 AM. J. INT'L .L. 398, 402 (1998) (discussing the persuasive impact of prior panel decisions that do not serve as precedent).

121. *See* John J. Kim & Gregory Gerdes, *International Institutions*, 32 INT'L LAW. 575, 588 (1998) (noting that the WTO's Appellate Body generally upheld the panel's conclusions). *See generally* Raj Bhala, *Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 877 (2001) (noting that prior holdings direct the thinking of the WTO Appellate Body in a certain direction); Eldon V. C. Greenberg, Paul S. Hoff & Michael I. Goulding, *Japan's Whale Research Program and International Law*, 32 CAL. W. INT'L. L.J. 151, 194 (2002) (illustrating the Appellate Body's decision to uphold findings of the panel).

122. *See* Julie H. Paltrowitz,, *A "Greening" of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 BROOK. J. INT'L L. 1789, 1793 n.23 (2001) (noting that the WTO dispute resolution system does not possess the same rationale regarding stare decisis as the United States does); *see also* Hertz, *supra* note 35, at 280 (noting that WTO law does not incorporate the formal common law doctrine of stare decisis, which makes judicial precedents binding). *But see* Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 331 (1998) (noting that lack of stare decisis would severely undermine not only the credibility and stability of the dispute settlement system, but the entire WTO system).

3. Transparency

Transparency issues remain the most controversial at this moment in the WTO's evolution,[123] as the protests in Seattle and at the IMF/World Bank illustrated.[124] Two areas in particular highlight the transparency issue of WTO dispute resolution reform: confidentiality of proceedings and admission of amicus briefs.[125]

Proceedings by both the panel and Appellate Body remain closed.[126] While there is a "blind awareness" in public, proceedings are technically closed to the public-at-large.[127] Critics contend that if greater public access to documents and proceedings existed, then there would be greater WTO awareness in general.[128] Yet, some fear that greater access would also lead to greater manipulation and "grandstanding" by governments to influence decisions.[129] But if the

123. *See* Kristin Woody, *World Trade Organization's Committee on Trade and Environment*, 8 GEO. INT'L ENVTL. L. REV. 459, 465 (1996) (citing transparency as one of the controversial issues); *see also* Peter K. Yu, *Toward a Non-zero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 585–86 (2002) (noting lack of transparency of proceedings as one of the weaknesses of the dispute settlement mechanism). *See generally* John Jackson, *Reflections on Constitutional Changes to the Global Trading System*, 72 CHI.-KENT L. REV. 511, 517 (1996) (noting that transparency has been an enormous weakness of international organizations and structures).

124. *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 274 (2000) (noting protestors' objections to the closed-door policy of the tribunals); *see also* Yu, *supra* note 123, at 586 (noting the lack of transparency as one of the weaknesses that was intensified by protests in Seattle). *See generally* John C. Reitz, *A Life in the Craft of Comparative Law*, 100 MICH. L. REV. 1453, 1469 (2002) (noting that concerns about transparency have been a reason for protests).

125. *See* William H. Meyer & Boyka Stefanova, *Human Rights, The UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, 518 (2001) (citing amicus curiae briefs and opening dispute settlement proceedings to the public as steps to increase transparency); *see also* Feeney, *supra* note 106, at 114 (citing lack of transparency and discretionary refusal of amicus briefs as major problems with DSU); S. Bruce Wilson, *Can the WTO Dispute Settlement Body be a Judicial Tribunal Rather than a Diplomatic Club?*, 31 LAW & POL'Y INT'L BUS. 779, 779–80 (2000) (noting improved transparency, amicus briefs, and improved procedures to deal with conflicts as reforms needed in order to have a true adjudicatory model in the WTO).

126. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, Article 17.10 (Feb. 28, 1997) (noting that the proceedings of the Appellate Body shall be confidential and that the reports are to be drafted without the presence of the parties to the dispute), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

127. *See* Federal Rules Decisions, 166 F.R.D. 515, 615 (May 25, 1995) (noting criticism of the closed nature of the proceedings); *see also* F. Amanda DeBusk & Michael A. Meyer, *Antidumping and Countervailing Duty Disputes: Comparisons between the NAFTA and the WTO Agreement*, 1-SPG NAFTA: L. & BUS. REV. AM. 31, 42–47 (1995) (discussing that proceedings are generally closed to non-government representatives); Hudec, *supra* note 17, at 43 (stating that the proceedings are closed to the public).

128. *See* Hudec, *supra* note 17, at 44 (noting that public access to proceedings would lead to legitimacy of WTO's legal process); *see also* Kelly Jude Hunt, *International Environmental Agreements in Conflict with GATT—Greening GATT after the Uruguay Round Agreement*, 30 INT'L LAW. 163, 190 (1996) (stating that WTO can achieve a greater awareness while also allowing greater public access). *See generally* Mark A. Drumbl, *Does Sharing Know Its Limits? Thoughts on Implementing International Environmental Agreements: A Review of National Environmental Policies, A Comparative Study of Capacity-Building*, 18 VA. ENVTL. L.J. 281, 296 (1999) (illustrating that public access leads to awareness).

129. *See* Hudec, *supra* note 17, at 45 (arguing that greater access would lead to "grandstanding" behavior to satisfy public demands). *See generally* David A. Gantz, *Failed Efforts to Initiate the "Millennium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349, 363 (2000) (noting general opposition to participation by public and non-governmental organizations). *But see* Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 608 n.1 (2000) (citing criticisms of non-transparency by Western commentators).

procedures of the WTO become more accepted, such influences would probably be minimized.[130] As Hudec explains, "The more the WTO accomplishes, the brighter that spotlight will become, with or without confidentiality restrictions. Therefore, instead of thinking about how to run away from the unpleasant legal behaviors caused by this public attention, the WTO should think about how to manage it."[131]

The second issue combines transparency with influence and culminates in the submission of amicus briefs.[132] The underlying issue is the general access of outside interest groups, ranging from NGOs to corporate entities, to influence trade policy.[133] Here again, the rule-based versus power-based dynamic comes to the fore.[134] The WTO should take pride in the amount of publicity and reaction it has garnered, as the growing importance of the WTO's strength is recognized by the protests and demands for admission.[135] The arrival of outside opinions to the WTO is inevitable.[136] Thus, "rather than suffer continued criticism from a progressively less

130. *See* Abbott, *supra* note 10, at 185 (noting that proceedings are designed to reduce political influence in the outcome); *see also* Peter C. Maki, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, 9 MINN. J. GLOBAL TRADE 343, 343 (2000) (recognizing the institution of new procedures that increase the power of dispute settlement by referring to rules rather than political influence); Reich, *supra* note 23, at 846 (discussing the ability of the WTO institution to isolate dispute settlement procedures from political influence on paper as well as in reality).

131. Hudec, *supra* note 17, at 46 (noting that increased public scrutiny has resulted in lengthier panel proceedings and zealous advocacy efforts by government lawyers).

132. *See* David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 50 EMORY L.J. 717, 728 (2001) (noting that greater transparency can be achieved by amicus briefing in certain forms of dispute resolution); *see also* Barfield, *supra* note 105, at 413 (maintaining that amicus briefs may help to ensure transparency of the proceedings); Symposium, *supra* note 104, at 102–03 (discussing the United States' argument that amicus briefs will increase the transparency of the WTO).

133. *See* Shaffer, *supra* note 94, at 67 (noting demands for greater access by private groups to WTO decision-making); *see also* Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, 32 INT'L LAW. 901, 918–19 (1998) (reflecting that many NGOs are seeking more direct input opportunities, especially on matters in which the participating governments are not espousing important NGO views); Warren H. Maruyama & Timothy M. Reif, *Co-Chairs' Introduction*, 31 LAW & POL'Y INT'L BUS. 551, 554 (2000) (discussing an urgent need to increase the transparency and access to the system by the public).

134. *See* Steve Charnovitz *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L.J. 173, 201 (Nov./Dec. 2000) (contrasting the WTO, a rule-based organization, with the U.N., a power-based organization); Kevin C. Kennedy, *I. Trade and the Environment: Implications for Global Governance: Why Multiateralism Matters in Resolving Trade-Environment Disputes*, 7 WIDENER L. SYMP. J. 31, 64 (Spring 2001) (noting that developing countries have found success in legal challenges against developed countries under the WTO rules-based legal regime); Pauwelyn, *supra* note 1, at 338 (April 2000) (explaining that while a rules-based system has increased the number of disputes brought to the WTO, a stronger enforcement mechanism of compliance is needed to ensure "legalization" of such disputes).

135. *See generally* Gary Minda, Note, *Commanding Heights: The Battle Between Government and the Marketplace that Is Remaking the Modern World*, 71 U. COLO. L. REV. 589, 626 (2000) (illustrating the increased effect of the Seattle protests on global awareness of WTO, its influence, and functions); *China's WTO entry vital for world economy*, China Daily, *available at* http://www1.chinadaily.com.cn/news/cb/2001-11-08/42657.html (last visited Nov. 8, 2001) (illustrating increased importance of WTO though the acceptance of China); *WTO Protests Awaken '60's-Style Activism*, CNN, *available at* http://www.cnn.com/1999/US/12/02/wto.protest.perspective/ (last visited Dec. 2, 1999). (illustrating increased activism due to increased strength of WTO).

136. *See* Vanessa P. Sciarra, *Note, World Trade Organization: Services, Investment, and Dispute Resolution*, 32 INT'L LAW. 923, 930 (1998) (discussing how developments outside the WTO system will influence how the WTO addresses issues); *see also* Gaffney, *supra* note 85, at 1190 (noting the general principles found outside of the WTO system may also influence the interpretation of WTO rules). *See generally* William M. Reichert, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219, 242 (1996) (illustrating the WTO's interest in outside public opinion).

effective confidentiality policy, WTO governments should accept the inevitability of less cooperative legal practice, and should deal with the negative effects of this changed behavior by strengthening control and management of the panel procedures."[137]

III. International Human Rights Court

The Inter-American System of human rights adjudication is unique in that it takes a multi-layered approach,[138] quite different from the WTO dispute settlement procedures.[139] At each step of the process, there are always two separate, but equal, paths a complainant can follow.[140] The primary aim of this dual approach may have been to encompass the variable nature of human rights atrocities.[141] However, the very nature of this dual approach complicates its efficacy in the human rights arena due to its conflicting duties to both the individual and society.[142] After a brief history, this section will explain the process of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, then conclude by highlighting the criticisms of the Inter-American human rights process.

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137. *See* Hudec, *supra* note 17, at 46 (suggesting that the WTO should recognize its increased role and legitimacy by managing public access to documents and hearings).

138. *See* Victor Rodriguez Rescia & Marc David Seitles, *Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 599–600 (2000) (stating that the Inter-American System has a dual structure); *see also* Irum Taqi, Note, *Adjudication Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach*, 24 FORDHAM INT'L L.J. 940 (2001) (illustrating the multi-layered approach of the Inter-American adjudication model). *See generally* Fionnuala Ni Aolain, *Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101 (1995) (referring to the multi-layered approach of the Inter-American Court).

139. *See* GATT, *supra* note 33, at 1226 (clarifying the rules and procedures of settlements under the WTO); *see also* James Mercury & Bryan Schwartz, *Creating the Free Trade Area of the Americas: Linking Labor, the Environment, and Human Rights to the FTAA*, 1 ASPER REV. INT'L BUS. & TRADE L. 37, 54 (2001) (criticizing the procedures of dispute settlement under the WTO); Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 80–82 (1999) (discussing the resolution of disputes under the WTO).

140. *See* Seitles, *supra* note 138, at 600 (noting the rise of the dual system of human rights adjudication in the Inter-American System after the American Convention on Human Rights); *see also* Michael F. Cosgrove, Note, *Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, 32 CASE W. RES. J. INT'L L. 39, 41–42 (2000) (discussing the strengthening of the Inter-American System by the creation of the dual system); Patricia E. Standaert, *Other International Issues: The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT'L L. 519, 530 (1999) (discussing the advantages of the dual approach in being able to balance the power within the Inter-American System).

141. *See* Rescia, *supra* note 138, at 600 (noting that the expansion of the responsibilities under the Inter-American Commission allow for varying types of petitions against human rights abuses); *see also* Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 353–54 (1997) (discussing the evolution and transformation of the Inter-American System in being able to better deal with human rights); Standaert, *supra* note 140, at 532 (comparing the traditional role of a mediator with the effects that the dual system has upon the mediator).

142. *See* Standaert, *supra* note 140 at 532–33 (discussing the undermining effect the dual system has on the trust that must be placed in the mediator by the conflicting parties); *see also* Jo M. Pasqualucci, *Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 330–32 (1994) (discussing the rights of society and the individual with respect to human rights); Rescia, *supra* note 138, at 625 (suggesting that the dual system may result in the victim being forced to undergo two procedures, resulting in dual victimization).

A. Brief History

In 1948, the Ninth International Conference of American States at Bogota, Colombia, realized the international scope of human rights abuses and first proposed the formation of an inter-American human rights court.[143] Resolution XXXI establishes the purpose of the inter-American court in its title, *The Inter-American Court to Protect the Rights of Man.*[144] The Conference suggested that these "Rights of Man . . . should be guaranteed by a juridical organ, inasmuch as no right is genuinely assured unless it is safeguarded by a competent court, . . . [whose] juridical protection, to be effective, should emanate from an international organ."[145]

After two Inter-American Conferences[146] and five Meetings of Consultations,[147] the Inter-American Council of Jurists ("Council") in 1959 was assigned the task of preparing two draft conventions, one on the creation of an Inter-American Court of Human Rights ("Court") and the other, on an Inter-American Commission on Human Rights ("Commission").[148] While the Council outlined proposals for both entities, the Commission began its work first and is an autonomous organ of the Organization of American States (OAS).[149] On April 10, 1967, the Commission presented the American Convention on Human Rights, which created

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143. *See* Christian A. Levesque, *International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. U. L. REV. 755, 766 n.60 (2001) (noting that the court was established in Bogota to ensure to protect against human rights abuses); *see also* Rescia, *supra* note 138, at 608 (stating that the court was created to ensure that there was a genuine protection against human rights abuses); Inter-American Court of Human Rights, General information, University of Minnesota Human Rights Library, *available at* http://www1.umn.edu/humanrts/iachr/general.htm (last visited Sept. 26, 2002), *citing* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82doc.6rev.1 (1992) (stating that the Bogota Conference noted that human rights should be guaranteed by a judicial mechanism).

144. *See* Basic Documents, Inter-American Commission on Human Rights, The Organization of American States, *available at* http://www.cidh.oas.org/basicos/basic1/htm (last visited Sept. 26, 2002) (quoting the resolution XXXI).

145. *See* Inter-American Court of Human Rights, General Information, University of Minnesota Human Rights Library (1992) (noting that the Inter-American Court aims to protect the rights of individuals), *available at* http://www1.umn.edu/humanrts/iachr/general.html (last visited Dec. 28, 2000).

146. *See* Rescia, *supra* note 138, at 608–609 (discussing the Ninth and Tenth Inter-American Conferences); *see also* Dinah Shelton, *Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333, 334 (1994) (noting the developments that occurred in the Ninth and Tenth Inter-American Conferences); Inter-American Court of Human Rights, *supra* note 143 (discussing the history of the Inter-American Conferences).

147. *See* Rescia, *supra* note 138, at 609–10 (noting the role of the Fifth Meeting of Consultation in the development of the Inter-American System); *see also* Shelton, *supra* note 146, at 334–35 (noting the proclamation of the Fifth Meeting of Consultation that there must be harmony in the Americas regarding human rights); Inter-American Court of Human Rights, *supra* note 143 (relaying the instructions of the Fifth Meeting of Consultation to the Inter-American Council of Jurists).

148. *See* Rescia, *supra* note 138, at 609-10 (stating that the Council of Jurists was assigned the task of creating the Court and the Commission); *see also* Inter-American Court of Human Rights, *supra* note 143 (noting the Council of Jurists carried out the tasks assigned). *See generally* Shelton, *supra* note 146, at 334–35 (discussing the creation of the Court and the Commission).

149. *See* Cosgrove *supra*, note 140, at 41–42 (noting that the Inter-American human rights system originates from the Organization of American States); *see also* Rescia, *supra* note 138, at 600 (noting the amendment to the OAS charter making the Inter-American Commission a principal part of the OAS). *See generally* Mary Caroline Parker, Note, *"Other Treaties": The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U. L. REV. 211, 212–13 (1983) (discussing the development of the Inter-American System of protecting human rights as coming from the OAS).

the Inter-American Court of Human Rights in chapter VII, part II of its Convention.[150] The dual nature of the inter-American human rights system's historical underpinnings will continue to pervade almost all aspects of the Commission's and Court's procedures.[151]

B. Inter-American System

1. First Instance of Adjudication—"Friendly Settlements"

The Inter-American Commission on Human Rights is unique in that it serves both as mediator and adjudicator in human rights cases.[152] The dual role of the Commission allows it to serve as a clearinghouse for human rights claims,[153] yet also to arbitrate and recommend its own binding solutions.[154] The three central roles of the commission are: 1) fact finder, 2) mediator/advisor, and 3) adjudicator.[155]

The selection of judges to the Commission is similar to the procedure adopted by the WTO. The judges on the Commission are nominated in slates of three by members of the

150. *See* Inter-American Court of Human Rights, *supra* note 143 (noting that the Inter-American Court of Human Rights was created in San Jose, Costa Rica, by the American Convention on Human Rights); *see also* Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) (noting the OAS developed the American Convention on Human Rights, which subsequently created the Inter-American Court of Human Rights). *See generally* Joseph G. Bergen, Note, Princz v. The Federal Republic of Germany: *Why the Courts Should Find that Violating Jus Cogen Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT'L L. 169, 197 (1999) (stating that the Inter-American Court of Human Rights was created to enforce the American Convention on Human Rights).

151. *See* Rescia, *supra* note 138, at 600 (discussing the dual nature of the Inter-American human rights system); *see also* Cosgrove, *supra* note 140, at 42 (noting the dual role of the Inter-American Commission on Human Rights); Standaert, *supra* note 140, at 532–33 (discussing the shortcomings of the dual-role system).

152. *See* Jo M. Pasqualucci, *Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 306 (1995) (discussing the role of the Commission in resolving human rights disputes within the Inter-American System); *see also* Jenny R. Culler, Note, *U'wa Struggle to Protect their Cultural Lands: A Framework for Reviewing Questions of Sovereignty and the Right to Environmental Integrity for Indigenous Peoples*, 29 GA. J. INT'L & COMP. L. 335, 355 (2001) (noting that the Commission has taken on the role of a mediator to protect human rights within the OAS); Standaert, *supra* note 140, at 532–33 (noting the disadvantages to the dual role of the Commission).

153. *See* Beth Lyon, *Efforts and Opportunities to Use International Law to Alleviate Poverty in the United States*, 7 HUM. RTS. BR. 6, 7 (2000) (noting that the Commission is the first adjudicator of human rights issues in the OAS); *see also* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141, 163–64 (2001) (stating that once an individual has exhausted local claims, they must first seek redress from the Inter-American Commission); Scott Splittgerber, Note, *Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L.J. 185, 216 (1996) (noting that for a case to reach the Inter-American Court, it must first be adjudicated in the Inter-American Commission).

154. *See* Schaak, *supra* note 153, at 164 (noting that the Commission seeks to settle the dispute and then reports its conclusions); *see also* Splittgerber, *supra* note 153, at 215–16 (discussing the functions of the Inter-American Commission); Henry T. King, Jr., *Nuremberg and Sovereignty*, 28 CASE W. RES. J. INT'L L. 135, 138–39 (1996) (noting that the Commission can issue opinions in disputes that have been brought when the state is a party to the American Convention on Human Rights).

155. *See* Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L.J. 409, 436 (2002) (stating that the Inter-American Commission prefers to mediate a friendly settlement when there are serious disputes among governments); *see also* King, *supra* note 154, at 138–39 (noting the role of the Inter-American Commission as an advisor and an adjudicator); Antonio Augusto Cancado Trindade, *Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 26 (1998) (noting the role of the Inter-American Commission as a fact finder).

OAS.[156] One of the proposed judges must not be from the nominating country.[157] The judge is selected for a one-time renewable term of four years[158] by majority vote of the General Assembly of the OAS.[159]

Any person, group of persons, NGO, or state can lodge a petition with the Commission.[160] However, a state can only submit a petition after it has accepted the Commission's jurisdiction.[161] While the state's submission to the Commission is voluntary,[162] it can also be temporary,[163] allowing the state to submit to its jurisdiction on a case-by-case basis after depositing such an affirmative statement with the Commission.[164] A petition may be filed only after exhausting local remedies.[165] Exceptions are made for those denied local due process or other denial of justice issues.[166] In addition, the case cannot be pending before another international adjudicatory body.[167] After a complaint has been lodged, the Commission will assess whether a violation has been committed,[168] then request one of two actions, either an initiation of

156. *See* American Convention on Human Rights, Nov. 22, 1969, art. 36(2), 9 INT'L LEGAL MATERIALS 99, 111 (1970), *available at* http://www.cidh.oas.org/Basicos/basic3.htm; Statute of the Inter-American Commission on Human Rights, OAS Gen. Ass. Res. 447, 9th Sess., art. 3(2) (last visited Oct. 1979), *available at* http://www.cidh.oas.org/Basicos/basic15.htm.

157. *See* American Convention, *supra* note 156, art. 36 (2), at 111 (stating that members of the OAS must nominate at least one foreign judge); Statute of the Commission, *supra* note 156, art. 3(2) (noting that at least one of the nominees must be a foreigner).

158. *See* American Convention, *supra* note 156, art. 36 (1), at 111; Statute of the Commission, *supra* note 156, at art. 5 (describing the durational limit of the appointed judge); *see also* Rules of Procedure of the Inter-American Commission on Human Rights, Inter-Am. C.H.R., 108th Sess., art. 1(3) 40 INT'L LEGAL MATERIALS 752 (stating that the members of the Commission shall be elected for four years and may be re-elected only once), *available at* http://www.cidh.oas.org/Basicos/basic16.htm (last visited Dec. 8, 2000).

159. *See* American Convention on Human Rights (Pact of San Jose, Costa Rica), Nov. 22, 1969, OEA/ser. K/XVI/1, doc. 65, rev.1, corr.1, art 34–40 (1970) (entered into force July 18, 1978), *available at* http://fletcher.tufts.edu/multi/texts/BH547.txt (last visited Dec. 27, 2000) (stating that it takes a majority vote of the General Assembly of the OAS to select a judge).

160. *See* American Convention, *supra* note 156, at 113 art. 44; Rules of Procedure, *supra* note 158, at 757 art. 23.

161. *See* American Convention, *supra* note 156, at 113 art. 45. In order to level the educational and economic disadvantages of human rights victims, amicus briefs, in the form of surrogate representation is encouraged, but only by a list of those groups who have submitted to the jurisdiction of the Commission. In addition, since the Commission serves as fact finder, it can investigate whomever its pleases to gather the facts necessary for its determination. *Id*. at art. 44.

162. *See* American Convention, *supra* note 156, art. 45(1), at 113.

163. *Id*. at art. 45(3).

164. *Id*. (noting that any state is permitted to submit to the jurisdiction of the Commission on a case-by-case basis).

165. *Id*. at art. 46(1)(a); see also Rules of Procedure, *supra* note 158, at 760 art. 31(1).

166. *See* American Convention, *supra* note 156, at 113 art. 46(2); *see also* Rules of Procedure, *supra* note 158, at 760-61 art. 31(2).

167. *See* American Convention, *supra* note 156, art. 46(1)(c), at 113; *see also* Rules of Procedure, *supra* note 158, art. 33(1)(a), at 760–61.

168. *See* American Convention, *supra* note 156, at 114 art. 48 (1)(d) ; *see also* Statute of the Commission, *supra* note 156, at art. 19(a); Rules of Procedure, *supra* note 158, at 761 art. 37(2).

"friendly settlement" negotiations[169] or submission to the Court as a "contentious" concern.[170] The Commission's recommendation for Court action is severely limited by the "friendly settlement" requirement.[171] This requirement can only be bypassed by the "provisional measure" at the rare discretion of the Commission in cases of "extreme gravity or urgency."[172]

Article 48.1.f. of the Commission defines its role as mediator in the "friendly settlement" clause of the American Convention.[173] The Commission must not only offer the opportunity for negotiations, but it must also offer itself as mediator to the dispute.[174] Discretion to utilize the "friendly settlement" option rests with the parties, not the Commission.[175] If a settlement is

169. *See* American Convention, *supra* note 156, at 115 art. 48(1)(f); *see also* Rules of Procedure, *supra* note 158, at 762 art. 41.

170. *See* American Convention on Human Rights (Pact of San Jose, Costa Rica), Nov. 22, 1969, OEA/ser. K/XVI/1, doc. 65, rev.1, corr.1, art 48.1.f (1970) (entered into force July 18, 1978) (stating that "[t]he Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention"), *available at* http://fletcher.tufts.edu/multi/texts/BH547.txt. (last visited Dec. 27, 2000); Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U.J. INT'L L. & POL'Y 653, 661 (1994) (discussing the role of the Commission under the American Convention); Mary Caroline Parker, Note, *"Other Treaties": The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U.L. REV. 211, 212-13 (1983) (noting the responsibilities delegated to the Commission).

171. *See* Pasqualucci, *supra* note 152, at 317–18 (discussing how the Commission can serve multiple purposes including that of factual investigator, mediator, and prosecutor. However, once relieved of its prosecutorial role, it may act to facilitate a settlement); *see also* Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 10–11 (1996) (stating that when states refuse to take legal responsibilities for their violations, an offer of *ex gratia* compensation would normally be made during negotiations for a friendly settlement); Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 10–11 (2000) (noting that under the preventative functions of the Commission, recommendations for changes can be made to adjust nonconforming laws).

172. *See* Thomas Buergenthal, *Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 241 (1982) (discussing a provision in the Inter-American Commission which allows the Commission in "cases of extreme gravity and urgency" to immediately request adoption of provisional measures by the Court); David J. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U.J. INT'L L. & POL'Y 95, 112, 112 (1993) (quoting the American Convention on Human Rights, Article 63(2) as stating: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration."); Pasqualucci, *supra* note 152, at 311–312 (stating that the Court has the power to grant an extraordinary remedy such as an injunction but that this power is limited by Article 63(2) of the Convention on Human Rights to cases of "extreme gravity and urgency").

173. *See* American Convention, *supra* note 156. at art. 48.1.f.

174. *Id*.

175. *See* Standaert, *supra* note 140, at 527 (noting that the Commission now asks the parties if they wish to use the "friendly settlement" procedures).

reached, the case is considered closed after a brief report, detailing only the statement of facts and solutions,[176] is submitted to the Secretary General of the OAS.[177]

If a stalemate persists, the Commission then becomes prosecutor and should carry out its investigation, including active fact-finding from the state party,[178] and transmit its report to the parties of the dispute, in private.[179] If there is no agreement after three months from the report's submission to the parties, the Commission, by majority vote of its seven member judges, can publish the report and its recommendations.[180]

As the Commission is both a mediator and an adjudicator, its enforcement powers and remedies are limited.[181] For settlements, in theory, the country bears the responsibility of submitting updated reports to the Commission. The Argentina cases illustrate otherwise.[182] As for remedies, the Commission can only offer its discretionary recommendations or refer the "con-

176. *See* Dr. Kristen Henrard, *Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595, 623 (1999) (stating that the Inter-American Court of Human Rights views the duty to investigate as a serious matter); *see also* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451, 478 (1990) (declaring that the IACHR has determined "a right to remedy" as including the obligation to investigate and to prosecute); Standaert, *supra* note 140, at 523 (remarking about the right and obligation of the IAHRC to investigate).

177. *See* Henrard, *supra* note 176, at 624 (stating that the Human Rights Committee has repeatedly held that state parties also have an obligation to investigate); *see also* Symposium, *Role of Forgiveness in the Law, Presentation before the Fordham University School of Law*, 27 FORDHAM URB. L. J. 1347 (2000) (stating that states have the obligation to investigate and report factual findings to the commission); Standeart, *supra* note 178, at 522 (writing that the IACHR can request information from the state and obligate the state to investigate).

178. *See* American Convention, *supra* note 170, at art. 50-5 (specifying the procedures for publishing the report and its recommendations if there is no agreement).

179. *See* Standaert, *supra* note 140, at 524 (noting the Commission's role as mediator); *see also* Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT'L L. 559, 592–93 (1993) (detailing the Commission's role as an adjudicator); Pasqualucci, *supra* note 152, at 317 (noting the Commission's role as both mediator and adjudicator).

180. *See* American Convention, *supra* note 170, at art 50-5 (describing what the Commission must do when a matter has not been settled within three months).

181. *See* Standaert, *supra* note 140, at 524 (noting the Commission's role as mediator); *see also* Brescia, *supra* note 179, at 592–93 (implying Commission's role as an adjudicator); Pasqualucci, *supra* note 152, at 317 (noting the Commission's role as both mediator and adjudicator).

182. *See* Standaert, *supra* note 140, at 527 (noting that the Argentina cases are considered one of the crowning achievements of the "friendly settlement" procedure). While the American Convention requires that the state provide proof of enforcement of the Court's rulings, Argentina shifted the burden to the human rights victim to prove the acts committed against them, even after the new Argentina government detained its former President, Carlos Menem, and admitted its wrongs in the "Dirty War." *Id*. at 528.

tentious" case to the Court.[183] While the recommendations are binding,[184] enforcement rests solely upon the voluntary good will of the party.[185]

2. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights also has a dual nature as both the court of last resort and as advisor to members on human rights issues.[186] The Court's role as a judicial institution of the OAS is grounded in its advisory jurisdiction,[187] thus entwined in a very unique way with distinct consequences.[188]

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183. *See* American Commission, *supra* note 170, at art. 61 (stating that the Commission has a right to submit cases to the Court); *see also* Thomas Burgenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 9 (1985) (explaining that the Commission has the power of a "tribunal of first instance," in addition to its power to refer contentious cases to the Court); Michael C. Cosgrove, *supra* note 140, at 48 (noting that the Commission can refer cases to the Court if a state agrees to the Court's contentious jurisdiction).

184. *See* Ismene Zarifis, *News from the Inter-American System*, 9 HUM. RTS. BR. 31, 31 (2001) (outlining the change in the role of the Inter-American Commission on Human Rights under its new Rules of Procedure enacted May 1, 2001); *see also* Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 288 n.1 (1999) (discussing the various international tribunals that adjudicate petitions filed by victims of human rights abuses against national governments that have agreed to subject themselves to scrutiny by the tribunals); Inara K. Scott, Note, *Inter-American System of Human Rights: An Effective Means of Environmental Protection?* 19 VA. ENVTL. L.J. 197, 201 (2000) (proposing and discussing a potential role for the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights with regard to environmental issues in Latin America).

185. *See* Inter-American Commission on Human Rights: Rules of Procedure, May 1, 2001, 40 INT'L LEGAL MATERIALS 752, 764 (2001) (setting forth the follow-up procedures taken by the Commission to enforce its recommendations); *see also* United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights, 9 INT'L LEGAL MATERIALS 710, 738 (1970) (providing the input of the United States regarding the functions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as established by the American Convention). *See generally* Thomas Buergenthal, *supra* note 172, at 241 (providing a comprehensive overview of the Inter-American Court of Human Rights and related OAS organs).

186. *See* Inter-American Commission, *supra* note 185, at 770 (delineating the role of the Commission in conjunction with the Inter-American Court of Human Rights); *see also* Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 242–51 (2002) (describing and providing an overview of the advisory practice as well as other functions of the Inter-American Court of Human Rights); Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2393 (1993) (discussing various international dispute settlement organizations and tribunals).

187. *See* American Convention on Human Rights, Nov. 22, 1969, OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr., art. 64, 9 INT'L LEGAL MATERIALS 673, 692 (1970) (setting forth the Court's ability to provide advisory opinions to member states of the OAS); *see also* Thomas Buergenthal, *Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 2 (1985) (describing the Court's advisory jurisdiction); Pasqualucci, *supra* note 186, at 242–51 (describing and providing an overview of the advisory practice as well as other functions of the Inter-American Court of Human Rights).

188. *See* Buergenthal, *supra* note 187, at 3 (describing the consequences of the Court's exertion of its advisory jurisdiction); *see also* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 721–22 (1999) (discussing the role of the OAS organs in criminal accountability for human rights violations). *See generally* Cesare P.R. Romano, *Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (discussing the role of various international tribunals).

Depending upon the Court's role, its function and jurisdiction may shift to a small degree.[189] For "contentious" cases, only a state party or the Commission can bring suits.[190] The state party must submit to the Commission's jurisdiction in the same manner as for the Commission level report.[191] In addition, the parties must have completed the "friendly settlement" requirement of the Commission process.[192] Decisions by the Court are final and binding,[193] with clarification only granted with respect to the meaning and scope of the rendered decision.[194] Such requests must be made within 90 days of the final report's issue,[195] one of a few explicit time requirements listed throughout the Convention.[196] All proceedings, including the votes, opinions and other data by individual judges, are open.[197] While there is no exact provision concerning amicus briefs, the Court, like the Commission, has authority to fact-find,[198]

189. *See* Organization of American States: Statute of the Inter-American Court of Human Rights, 19 INT'L LEGAL MATERIALS 634, 635 (1980) (the text of the Statute that was adopted by the O.A.S. General Assembly at its ninth regular session held in La Paz, Bolivia, Oct. 1979); *see* American Convention, *supra* note 187, at 691 (outlining the role of the Court in relation to its jurisdiction in certain cases); Buergenthal, *supra* note 185, at 240–43 (describing the different roles assumed by the Inter-American Court of Human Rights and the effect of these roles on its jurisdiction).

190. *See* Inter-American Court of Human Rights: Rules of Procedure, art. 25, 20 INT'L LEGAL MATERIALS 1289 (1981) (detailing the revised rules of procedure describing the parties that may institute proceedings before the Court); *see also* Trindade, *supra* note 171, at 8–24 (describing the revisions of the Court's Rules of Procedures to define its contentious jurisdiction). *See generally* Pasqualucci, *supra* note 152, at 316–21 (describing what parties have standing to bring cases before the Court).

191. *See* American Convention, *supra* note 187, at 691 (providing the guidelines for a party to submit to the jurisdiction of the Court); *see also* Inter-American Court, *supra* note 190, at art. 25 (discussing the guidelines for the institution of proceedings). *See generally* Buergenthal, *supra* note 185, at 236 (1982) (explaining the function and rules of the Inter-American Court of Human Rights).

192. *See* American Convention, *supra* note 187, at 691 (discussing the requirement that the procedures involving the Commission must be completed prior to the Court hearing a case); *see also* Inter-American Court, *supra* note 190, at art. 25. *See generally* Buergenthal, *supra* note 185, at 236–37 (1982) (delineating the procedures which must be completed before a submission is made to the Inter-American Court of Human Rights); Standaert, *supra* note 140, at 522–28 (evaluating the procedures available for friendly settlement in the Inter-American System).

193. *See* American Convention, *supra* note 187, at 693 (stating that "the judgment of the Court shall be final and not subject to appeal."); *see also* Buergenthal, *supra* note 185, at 243 (contrasting the scope and application of the Court's advisory jurisdiction with its contentious jurisdiction). *See generally* Symposium, *International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration: Article & Essays: International Law and the Protection of Human Rights in the Inter-American System*, 19 HOUS. J. INT'L L. 731, 754–56 (1997) (summarizing remarks made on the effect of Court decisions during a panel presentation entitled International Law and the Protection of Human Rights in the Inter-American System).

194. *See* American Convention, *supra* note 187, at 693 (stating that "[i]n case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties…").

195. *See* American Convention, *supra* note 187, at 693 (stating that "the request [must be] made within ninety days from the date of notification of the judgment").

196. *See id*. at 73, 693 (placing a time requirement on requests for clarification of decisions by the Court). *See generally* Inter-American Court, *supra* note 190, at art. 1–55 (delineating the rules of the Court, including all time limitations imposed on parties involved in litigation before the Court); Inter-American Commission, *supra* note 185, at 764 (setting forth the Rules of Procedure of the Inter-American Commission on Human Rights, including all time limitations imposed on parties involved in hearing before the Commission).

197. *See* Organization of American States, *supra* note 189, at 642 (setting forth the procedure and nature of Court proceedings).

198. *See id*. at 642 (1980) (setting forth the procedure and means by which the Court reviews cases); *see also* Cosgrove, *supra* note 140, at 57 (describing the procedures of the Court and Commission in reviewing cases); Pasqualucci, *supra* note 152, at 343–49 (describing the Court's consideration of evidence).

thus implying admissibility of amicus briefs.[199] Article 63 of the Convention is particularly noteworthy, in that it specifically calls for a direct remedy by the "contentious" Court, although the exact definition of the crime and remedy is not clearly articulated.[200] If the Court should find that there has been a violation of the freedoms expressed in the Convention, the Court

> shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[201]

Article 64 grants the Court advisory jurisdiction to interpret the "Convention or . . . other treaties concerning the protection of human rights in the American state."[202] The distinction between member state and state party is important here. For advisory jurisdiction, the Court is not limited to those entities that have submitted to the Commission's jurisdiction,[203] but rather extends to members of the OAS generally, including approved NGOs.[204] Therefore, the Court can advise, interpret, and recommend on any member's compliance with any international treaty or obligation,[205] a scope as wide as the realm of all international human rights law.[206]

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199. *See* Buergenthal, *supra* note 187, at 15 (stating that the Court has accepted amicus briefs in the past); *see also* David J. Padilla, *Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INT'L L. & POL'Y 95, 111 (1993) (summarizing the role of the Inter-American Commission on Human Rights in adjudicating international human rights issues.); Pasqualucci, *supra* note 186, at 280–82 (discussing the submission of amicus briefs to the Inter-American Court of Human Rights with regards to its advisory jurisdiction).

200. *See* American Convention, *supra* note 187, at 686. Article 63 of the convention does not indicate precisely what crimes will demand a remedy. It states in pertinent part:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission. *Id.*

201. American Convention, supra note 187, at 686.

202. *Id.* at 688.

203. *See Creation of the Inter-American Commission on Human Rights* (illustrating that any recognized entity may seek guidance from the Court and it is not limited to member state status), *available at* http://cidh.org/basicos/basic1.htm#.

204. *See* Buergenthal, *supra* note 187, at 3 (noting that the petitions to the Court to resolve matters is limited to states or countries and member non-governmental entities).

205. *See* American Convention on Human Rights "Pact of San Jose, Costa Rica," Sept. 28, 1966, art. 63, 1966 U.S.T. LEXIS 521, 49 (noting that the Court may comment on any issue raised as long as the parties are members of the Commission); see also George W. Libby, *American Bar Association Section of International Law and Practice Report to the House of Delegates*, 27 INT'L LAW. 251, 251 (1993) (outlining the scope and responsibilities of the Court).

206. *See* Libby, *supra* note 205, at 251.

In its capacity as both adjudicator and advisor,[207] the Court is comprised of seven judges.[208] When deciding any matter, a quorum of five is necessary.[209] Unlike the Commission, the Court allows for the appointment of ad hoc judges.[210] The Court appears concerned about the equity of distribution and nationality in the quorum makeup,[211] but not necessarily in reference to the parties in dispute.[212] Judges are nominated to the Court in the same manner as they are to the Commission, but can be from the same country of a "contentious" party.[213] If there is no judge from the country of a party to the suit, they can appoint an ad hoc judge.[214] The permanent judges are appointed for a one-time renewable six-year term.[215] According to the text of the treaty, enforcement is placed upon the shoulders of the state party.[216] The level of enforcement is difficult to measure, as there have been only ten "contentious" cases within the past twenty years.[217]

C. Criticisms of the Inter-American Human Rights System

The process of both the Commission and the Court is quite intricate and complex. Due to the dual nature of the Commission and Court, there have been some criticisms of the Inter-American process.[218] Comprehending the dual nature of the process of human rights adjudication is imperative to understanding the implications in the rule-based versus power-based dynamic.[219]

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207. *See* American Convention, *supra* note 205, at 167 (remarking that the purpose of the Court is to advise and hear issues of pertinent international law).

208. *See* American Convention, *supra* note 187, at 676 (stating that five judges are required in order to adjudicate a matter in front of the Court.).

209. *See id*. at 676 (noting that seven judges comprise the entirety of the Court for one given session).

210. *See id*. at 676 (stating that the Commission may at any time appoint one or more ad hoc judges).

211. *See generally id*. at 673–76 (discussing the procedures and policy behind proper adjudication).

212. *See id*. at 674.

213. *See id*. (noting that a party in dispute does not have to be diverse from the nationality of the judges sitting on the matter).

214. *See id*. at 673 (noting that one judge sitting on a matter must necessarily be from the same nation as one of the parties at bar).

215. *See id*.

216. *See Contentious Cases of the Inter-American Court of Human Rights*, *available at* http://heiwww.unige.ch/human-rts/iachr/contntus.htm (last visited Jan. 22, 1999) (listing numerous cases where the court relies on the individual aggrieved state to enforce its judgment); *see also* Aloeboetoe et al. Case, Inter-Am. Ct. H.R. No. 15 (1994).

217. *See* Standaert, *supra* note 140, at 537. *See generally* Panday, *supra* note 216 (highlighting examples of two of the ten "contentious" cases).

218. *See* Cosgrove *supra*, note 140, at 56 (noting that the Inter-American bifurcated system is a source of delay because the Commission allows a great amount of time to pass before it takes action and once the Commission sends a case to the Court, the Court then takes additional time to decide the case); *see also* Pasqualucci, *supra* note 152, at 307–09 (questioning and critiquing the two-tiered system's time-consuming procedures that may result in failure to protect the victim's rights); Seitles, *supra* note 138, at 621–32 (listing and assessing structural, normative and procedural problems affecting both the Inter-American Commission and Court of Human Rights).

219. *See generally* Brimeyer, *supra* note 107, at 133 (explaining that the WTO uses a rule-based dispute resolution process); Hudec, *supra* note 17, at 10 (citing advantages to a rule-based system in resolving conflicts); Schloemann, *supra* note 35, at 426–41 (distinguishing the rule-based and power-based systems within the WTO).

1. Delay

One of the first criticisms of the multi-layered system is the delay it causes.[220] To complete one case takes a significant amount of time, especially when viewed in light of the immediate nature of human rights abuses.[221] While due process concerns for a fair and equitable trial may sometimes be at odds with the goal of a right to a reasonably timely adjudication,[222] the Velasquez Rodriguez cases took eight years from initial complaint with the Commission to full Court judgment.[223]

2. "Friendly Settlements"

One inherent defect of the entwined Commission/Court system is its heavy emphasis on utilizing the "friendly settlements" system.[224] While methods of alternate dispute resolution (ADR) do serve their function in certain human rights instances and can prove very effective, the guidelines of the Convention form a de facto reliance on "friendly settlements," even when

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220. *See* Cosgrove *supra*, note 140, at 56–57 (explaining that the bifurcated system's procedures can promote delays); *see also* Pasqualucci, *supra* note 152, at 307–09 (criticizing the tiered system's procedures for being time-consuming). *See generally* American Convention, *supra* note 187, at 675 (enumerating the Commission's procedures regarding petitions).

221. *See* In the Matter of Viviana Gallardo et al., Inter-Am. C.H.R., Ser. A, No. G101/81, 20 INT'L LEGAL MATERIALS 1424 (1981) (criticizing the two-tiered system, Judge Piza Escalante wrote:

> I have come to the conclusion that unfortunately the system of the Convention appears to make [the best protection of human rights] impossible because the American States in drafting it did not wish to accept the establishment of a swift and effective jurisdictional system but rather they hobbled it by interposing the impediment of the Commission, by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel.)

See generally Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 16–17 (1999) (explaining that parties, even in serious human rights violations, may not circumvent the current procedure by bypassing the Commission and applying directly to the Court).

222. *See* American Convention, *supra* note 187, at 678 (noting every person has a right to a hearing within a reasonable time); *see also* Pasqualucci, *supra* note 152, at 307–309 (questioning whether using the Court and Commission are the best way to resolve human rights abuses). *See generally* Pasqualucci, *supra* note 142, at 360 (describing the rights the American Convention protects).

223. *See* Velazquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. C.H.R. (Ser. C) No. 4 (1998) (noting that a case of a Honduran student who disappeared after being detained by Honduran security officials took eight years to be completed), *available at* http://www.1.umn.edu/humanarts/iachr/b_11_12d.htm (last visited Sept. 25, 2002); *see also* Pasqualucci, *supra* note 152, at 307–309 (noting that the Velazquez case took eight years to be adjudicated). *See generally* Standaert, *supra* note 140, at 524–26 (describing the *Velazquez Rodriguez* case and its extensive delays).

224. *See* American Convention, *supra* note 187, at 675 (setting forth the friendly settlement provision). *See generally* Pasqualucci, *supra* note 221, at 81–83 (noting that the current practice in the Commission is always to ask both parties in every case if a friendly settlement is preferred); Standaert, *supra* note 140, at 527 (explaining that as a result of the Court's decision in the *Caballero Delgado* case the Commission must always ask the parties involved if they wish to use the friendly settlement method).

their use in grave crimes against humanity may not be justified or appropriate to redress the crimes alleged.[225]

The Convention confers on the Commission and the Court both adjudicatory and mediation powers.[226] "Contentious" adjudication is rarely triggered due to the "friendly settlement" procedures required by both the Commission and the Court.[227] As Standaert maintains,

> The Convention provides parties with two paths by which they may avoid either the 'recommendations' of the Commission or the eventual publication of a report, which in all probability, will be disfavorable. The first is to reach a friendly settlement with the complaining party before the expiration of the final 30-day period. The second is to accept the jurisdiction of the [Court]. Therefore, the failure to reach a friendly settlement creates an interesting dilemma for the State Party accused of human rights abuses. If no agreement is reached, it faces the possibility of mandated 'recommendations,' publication of a negative report, or an unfavorable ruling from the Court with which they must comply.[228]

If a state party accused of gross human rights violations wants to minimize its accountability, its best recourse is to enter "friendly settlements" and agree to a settlement,[229] where the final report will only briefly lists the facts and solutions.[230] Where true accountability is mini-

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225. *See* Mike Perry, *Beyond Dispute: A Comment on ADR and Human-Rights Adjudication*, 53 DISP. RESOL. J. 50, 57 (1998) (questioning the effects of alternative dispute resolution on complainants in the human rights arena); *see also* Standaert, *supra* note 140, at 539–40 (arguing that although the friendly settlement procedure offers the individual an unprecedented opportunity to vindicate his or her rights, the confidential nature of the closed proceedings deny society the right to know the truth about the past crimes of a government). *See generally* American Convention, *supra* note 187, at 688 (instructing the Commission to assist the parties in reaching a friendly settlement).

226. *See* American Convention, *supra* note 187, at 688–89 (defining the procedures of the Court and Commission); *see also* Pasqualucci, *supra* note 142, at 321 (noting the powers of the Court and Commission to adjudicate and mediate disputes); Standaert, *supra* note 140, at 523 (stating that parties may either use the mediation method of friendly settlement or accept the jurisdiction of the Court).

227. *See* Cosgrove *supra*, note 140, at 52 (comparing the Commission's use of contentious jurisdiction in the first decade of the Court's existence, which was infrequent, to its current, more frequent use); *see also* Parker, *supra* note 149, at 216 (explaining that the combination of the Commission's procedures and a state's reluctance to accept the Court's jurisdiction results in the Court deciding few contentious cases); Standaert, *supra* note 140, at 537 (arguing that the Court has rarely exercised its contentious jurisdiction and, thus, the friendly settlement procedure is a preferred option).

228. *See* Standaert, *supra* note 140, at 524 (1999).

229. *See* American Convention on Human Rights, Nov. 22, 1969, OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr., arts. 48-51, 9 INL'L LEGAL MATERIALS 673, 688–89 (1970) (enumerating the paths by which the parties can avoid a published report); *see also* Cosgrove *supra*, note 140, at 46–49 (illustrating the process by which a detailed report will not be published if the parties reach a friendly settlement); Standaert, *supra* note 140, at 522–23 (explaining that parties may avoid a detailed published report if they agree to a settlement).

230. *See* American Convention, *supra* note 187, at 689 (noting the contents of the report made after a friendly settlement is reached); *see also* Standaert, *supra* note 140, at 522 (noting that the reports only contain a brief content of facts and solutions). *See generally* Cosgrove *supra*, note 140, at 46–47 (discussing the reports the Commission will issue in the absence of a friendly settlement).

mized,[231] there is concern over whether this is the type of legitimacy and authority an adjudication process should afford to a gross human rights offender.[232]

In addition, because the Commission is required to first offer the mediation option,[233] it has no discretion to determine when mediation or adjudication should be used.[234] That strategic privilege is left to the parties to the complaint,[235] undermining the original purpose of the Commission.[236]

3. Dual Nature vs. Dual Purpose

The dual nature of both the Commission and the Court is necessary because of the variable goals of human rights adjudication.[237] Standaert is particularly astute is recognizing that

231. *See* American Convention, *supra* note 187, at 689 (outlining the Commission's procedures); *see also* Cosgrove *supra*, note 140, at 46–47 (noting that a second detailed report will be published if the state has not fulfilled its obligations under the first report); Standaert, *supra* note 140, at 522 (noting that states may accept a friendly settlement, thereby dispensing with the need for a detailed report).

232. *See generally* American Convention, *supra* note 187, at 688–89 (describing the adjudication procedures before the Commission); *see also* Standaert, *supra* note 140, at 528–40 (questioning whether mediation is a proper method for solving human rights abuses); Dialogue on the Inter-American System for the Promotion and Protection of Human Rights, Report by the Chair, Apr. 24, 2000, OEA/ser. G/ CP/CAJP-1610/00 rev. 2 (discussing ways in which the Inter-American Commission's and Court's authority could be strengthened and improved), *available at* http://www.summit-americas.org/Human%20Rights/Dialogue%20on%20the%20Inter-American%20Commission%20for%20the%20Promotion%20and%20Protection%20of%20Human%20Rights.htm (last visited Sept. 25, 2002).

233. *See* Pasqualucci, *supra* note 221, at 81–83 (explaining that the Commission currently asks parties if they would rather use a friendly settlement); *see also* Standaert, *supra* note 140, at 527 (noting that the Commission must ask parties if they would prefer to resolve the conflict using a friendly settlement). *See generally* American Convention, *supra* note 187, at 689 (referring to the Commission's duty to assist parties in reaching a friendly settlement).

234. *See* Pasqualucci, *supra* note 221, at 81–83 (explaining that the Commission no longer has the discretion to withhold the friendly settlement option, even in exceptional situations); *see also* Standaert, *supra* note 140, at 527 (discussing the Commission's current lack of discretion to use the friendly settlement option). *See generally* American Convention, *supra* note 187, at 689 (stating that the Commission should be available to the parties to help reach a friendly settlement).

235. *See* Pasqualucci, *supra* note 221, at 81–83 (recognizing that the choice to use the friendly settlement remains with the parties); *see also* Standaert, *supra* note 140, at 527 (stating that the Commission no longer has the discretion in deciding whether to use a friendly settlement). *See generally* American Convention, *supra* note 187, at 689 (noting that the Commission should aid the parties in reaching a friendly settlement).

236. *See* Introduction, Inter-Am. C.H.R. OEA/ser./L/V/II.114, doc. 5. rev. (2001) (discussing the object of the Inter-American System); *see also* Charles T. Mantel, *It Takes A Village to Raise a Child: The Role of the Organization of the American States In Eliminating the Worst Forms of Child Labor in Brazil*, 32 U. MIAMI INTER-AM. L. R. 469, 507–08 (2001) (describing the duties of the Inter-American Commission on Human Rights); *Purposes of the Organization of American States*, *available at* http:www.cidh.org/basic.eng.htm (last visited Oct. 2002) (identifying the role and purposes of the Inter-American Commission on Human Rights).

237. *See* Pasqualucci, *supra* note 142, at 360–61 (describing the structure of the Inter-American Human Rights System); Seitles, *supra* note 138, at 599 (indicating the dual nature of the Inter-American Human Rights System).

human rights torts carry a dual burden of redress,[238] not only to the individual, but also to society—which justifies the existence of the dual nature and purpose of a separate Commission and Court.[239] However, the Commission's role as both mediator and prosecutor is greatly hindered by its de-legitimizing effects as both "friend and foe."[240] How is the Commission's fact-finding role supposed to gain the trust of a state party, if the very same Commission could ultimately use the information garnered against that party in a formal adjudication decision?[241]

The human rights system's responsibility to the individual requires acknowledging and delegitimizing the systematic oppression that silenced its victim.[242] Thus it must recognize the individual by allowing private rights of action to be brought to the Commission.[243] While an individual tort is clear and easily identifiable through the execution of the Commission's fact-finder function,[244] the tort to society is less so.[245]

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238. *See* Standaert, *supra* note 140, at 539–40 (arguing that although the friendly settlement procedure offers the individual an unprecedented opportunity to vindicate his or her rights, the confidential nature of the closed proceedings deny society the right to know the truth about the past crimes of a government); *see also* Perry, *supra* note 225, at 57 (questioning the effects of alternative dispute resolution on complainants in the human rights arena) *See generally* American Convention, *supra* note 187, at 688 (instructing the Commission to assist the parties with reaching a friendly settlement).

239. *See* Standaert, *supra* note 140, at 534–5 (indicating the Inter-American System's responsibility to both society and the harmed individual); *see also* Buergenthal, *supra* note 187, at 19–20 (describing the purposes of the Inter-American System); Pasqualucci, supra note 142, at 331–32 (discussing the different duties of the Inter-American Commission on Human Rights).

240. *See* Standaert, *supra* note 140, at 528–29 (describing the shortcomings of the dual nature of the Inter-American Commission on Human Rights); *see also* Cosgrove *supra*, note 140, at 42 (describing the dual nature of the Inter-American Commission on Human Rights and the process it uses to deal with human rights violations); Gary W. Paquin, *The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky,* 81 KY. L.J. 1333, 1335 (1993) (examining the situation where a mediator acts as an intermediary and as an evaluator in domestic relations).

241. *See* Paquin, *supra* note 240, at 1335 (examining the situation where a mediator acts as an intermediary and as an evaluator in domestic relations); Standaert, *supra* note 140, at 528–33 (describing the shortcomings of the dual nature of the Inter-American Commission on Human Rights); ; *see also* Cosgrove *supra*, note 140, at 42 (describing the dual nature of the Inter-American Commission on Human Rights and the process it uses to deal with human rights violations).

242. *See* Pasqualucci, *supra* note 142, at 331–32 (discussing the human rights victim's right to have the truth revealed); Pasqualucci, *supra* note 152, at 339 (describing government submissions the individual in protection from human rights violations); *see also* Standaert, *supra* note 140, at 539 (indicating societal desire to recognize the truth about past human rights violations).

243. *See* Seitles, *supra* note 138, at 607–08 (describing the process by which the individual's rights are recognized by the Inter-American System); *see also* Buergenthal, *supra* note 239, at 19–20 (illustrating the individual-oriented approach of the Inter-American Court of Human Rights); Trindade, *supra* note 155, at 20–21 (examining the developments of the rights of the individual in the Inter-American System).

244. *See* Standaert, *supra* note 140, at 535 (discussing the individual human rights victim's rights within the Inter-American Human Rights System); *see also* Ariel E. Dulitzky Luguely Cunillera Tapia, *A Non-Governmental Perspective Regarding the International Protection of Children in the Inter-American System of Human Rights*, 8 FLA. ST. J. TRANSNAT'L L. & POL'Y 265, 275 (1999) (examining the rights of the individual and the process of the individual petition in the Inter-American System for Human Rights); Viviana Krsticevic, *How Inter-American Human Rights Brings Free Speech to the Americas*, 4 SW. J. L. & TRADE AM. 209, 222 (1997) (acknowledging the duty of the Inter-American System for Human Rights to inform the individual of the findings by the Inter-American Commission on Human Rights).

245. *See* Standaert, *supra* note 140, at 539–40(examining the difficulties of accountability to society with regard to the Inter-American System of Human Rights); *see also* Krsticevic, *supra* note 244, at 222 (acknowledging shortcomings of the Inter-American System for Human Rights in accountability to society). *See generally* Inter-Am. C.H.R. 193, OCEA/Ser.L/V/II.68, Doc. 8 rev.1 (1985-86) (acknowledging the right to know the truth about human rights violations is important to the resolution of cases).

Deterrence and collective memory are the remedies sought when a human rights violation results in a breach of a duty to society.[246] While the individual is recompensed,[247] the Commission must remedy society by publicly renouncing the atrocity.[248] The lack of clarity regarding when the Commission should utilize mediation or adjudication further hinders its obligation and duty to society.[249] The mandatory "friendly settlement" mediation evades true social accountability by protecting the violation from public disclosure.[250]

The parties to human rights abuse cases are inherently asymmetrical in power.[251] Fostering a relationship to unearth the motives and crimes in its pursuit of its duty to society is directly at odds with its prosecutorial duty to the individual.[252] Thus, the Inter-American

246. *See* Seitles, *supra* note 138, at 605–08 (2000) (describing the Inter-American Commission on Human Rights process of reporting and documenting human rights violations); Trindade, *supra* note 171, at 8–10 (indicating the Inter-American Commission on Human Rights methods of achieving its goals); *see also* Ariel E. Dulitzky & Luguely C. Tapia, *A Non-Governmental Perspective Regarding the International Protection of Children in the Inter-American System of Human Rights*, 8 FLA. ST. J. TRANSNAT'L L. & POL'Y 265, 273 (1999) (discussing how the Inter-American Commission on Human Rights serves its principle function of promoting observance of the human rights).

247. *See* Standaert, *supra* note 140, at 540 (discussing compensation for the individual petitioner to the Inter-American System); *see also* Natasha P. Concepcion, *Legal Implications of Trinidad & Tobago's Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847, 852–56 (2001) (describing the procedure and compensation for individual petitioners to the Inter-American System); Victor R. Rescia, *Reparations in the Inter-American System for the Protection of Human Rights*, 5 ILSA J. INT'L & COMP. L. 583, 587–89 (1999) (examining the victim of human rights violations right to reparation).

248. *See* Seitles, *supra* note 138, at 605–08 (describing the Inter-American Commission on Human Rights process of reporting and documenting human rights violations); Standaert, *supra* note 140, at 539 (discussing the societal remedies to human rights violation provided by the Inter-American System).

249. *See* Standaert, *supra* note 140, at 533 (examining the limitations on the Inter-American Commission on Human Rights discretion to screen cases presented for settlement); *see also* Romano, *supra* note 188, at 727 (indicating that the Inter-American Commission acts as a filter for the Inter-American Court). *See generally*, Inter-American Commission on Human Rights 109 Degree Special Session, Rules of Procedure tit. 2, ch. 2, art. 51 (2000) (describing the friendly settlement procedure for petitions to the Inter-American Commission on Human Rights).

250. *See* Pasqualucci, *supra* note 142, at 331–32 (discussing victim's and societal right to have the truth revealed); *see also* Standaert, *supra* note 140, at 539–40 (stating that the denial of the societal right to know causes a lack of social accountability); *cf.* Seitles, *supra* note 138, at 605–08 (describing the Inter-American Commission on Human Rights process of reporting and documenting human rights violations).

251. *See* Kelly Rowe, *Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 861 (1985) (citing the imbalance in bargaining power in violent situations as a drawback of the process of mediation); Standaert, *supra* note 140, at 539–40 (describing the inherent imbalance of power between the violent party and the victim in mediation); *South Africa Making Benefits of Democracy Available*, AFRICA NEWS (discussing the imbalance in power between the parties involved in violations of human rights) *available at* LEXIS, Africa, Africa News (Aug. 6, 2002).

252. *See generally* Pasqualucci, *supra* note 186, at 248–49 (noting that the Court must investigate all claims and then the individual must comply with the Court's findings); Pasqualucci, *supra* note 221, at 15–17 (describing the process the Court follows and how this may not provide for the needs of the individual); Patricia Stirling, *Use of Trade Sanctions As An Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 22–23 (1996) (explaining that the Commission's investigations are so lengthy that they are able to take few cases and therefore do not meet the needs of all individuals).

human rights system's inherent "friendly settlement" provision makes its accountability incomplete and ineffective.[253]

IV. Analysis and Comparison

Comparisons between the WTO dispute settlement procedure and the processes of the Inter-American Court present unique challenges.[254] Both systems adjudicate injustices,[255] albeit of different types, but the form and method of justice rendered remains unique to each procedure.[256] Who brings forth the violation? What are the underlying theories of justice and retribution? And how are the varying forms of power and sovereignty aligned to create an overarching system of adjudication within these realms? This section attempts to analyze and compare the two tribunal systems under two defining rubrics. The first compares the underlying theories of both tribunals, examining their similarities and differences. The second mode of comparison analyzes the function of sovereignty in a rule-based versus political/power-based adjudication.

A. Underlying Theories

1. Similarities

Both trade and human rights adjudication systems are designed to ultimately enhance human existence through world welfare and the maintenance of peace.[257] Those lofty goals

253. *See generally* Kimberly D. King-Hopkins, I*nter-American Commission on Human Rights: Is Its Bark Worse Than Its Bite In Resolving Human Rights Disputes?*, 35 TULSA L.J. 421, 437 (2000) (noting that friendly settlement proceedings are being used in cases where they cannot prove to be an effective tool); Pasqualucci, *supra* note 186, at 266 (explaining the challenges the Court faces from the states concerning the friendly settlement provision and the likelihood of the states' acceptance); Standaert, *supra* note 140, at 522 (explaining that the Court's best efforts are put into helping the parties reach a settlement).

254. *See generally* David Palmeter, et al., *WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 398–99 (1998) (noting that the WTO settlement procedure revolves around sources of law from previous decisions as well as the original form of settlement under the GATT); Pasqualucci, *supra* note 186, at 248 (explaining the dual nature of the process of the Inter-American System and the necessary acceptance of its jurisdiction by states in order for it to have force); Jane I. Yoon, Note, *World Trade Organization: Environmental Police?*, 9 CARDOZO J. INT'L & COMP. L. 201, 214–15 (2001) (asserting that the WTO dispute settlement procedure is effective because decisions will be handed down and there will be consequences for non-compliance).

255. *See generally* Pasqualucci, supra note 186, at 248 (noting that the Court's job is to hear petitions alleging human rights violations); Inter-American Commission on Human Rights, *Organization of American States: The American Convention on Human Rights* (2001) (noting that the Court has power to apply and interpret in the field of human rights), *available at* http://cidh.org/Basicos/basic1.htm#_ftnref19; *WTO Transparency and the Rule of Law, Dispute Settlement Mechanism* (2001) (describing the WTO dispute settlement system's role in hearing injustices created by non-compliance with agreements), *available at* http://wto.org/wto/english/thewto_e/whatis_e/eol/e/wto08/wto8_18.htm#note2.

256. S*ee generally* Yoon, *supra* note 254, at 214–15 (asserting that the WTO dispute settlement body is not subject to jurisdictional limits and has the power to enforce its decisions); Inter-American Commission on Human Rights, *supra* note 255; *WTO Transparency and the Rule of Law, supra* note 255.

257. *See generally* Charles Lysaght, *International Humanitarian and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 9, 20–21 (1986) (noting one instance of the ability of the Court to aid in maintaining world peace); Inter-American Commission on Human Rights, *supra* note 255; *WTO Transparency and the Rule of Law, supra* note 255 (asserting that the dispute settlement procedure of the WTO was formed to achieve a more efficient and friendlier resolution to conflicts as a way to maintain peace among nations).

result in a predictable difficulty in fulfilling those principles as evidenced through case law analysis.[258] Jackson states,

> . . .governments often find (as they do internally) that various worthy polices are conflicting. Trade liberalization policies are designed to promote the enhancement of world welfare and to preserve the peace against rancorous economic quarreling. Often, however, their policies appear to conflict with environmental goals, human rights norms, and labor standards. When these "dilemmas" of conflict occur within a nation-state, they must be ironed out through the governmental institutions of that nation. When these similar conflicts occur on an international scale, then we must look to international institutions for this task. Unfortunately, the international institutions are notably weaker than most national institutions.[259]

Running counter to this dichotomy of underlying theories is a continuing nexus between trade and human rights.[260] Political philosophers such as Immanuel Kant and Charles Rawls hypothesized that "justice" and its interaction with trade or commerce was not confrontational, but rather interdependent.[261] Since trade benefits all,[262] and trade elevates the standards of liv-

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258. *See generally* Frank J. Garcia, *Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999) (explaining that achieving the goals of the adjudicatory system involves more than basic regulation of practices); Palmeter, *supra* note 254, at 401–02 (asserting that there is no hard and fast precedent for the WTO dispute settlement body to follow in its decision making).

259. *See* John H. Jackson, *Introduction: Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 25 (1996) (noting that there is no single-nation institution that can govern international affairs, so there is a need for international cooperation to form an institution strong enough to deal with conflict between policies of different nations).

260. *See generally* Thomas S. O'Connor, *"We Are Part of Nature": Indigenous Peoples' Rights As A Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L ENVTL. L & POL'Y 193, 210 (1994) (noting how human rights are considered in trade agreements and how a healthy environment is being forwarded as a human right); Stirling, *supra* note 252, at 30 (explaining the use of trade to promote human rights goals); Yoon, *supra* note 254,at 203–204 (noting the linkage between trade and the environment).

261. *See generally* Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL. 299, 302–03 (2002) (noting that Kant suggests that trade cannot exist with confrontational concepts such as war); Frank J. Garcia, *Building a Just Trade Order for a New Millenium*, 33 GEO. WASH. INT'L L. REV. 1015, 1029 (2001) (applying Rawls' theory to trade and hypothesizing that justice is developed through the furthering of human rights); Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1375 (1992) (explaining that Kant believes it necessary for trade to be reconciled with things that are just, such as the protection of the environment).

262. *See* Gerald Brooks, *Environmental Economics and International Trade: An Adaptive Approach*, 5 GEO. INT'L ENVTL. L. REV. 277, 285 (1993) (asserting that trade is beneficial from an economic perspective); *see also* Robert F. Housman, *Democratizing International Trade Decision Making*, 27 CORNELL INT'L L. J. 699, 702 (1994) (noting that trade may provide a wealth of benefits); Jonathan I. Miller, *Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1313, 1315–17 (1994) (explaining the benefits produced for business through trade agreements).

ing throughout the world,[263] then trade helps alleviate human rights abuses and poverty.[264] Kant further theorizes that the economic entanglement of democracy leads to a perpetual peace in societies throughout the world.[265]

Petersmann reiterates,

> This exemplary function of liberal international economic rules seems to confirm the long-standing emphasis in political philosophy . . . and economic theory . . . that the mutual gains from voluntary international trade, and from the international division of labor based on liberal rules, offers the most important means to overcome the 'Hobbesian war of everybody against everybody else' through peaceful cooperation, even if people and governments act as self-interested utility-maximizers.[266]

2. Differences

While an attenuated connection may exist between trade and human rights,[267] there are fundamental differences in aims and goals.[268] Whereas trade emphasizes livelihood,[269] human

263. *See* Housman, *supra* note 261, at 1373 (noting that trade promotes human welfare); *see also* Daniel Friedenzohn, Note, *Reality Faced By Mexican Employees Who Lose Their Jobs: A Review of the North American Agreement on Labor Cooperation and Two U.S. National Administrative Office Decisions*, 22 SYRACUSE J. INT'L L. & COM. 103 n.124 (1996) (asserting that the purpose of trade is to increase standards of living). *See generally* Brooks, *supra* note 262, at 285 (noting that trade can aid the goal of a cleaner environment).

264. *See* Ernst-Ulrich Petersmann, *Institutions for International Economic Integration: Constitutionalism and International Organizations*, 17 J. INTL. L. BUS. 398 (1996) (noting that trade can produce cooperation which in turn will help eliminate abuses of human rights). *See generally* James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 805 (1994) (asserting that trade can be used as a method of enforcement of human rights); Stirling, *supra* note 252, at 2 (explaining how the detrimental effect of trade sanctions are an impetus for observance of human rights).

265. IMMANUEL KANT, TED HUMPHREY, PERPETUAL PEACE AND OTHER ESSAYS, 109 (1998) (asserting that a nation's allegiance to trade and the benefits it bestows will compel it to conform to human rights standards of international law).

266. *See* Petersmann, *supra* note 264, at 399 (noting that international trade can be beneficial to everyone involved, not only by use of strict regulations, but by cooperation with liberal rules).

267. *See generally* Smith, *supra* note 264, at 802 (noting the use of trade sanctions to enforce certain human rights positions such as workers rights); Stirling, *supra* note 252, at 33–34 (noting the possible acceptance of human rights regulation through widely accepted methods of trade regulation).

268. *See generally* Garcia, *supra* note 261, at 1027-58 (asserting that the WTO would choose methods of dispute resolution that may favor trade over human rights); Yoon, *supra* note 254, at 210 (asserting that the purpose of the WTO is to protect the trading rights of its parties); Inter-American Commission on Human Rights, *Organization of American States: Purposes* (noting the purpose of the OAS to protect its member states interests as far as sovereignty and independence), *available at* http://cidh.org/Basicos/basic1.htm#_ftnref19 (last visited Sept. 12, 2002).

269. *See generally* Salman Bal*, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT,* 10 MINN. J. GLOBAL TRADE 62, 83–84 (2001) (explaining how trade can enhance standards of living); John David Donaldson, *Television Without Frontiers: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity,* 20 FORDHAM INT'L L.J. 90, 107 (1996) (noting that advocates of free trade will argue that the eventual effects will be sustained livelihood); Yoon, *supra* note 254, at 210 (noting that the goal of trade is to produce economic growth for all nations).

rights focuses on life.[270] As such, human rights issues are political,[271] while trade concerns are more stoic.[272] Therefore, while the judicial infractions in international economic procedures require more political rigidity to gain legitimacy,[273] international human rights adjudication is fluid, encompassing politics and emotion.[274] The legitimacy sought in human rights abuses is twofold: societal retributive justice and personal emotional catharsis.[275] Human rights laws are accountable to both society and the individual.[276] Economic relations seek legitimacy, in solely

270. *See* Inter-American Court of Human Rights, *supra* note 143 (stating that the Inter-American Court of Human Rights was established to guarantee the protection of the rights of man); *see also* Buergenthal, *supra* note 187, at 7 (arguing that the American Convention on civil rights refers to many different kinds of human rights, from civil rights to cultural rights). *See generally* American Convention, *supra* note 187, at pmbl. (entered into force July 18, 1978) (holding that the intention of the convention was to create a system of liberty for every man based on personal rights).

271. *See* Pasqualucci, *supra* note 152, at 299–303 (asserting that because many human rights violations are committed during times of political turmoil, many of them go unpunished); *see also* Sampong Sucharitkul, *Inter-Temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3, 26 (2002) (describing the method in which the Chinese can protect their human rights using their existing legal regime).

272. *See* Croley, *supra* note 82, at 194 (discussing the manner in which international trade governing bodies such as GATT and the WTO panels deal with the complicated issue of national "sovereignty"). *See generally* Hudec, *supra* note 17, at 20–22 (describing the first three years of the WTO dispute settlement procedure and its impact on global trade); Joel P. Trachtman, *Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 334 (1999) (analyzing the function, vocation, and techniques of WTO dispute resolution).

273. *See* Croley, *supra* note 82, at 196 (discussing a GATT panel case between Finland and New Zealand that required the former to strictly establish the validity of an alleged material injury). *See generally* Genoveva Gilbert, *Annual Survey of Caselaw, Criminal Procedure*, 23 U. ARK. LITTLE ROCK L. REV. 1107, 1124 (2002) (noting the proper standard of review for WTO dispute settlement procedure and the method the WTO uses to "attribute damage to a domestic industry from foreign imports."); Daniel M. Lopez, *Continued Dumping and Subsidy Offset Act of 2000: 'Relief' For the U.S. Steel Industry; Trouble For the United States In the WTO*, 23 U. PA. J. INT'L ECON. L. 415, 420 (2002) (asserting that opposition of U.S. antidumping practices by WTO member nations would cause many U.S. cases to be overturned).

274. *See* Louise Tsang, *UN Human Rights Treaty System: Universality at the Crossroads*, 30 INT'L J. LEGAL INFO. 373, 377 (2002) (asserting that human rights protection should be based on a balanced division of labor between non-governmental entities); *see also* Thio, *supra* note 155, at 411 (noting that group-oriented protective measures within the African and Inter-American Systems might be beneficial to the minority groups in both areas). *See generally* Edward D. Re, *Universal Declaration of Human Rights and the Domestic Courts*, 14 ST. THOMAS L. REV. 665, 669 (2002) (discussing some of the various human liberty charters that have been established outside of the United Nations).

275. *See* Inter-American Court of Human Rights, *supra* note 270; *see also* Jo M. Pasqualucci, *Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 242–44 (2002) (discussing the advisory jurisdiction of the Inter-American Court as well as the difference between traditional international law and international human rights law). *See generally* Pasqualucci, *supra* note 152, at 304 (providing a brief history of the development of international human rights law).

276. *See* Buergenthal, *supra* note 187, at 13 (analyzing the Court's assertion that the purpose of its advisory function was to assist members with international human rights violations and to help members avoid an unwanted legal process). *See generally* American Convention on Human Rights (Pact of San Jose, Costa Rica), Nov. 22, 1969, pmbl., 9 INT'L LEGAL MATERIALS 673 (entered into force July 18, 1978) (stating the intentions, purposes, and obligations of the Inter-American System).

promoting greater trade access through the increased transfers of goods and services for a higher global standard of living.[277] International trade carries its only duty to society.[278]

The thirty-four differing Agreements and Declarations of the WTO specifically outline the infractions, type of violations, degrees of harm, etc. in the trade of the particularly delineated good or service.[279] By its very definition, an unfair subsidy or tariff equates to a precise numerical qualification for purposes of proving that a violation has occurred.[280] The WTO offers a very specific procedure or hierarchy of remedies through its Agreement procedures.[281] In essence, the good or service is quantifiable.[282]

Like the classification of goods and services in trade, human rights infractions can be categorized,[283] but the degree of harm in the latter is usually immeasurable.[284] The American Convention on Human Rights clearly articulates in Article 4 "man's right to life."[285] However, its

277. *See generally* Genoveva Gilbert, *International Trade Law*, 24 ARK. LITTLE ROCK L. REV. 1053, 1055 (2002) (discussing intellectual property litigation under the WTO); Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 5 ELR 10769, (2002) (discussing international trade rules and their effect on environmental standards).

278. *See* Jesse Parker, *Lotus Files: The Emergence of Technology*, 26 FLETCHER F. OF WORLD AFF. 119, 130 (2002) (discussing foreign investment in the Chinese market and the liberalization of WTO regulations in the region). *See generally* Croley, *supra* note 82, at 193 (discussing the role that dispute settlement procedures in international trade play in the development of treaty systems); Gilbert, *supra* note 277, at 1057 (visiting a U.S. appeal to a WTO mandate and the ramifications it has for the WTO).

279. *See* GATT, *supra* note 33, at 1227 (giving a general overview of the declarations of the WTO); *see also* Trachtman, *supra* note 272, at 333 (discussing the problems arising out of the shrimp/turtle decision handed down by the WTO). *See generally* Hudec, *supra* note 17, at 5 (noting the history of the WTO from 1994).

280. *See* Lihu chen & Yun Gu, *China's Safeguard Measures Under the New WTO Framework*, 25 FORDHAM INT'L L.J. 1169, 1170 (2002) (discussing countervailing duties which are imposed by importing governments on imports produced with unfair subsidies); *see also* Erik Loftus, Note, *Constitutional Law*—Terran v. Secretary of Health and Human Services: *Modifications of Statutes and the Presentment Clause of the Constitution*, 24 W. NEW ENG. L. REV. 177, 189 (2002) (asserting the president's constitutional right to determine when another country was placing unfair tariffs on U.S. exports). *See generally* Buergenthal, *supra* note 187, at 13 (noting the process taken by the Convention to adjudicate trade disputes).

281. *See* Parker, *supra* note 278, at 130 (discussing the phasing in of WTO regulations into the Chinese economy). *See generally* Gilbert, *supra* note 277, at 1058 (addressing the European Union's filing of a request demanding the WTO implement a timely ruling); Kibel, *supra* note 277, at 10769 (discussing the U.S. ban on shrimp caught in non-"sea turtle" safe nets).

282. *See* Parker, *supra* note 278, at 130 (discussing the blossoming venture capital market in China). *See generally* Gilbert, *supra* note 273, at 1124 (assessing a WTO ruling dealing with imports of combed cotton yarn from Pakistan); Lopez, *supra* note 273, at 415 (analyzing the WTO's regulation of its member nations antidumping procedures).

283. *See* Pasqualucci, *supra* note 152, at 305–306 (listing many of the human rights the Inter-American System seeks to protect); *see also* American Convention, *supra* note 276, at 675 (describing some of the many different types of human rights that are protected under the Convention); Thio, *supra* note 155, at 411 (highlighting minority rights problems in Europe and abroad).

284. *See* Pasqualucci, *supra* note 152, at 299 (discussing atrocities such as torture and summary execution which are patently immeasurable). *See generally* Inter-American Court of Human Rights, *supra* note 143 (establishing the Inter-American Court for the broad purpose of "protecting the rights of man").

285. *See* GATT 1947, *supra* note 33, at 1227 (discussing man's right to life as set out by the Convention); *see also* American Convention, *supra* note 187, at 675 (giving a description of each article of the GATT agreement). *See generally* Pasqualucci, *supra* note 152, at 299 (stating the general principles and goals of the American Convention).

corresponding provision in the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights simply states that the crime was a violation of the Convention and orders individual compensation.[286] It does not clearly define its broader remedy to society.[287] The main remedy sought is not remuneration, but vindication, which is not easily quantifiable.[288]

The underlying duties of trade and human rights differentiate the two.[289] Whereas trade carries a duty to society,[290] human rights carries a duty to both the individual and society.[291]

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286. *See* Buergenthal, *supra* note 187, at 23–24 (discussing the Inter-American Court's interpretation of the American Convention's Article 4); Frank Hoffmeister, *International Decision: Cyprus v. Turkey*, 96 AM. J. INT'L L. 445, 449–50 (2002) (interpreting the Inter-American Court of Human Rights' consideration of the American Convention); The Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man* (1948) (providing Article 1: "Every human being has the right to life, liberty and the security of his person"), *available at* http://www.cidh.org/Basicos/basic2.htm (last visited Sept. 18, 2002).

287. *See* Standaert, *supra* note 140, at 535 (discussing a victim's remedy under the Inter-American Court); The Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression* (enforcing a victim's right to compensation), *available at* http://www.cidh.org/Basicos/principles.htm (last visited Sept. 18, 2002). *See generally* Pasqualucci, *supra* note 152, at 335–38 (comparing the remedies provided by the Inter-American Court and the American Convention).

288. *See* S. James Anaya & Claudio Grossman, *Case of* Awas Tingni v. Nicaragua: *A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 13–14 (2002) (discussing vindication incurred by victims). *See generally The Sacred and the Profane: Second Annual Academic Symposium in Honor of the First Americans and Indigenous Peoples Around the World: The Awas Tingni Petition to the Inter-American Commission On Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV 157 (1996) (examining Nicaragua's policy on vindication of rights); Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 303 (2001) (considering vindication with binding settlement disputes).

289. *See* The American Convention on Human Rights, *Pact of San Jose, Costa Rica* (Nov. 22, 1969) (presenting detailed description of the function of the American Convention on Human Rights) *available at* http://fletcher.tufts.edu/multi/texts/BH547.txt (last visited Sept. 19, 2002); Inter-American Court of Human Rights, *supra* note 143 (stating that the focus of the Inter-American Court is on human rights); GATT, *supra* note 33 (discussing the Uruguay Round Agreement whereby the Marrakesh Agreement created the World Trade Organization to focus on international trade).

290. *See* Josh H. Jackson, *Introduction: Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 23-25 (1996) (providing examples of trade's duty in society). *See generally* World Trade Organization, *What is the World Trade Organization?* (describing the purpose of the World Trade Organization and its duty to society), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact0_e.htm (last visited Sept. 20, 2002).

291. *See* Pasqualucci, *supra* note 142, at 330–31 (discussing the Inter-American Court's imposed duty of human rights); The Inter-American Commission on Human Rights, *What are the Functions and Powers of the Commission?* (describing the Inter-American Court of Human Rights' functions and purposes in protecting human rights), *available at* http://www.cidh.org/what.htm (last visited Sept. 20, 2002). *See generally* Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 590–91 (2001) (discussing government's imposition of human rights duties designed to protect the individual and society).

B. Sovereignty

1. Rule-based vs. Power-based

a. Similarities

Both structures seek formal, rule-based systems of adjudication over power/political forms.[292] Both processes desire a rule-based system to aid smaller powers,[293] which usually fare better under a rule-based system than under a world of ad hoc negotiations where power dictates outcome.[294] As one can get no smaller than a human rights victim,[295] the logic prevails under both economic trade and human rights analysis.[296] Whether Chile petitions against an unfair U.S. tariff,[297] or a relative of the "disappeared" makes a crime-against-humanity claim

292. *See* Pasqualucci, *supra* note 152, at 300–302 (providing a discussion on the function of the Inter-American Court of Human Rights); Standaert, *supra* note 140, at 522–23 (discussing the procedural framework of the American Convention on Human Rights); World Trade Organization, *At the Heart of the System* (providing a brief description of how the World Trade Organization works), *available at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Sept. 21, 2002).

293. *See* James J. Kenworthy, *U.S. Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Futire of the WTO*, 5 GEO. PUBLIC POL'Y REV. 103, 104 (2000) (providing that the World Trade Organization uses a rule-based system in "bringing together all trading nations, developed and developing, rich and poor"); Pasqualucci, *supra* note 152, at 298–302 (describing the necessity of a means to redress human rights violations in Third World countries and how the Inter-American Human Rights system seeks to remedy such problems). *See generally* Symposium, *Boundaries of the WTO: From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 102 (2002) (stating that the WTO rules have "more ambiguous welfare effects, both domestic and global").

294. *See* Hudec, *supra* note 17, at 10 (stating that smaller countries fare better under a rule-based system); Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2276–78 (1997) (noting that the prior usage of an ad hoc resolution system was ineffective). *See generally* William E. Scanlan, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan–United States Auto Parts Dispute*, 45 U. KAN. L. REV. 591, 604V05 (1997) (describing the new dispute resolution under the WTO and providing a settlement between the United States and Japan as an example).

295. *See* Hope Lewis, *Universal Mother: Transnational Migration and the Human Rights of Black Women in The Americas*, 5 J. GENDER RACE & JUST. 197, 228 (2001) (describing the categorization of human rights victims into race and gender categories); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 228–29 (2001) (stating that "in human rights literature, the victim is usually presented as a helpless innocent who has been abused directly by the state"). *See generally* Maha F. Munayyer, *Genetic Testing and Germ-Line Manipulation: Constructing a New Language for International Human Rights*, 12 AM. U. J. INT'L L. & POL'Y 687, 706 (1997) (providing a general definition of a human rights victim).

296. *See* Kenworthy, *supra* note 293, at 103–4 (providing that the establishment of the WTO implemented a rigid set of rules, thus improving upon the GATT's premise to aid all nations); Pasqualucci, *supra* note 152, at 299–301 (showing that under human rights analysis, a rule-based system can be effective). *See generally* Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000) (illustrating the relationship between international trade law and human rights law within the rule-based WTO), *available at* http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html (last visited Sept. 24, 2002).

297. *See* Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79, 87–90 (1990) (providing background information on GATT, the agreement that regulates tariffs); Thomas Andrew O'Keefe, *Chile: Team Player, Free Market Economic Power, and Entrant Into the Adversarial Criminal Procedure System: The Evolution of Chilean Trade Policy in the Americas: From Lone Ranger to Team Player*, 5 SW. J. L. & TRADE AM. 251, 268–71 (1998) (explaining Chile's trade disputes with the United States); *See generally* Rafael X. Zahralddin-Aravena, *Chilean Accession to NAFTA: U.S. Failure and Chilean Success*, 23 N.C. J. INT'L L. & COM. REG. 53, 95–97 (1997) (describing the political environment between Chile and the United States with respect to trade).

against Pinochet,[298] the power dynamic is the same. Large powers also seek a rule-based system,[299] but the basis lies less on the grounds of fairness and more on rules of efficiency.[300]

b. Differences

Due to the inherently fluid nature of human rights concerns, countries are far more fearful of ceding authority due to the potential volatility of the issues.[301] With this trepidation comes a more power-dominated mechanism within its adjudication structure.[302] Resolution of the conflict is constantly in flux with the jockeying of nation-states to influence and define the parameters of dispute—to define each procedure and violation most beneficial to its own constituency.[303]

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298. *See* Christine M. Chinkin, *United Kingdom House of Lords, (Spanish request for extradition)*. Regina v. Bow Street Stipendiary Magistrate, Ex Parte *Pinochet* Ugarte (no. 3). [1999] 2 Wlr 827, 93 AM. J. INT'L L. 703, 704 (1999) (describing charges issued against Pinochet for detention of hostages and torture). *See also* Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 23 B.C. INT'L & COMP. L. REV. 419, 438 (2002) (stating that Chilean dictator Augusto Pinochet was charged with numerous human rights crimes in 1998); Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 132–33 (1999) (stating that the Commission for Truth and Reconciliation was established in response to lawsuits filed against Pinochet by relatives of those who disappeared).

299. *See* Hudec, *supra* note 17, at 10 (stating that large countries want rule-based systems); Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Anti-Dumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 750 (1999) (providing that large powers such as Japan and the United States prefer a rule-based system). *See generally* Kenworthy, *supra* note 293, at 103–4 (stating that the rule-based system of the WTO brings together "all trading nations, developed and developing, rich and poor").

300. *See* Peter M. Gerhart, *Reflections on the WTO DOHA Ministerial: Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT'L L. REV. 1045, 1094–95 (2002) (describing the WTO as a rule-based system that advances efficiency values); Hudec, *supra* note 17, at 10 (discussing four main advantages a rule-based system provides to a large country). *See generally* Kevin C. Kennedy, *Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV 585, 588–89 (2001) (stating that liberal trade policies have a common objective of "promoting economic efficiency and welfare through non-discriminatory, transparent, rule-based regimes").

301. *See* George William Mugwanya, *Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court*, 8 M.S.U.– D.C.L. J. INT'L L. 707, 761 (1999) (describing the inherently fluid nature of international law); Todd M. Rowe, *Global Technology Protection: Moving Past the Treaty*, 4 MARQ. INTELL. PROP. L. REV. 107, 116 n.59 (2000) (stating that developing nations are protective of their sovereignty and are therefore "hesitant to cede authority to institutions dominated by the developed countries"). *See generally* Joshua D. Sarnoff, *Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 n.169 (1997) (providing that "members of the World Trade Organization do not cede authority for the WTO to impose within national borders the political resolution of free market and environmental protection norms").

302. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supernational Adjudication*, 107 YALE L.J. 273, 278 (1997) (remarking that some governments use political pressure and power in dispute resolution). *See generally* Kennedy, *supra* note 134, at 64 (noting that the WTO can serve as a rule-based dispute resolution body). *But see* Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753, 782–83 (1999) (conceding that many countries accept rule-based dispute settlements in order to avoid disputes).

303. *See* Croley, *supra* note 82, at 211 (acknowledging the clash that exists over the standard of review for international disputes); *see also* Paul B. Stephan, *American Hegemony and International Law: Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 51–52 (2000) (noting that private and diplomatic interests may affect dispute resolution). *See generally* Trachtman, *supra* note 272, at 336 (recognizing that dispute resolution and legislation are often related).

This section will first analyze the differences between the communities of interest and between the definitions of injustice in trade and human rights. Following this will be a comparison of specific differences between their procedures.

2. General Differences

The overarching question is: "What are the communities and constituencies of trade and human rights? Are they the same or different?" For human rights, "Is there a community outside the realm of humanity?" Human rights must first define its community in order to determine to whom sovereignty is ceded.[304] The trade community has been defined by the WTO,[305] therefore leading to far greater freedom in the utility of the WTO dispute settlement procedures.[306] Due to the defined community of trade, parties know how and when to parse power,[307] leading to a greater ceding of sovereignty for the benefit of a greater community.[308] Human rights, on the other hand, has the competing communities of both the individual and society-at-large without the benefit of a clearly outlined "member community."[309]

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304. *See* Louis Henkin, *Sibley Lecture/Keynote Address: Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 35 (1995) (arguing that international laws on human rights has adversely affected independent state sovereignty); Ivan Simonovic, *From Sovereign Equality to Equally Reduced Sovereignty*, 24 FLETCHER F. WORLD AFF. 163 (2000) (addressing the importance of sovereignty in international law); *see generally* Mitchell A. Meyers, *A Defense of Unilateral or Multi-Lateral Intervention Where a Violation of International Human Rights Law by a State Constitutes an Implied Waiver of Sovereignty*, 3 ILSA J. INT'L & COMP. L. 895, 901 (1997) (giving a general discussion of the relationship between human rights law and the concept of sovereignty).

305. *See* BBC News, *A Century of Free Trade* (defining the trade community in terms of membership—142 countries are members of the WTO with 28 other nations waiting to join), *available at* http://news.bbc.co.uk/2/hi/business/533716.stm (last visited Aug. 13, 2002).

306. *See* Van der Borght, *supra* note 17, at 1225 (listing several of the positive aspects of the WTO's dispute settlement procedures). *See generally* Trachtman, *supra* note 272, at 333–4 (discussing the tremendous scope of the WTO's dispute resolution power). *But see* Schaefer, *supra* note 116, at 310 (offering critiques of various features of the WTO's dispute settlement procedures).

307. *See* Trachtman, *supra* note 272, at 334 (describing the WTO's power and the theoretical framework upon which it is based); Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.–U.S. L.J. 399, 400 (1994) (characterizing sovereignty as "an allocation of power and responsibility"). *See generally* Van der Borght, *supra* note 17, at 1225 (chronicling the advantages of the WTO dispute settlement procedures).

308. *See* Henkin, *supra* note 304, at 35 (developing the concept of sovereignty in relation to the international community); Simonovic, *supra* note 304, at 163 (observing that actors in international relations are no longer isolated entities but are interested parties whose actions have implications within and without their borders); *see generally* Meyers, *supra* note 304, at 899 (reviewing the development of international human rights law and the concept of sovereignty).

309. *See* United Nations, *Universal Declaration of Human Rights* (proclaiming in its preamble that human rights ought to be achieved for all individuals and all of society), *available at* http://www.un.org/Overview/rights.html (1948); *see also* Council of Europe, *European Convention on Human Rights* (1950) (subscribing to the Universal Declaration of Human Rights and pronouncing its devotion to individual human rights and a democratic society), *available at* http://www.hri.org/docs/ECHR50.html; Australian Department of Foreign Affairs and Trade, *Human Rights* (quoting a statement that articulates that human rights involves the protection of human rights and a commitment to both individuals and society), *available at* http://www.dfat.gov.au/hr (last visited Sept. 26, 2002).

Limits in the definitions of trade allow for retaliatory measures against known culprits.[310] Definitions of "trade injustice" have parameters.[311] The human rights definition of injustice has no boundaries and is currently under debate.[312] Therefore, due to the lack of retaliatory measures in human rights procedures, it is hard for nation-states to cede sovereignty or power because community and injustice are ill-defined.[313]

The tension is clear:

> On the one hand, effective international cooperation depends in part upon the willingness of sovereign states to constrain themselves by relinquishing to international tribunals at least minimum power to interpret treaties and articulate international obligations. Recognizing the necessity of such power does not lessen the importance at the national level of decision-making expertise, democratic accountability or institutional efficiency. On the other hand, nations and their citizens—and particularly those particular interests within nation-states that are reasonably successful at influencing their national political actors—will want to maintain control of the government decision. . . . Invoke principles of national "sovereignty" to justify a deferential standard of review in the international context.[314]

3. Specific Differences

This section will specifically compare six areas of the adjudication process to illustrate how the more fluid nature of the Inter-American human rights system hinders the ceding of national sovereignty, while the WTO's static structures allow for greater confidence in ceding sovereignty for full adjudication. The areas of comparison are: 1) the procedural criticisms of each system, 2) judicial activism, 3) third-party participation, 4) jurisdiction, 5) retaliation, and 6) ADR.[315]

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310. *See* Marla Radinsky, *Retaliation: The Genesis of a Law and the Evolution Toward International Cooperation: An Application of Game Theory to Modern International Conflicts*, 2 GEO. MASON L. REV. 53, 57 (1994) (noting that retaliatory measures motivate groups to cooperate and encourage adherence to rules and agreements); Schaefer, *supra* note 116, at 323–24 (discussing retaliatory measures in international law). *See generally* Charnovitz, *supra* note 53, at 799 (examining retaliatory trade sanctions authorized by the WTO).

311. *See generally* Garcia, *supra* note 5, at 423 (1998) (discussing the often necessary use of trade sanctions as a human rights enforcement mechanism).

312. *See* Frank J. Garcia, *Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century*, 19 U. PA. J. INT'L ECON. L. 201, 201-02 (1998) (discussing again the wide scope and influence of international trade on human rights and other social concerns); Garcia, *supra* note 261, at 1020 (stating briefly that international trade law is a vehicle for policy and justice). *See generally* Garcia, *supra* note 5, at 400 (1998) (discerning the broad and far-reaching nature of international trade and its link to human rights).

313. *See* Anthony D'Amato, *Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982) (demonstrating that human rights relate to the structure of international relations); Radinsky, *supra* note 310, at 56 (stating that retaliation is a threat to cooperation and may result in much conflict*). See generally* Lowenfeld, *supra* note 20, at 481 (mentioning that some retaliatory measures are not to be put into effect).

314. *See* Croley, *supra* note 82, at 209 (describing the difficulty that exists in formulating a single standard of review in international law).

315. *See infra* Appendix (offering a condensed comparison of various issues between the WTO and the Inter-American System).

4. Procedural Criticisms

While both the WTO dispute settlement procedure and the Inter-American Human Rights (IA) system have made great accomplishments, the academic discussions and criticisms surrounding their reform demonstrate how the rule-based versus power-based dynamic underlies much of the debate.[316] Transparency is fairly closed for the WTO,[317] while mostly open in the IA system.[318] The rigid rules and tight controls of the WTO DSP allow for a more rules-based determination,[319] while the IA system is open to more power-dominated issues due to its transparency and fluid nature.[320]

Independent parties are freely allowed to bring forth complaints,[321] even individual concerns,[322] before the IA Court.[323] The WTO DSP remains strictly a treaty-based organization

316. *See* Kennedy, *supra* note 302, at 64 (describing the benefits of the rule-based WTO system); *see also* Seitles, *supra* note 138, at 593 (offering a critique and suggested reforms for the Inter-American System); Dierk Ullrich, *No Need for Secrecy?—Public Participation in the Dispute Settlement System of the World Trade Organization*, 34 U. BRIT. COLUM. L. REV. 55, 57 (2000) (referring to the debate among scholars about the need for reform of the WTO system).

317. *See* Van der Borght, *supra* note 17, at 1227 (proposing greater transparency of the dispute settlement mechanism); *see also* Jeff Frankel, *Trade, Environment, and Social Goals, In the Wake of Seattle: A Proposal for a Constructive Way Forward* (2000) (suggesting that the WTO be made more transparent by being more accepting of possible reforms), *available at* http//ksghome.Harvard.edu/~.jfrankel.academic.ksg/WTO-JFr.pdf; Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 1–2 (1998) (explaining the notion of transparency and how it relates to the WTO).

318. *See* Daniel Bodansky, *Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. INT'L L. 596, 619 (1999) (discussing transparency in international proceedings); Pasqualucci, *supra* note 221, at 7 (stating that "the Commission has instituted procedures to enhance the transparency of its procedures . . . "); *see also* Antonio Augusto Cancado Trinidade, *Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUMAN RIGHTS L. REV. 1, 24 (1998) (discussing the benefits of the transparency in the Inter-American system, among others).

319. *See* Charnovitz, *supra* note 53, at 811 (referencing the fortification of the WTO rules); Gantz, supra note 48, at 1031 (stating that "[WTO] . . . mechanisms are at least nominally legalistic or 'rules based' . . . "); *see also* Kenworthy, *supra* note 293, at 110 (emphasizing the WTO reliance on rules based decisions).

320. *See* Cosgrove *supra*, note 140, at 48 (stating that the flexibility of the Inter-American System is illustrative of its fluid nature); Chang S. Oh-Turkmani, *Expanding International Trade Regime: New Challenges and Opportunities for Legal Practitioners*, 13 AM. U. INT'L L. REV. 915, 917 (1998) (noting that the power of the United States in the Inter-American System is an example of the influence wielded by member states); *see also* Splittgerber, *supra* note 153, at 219 (discussing the fluid nature of the Inter-American System).

321. *See* Buergenthal, *supra* note 187, at 3 (elaborating on the rights of states to bring suits in the Inter-American System); Cosgrove, *supra* note 140, at 45 (discussing the various entities that may bring suit in the IAC); *see also* Pasqualucci, *supra* note 221, at 34–35 (listing the entities that may bring complaints to the IA).

322. *See* Buergenthal, *supra* note 187, at 36 (noting that the individual petitioner can file contentions in the Inter-American System); Pasqualucci, *supra* note 221, at 6 (stating that individuals may file petitions with the Inter-American System); *see also* Standaert, *supra* note 140, at 540 (stating that the IA system has a duty to protect the rights of individuals).

323. *See* Cosgrove, *supra* note 140, at 42 (discussing the procedure for bringing complaints through the Inter-American System); Pasqualucci, *supra* note 221, at 20 (stating that the duty of the Inter-American System is to protect the rights of individuals); *see also* Diego Rodriguez Pinzon, *"Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System*, 7 ILSA J. INT'L & COMP L. 369, 372 (2001) (tracing the path of the petitioner's complaint through the IA system).

between nations.[324] The broadening of the definition of "claimant" lends itself to more power-type struggles, where states obviously have a greater advantage.[325] Since the pool of potential claimants is limited in the WTO, the WTO, unlike the IA, is not primarily concerned with the entire world community. Member states can exert a more power-based dynamic in the WTO, since its membership is limited.

While the credibility of the first-level panel is questionable in the WTO DSP,[326] the basis of such criticism is due to the more formal structure the Appellate Body affords the WTO DSP in general.[327] In contrast, the "friendly settlement" flaw strikes at the legitimacy of the IA system,[328] due to its more fluid mechanisms.[329] The strict structures of the Appellate Body are in stark contrast to the IA system where several procedures of resolution, such as mediation, negotiation, and adjudication, muddle its legitimacy and stability.[330] The lack of formal procedures and enforcement powers does not foster confidence in its ultimate power. The IA system does promote effective resolution of disputes, but lacks the power to implement and maintain such resolutions.

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324. *See* Bodansky, *supra* note 381, at 597 (stating that the GATT treaty formation led to the development of the WTO); Charnovitz, *supra* note 53, at 800 (characterizing the WTO as an evolution of various treaties); *see also* Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 656 (2000) (tracing the formation of the WTO back through a series of existing treaties).

325. *See* Cosgrove, *supra* note 140, at 42 (discussing the procedure for bringing complaints through the Inter-American System). *See generally* Pasqualucci, *supra* note 221, at 36 (explaining how complainants may bring suits in the Inter-American System).

326. *See* Raj Bhala, *Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 848 (1999) (likening the WTO to an American court, thereby permitting the inference of a rigid structure); Charnovitz, *supra* note 53, at 811 (criticizing the WTO panel); Gantz, *supra* note 48, at 1050–51 (discussing the WTO's use of a panel).

327. *See* Charnovitz, *supra* note 53, at 803 ("The establishment of Appellate Body made the system more judicial"); Gantz, *supra* note 48, at 1054 (discussing the functions of the Appellate Body); *see also* David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 131 (1995) (identifying potential enforcement problems with the panel process).

328. *See* Olz, *supra* note 141, at 356 (discussing the use of friendly settlements as a primary means of dispute resolution); *see also* Standaert, *supra* note 140, at 520 (discussing the strengths and weaknesses of the use of friendly settlements by the IA system). *But see* Pasqualucci, *supra* note 221, at 80 (highlighting the benefits of a friendly settlement, although acknowledging that the system may allow states to hide their human rights violations by minimizing the publicity associated with the violations).

329. *See* Pasqualucci, *supra* note 221, at 80 (exploring the flexibility of asking for friendly settlements; states are free to refuse, and the Commission can back down from the possible negotiation). *See generally* Splittgerber, *supra* note 153, at 219 (discussing the fluid nature of the Inter-American System); Standaert, *supra* note 140, at 521 (noting the instances of use of friendly settlements).

330. *See* Charnovitz, *supra* note 53, at 800 (discussing the dispute resolution structure framework within the WTO); Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. COMP. & INT'L L. 347, 360 (1996) (relating how the IA system guided Chile through various dispute resolution mechanisms, including negotiation, conciliation, and mediation). *See generally* Standaert, *supra* note 140, at 537 (explaining the weaknesses of the dispute resolution methods in the IA system).

5. Judicial Activism

Differences in judicial activism between the two systems further illustrate the rule-based versus power-based struggle.[331] The formal limits of the WTO DSP do not allow for much judicial activism, since WTO law is construed very strictly.[332] In contrast, the very nature of the IA's advisory role leads to complete judicial discretion and activism.[333] Its role as both mediator and prosecutor blurs any clear definition that could lead to more power-based issues,[334] whereas such neutrality concerns do not hinder the WTO DSP.[335] The lack of formal procedures does not create an arena for nations to exert their political power over the court. The strict guidelines promoted by the WTO allow for such a power-based dynamic. Again, the court's legitimacy extends only as far as the neutrality the court garners.[336]

6. Third Party Participation

The tight control over the WTO DSP allows limited access by third parties,[337] particularly at the discretion of the judges.[338] Since the IA system implicitly allows amicus briefs,[339]

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331. *See* Cosgrove, *supra* note 140, at 76 (discussing that "the . . . system . . . ultimately must rely on the support of Member States as the source of the system's strength" is indicative of the possible power differentials, as the member states have the right to withdraw if they disagree with the system's policies); *see also* Vincent O. Orlu Nmehielle, *Towards an African Court of Human Rights: Structuring and the Court*, 6 ANN. SURV. INT'L & COMP. L. 27, 46 (2000) (noting that states may use several options to delay proceedings thereby denying recourse to human rights victims); Standaert, *supra* note 140, at 528 (stating that the IA system of dispute resolution creates a power-based struggle between the two disputing parties).

332. *See* Charnovitz, *supra* note 53, at 809 (concluding that the WTO's reliance on sanctions connotes a rules-based system); *see also* Kenworthy, *supra* note 293, at 104 (emphasizing the WTO's reliance on a rules-based dispute resolution system). *See generally* Gantz, *supra* note 48, at 1031 (examining potential enforcement difficulties with the panel process).

333. *See* Buergenthal, *supra* note 187, at 2 (explaining that "the role of the court as a judicial institution is grounded in its advisory jurisdiction"); Nmehielle, *supra* note 331, at 31 (noting that the IA court has great discretion when acting in its advisory role and issuing reports); *see also* Standaert, *supra* note 140, at 525 (discussing the importance that the IA places on its discretionary power).

334. *See* Pasqualucci, *supra* note 275, at 245–46 (discussing the way the Inter-American System works); *see also* Pasqualucci, *supra* note 221, at 15 (alluding to how the Inter-American System acts as both mediator and prosecutor); Jo M. Pasqualucci, *Provisional Measures in Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803, 808 (1993) (explaining the Inter-American System).

335. *See* Jeffrey Waincymer, *Transparency of Dispute Settlement Within the World Trade Organization*, 24 MELB. U. L. REV. 797, 800 (2000) (giving an overview of the workings of the WTO). *See generally* Carmichael, *supra* note 91, at 158 (giving background for the WTO system); *WTO Organization Chart* (detailing how the WTO is structured), *available at* http://www.wto.org (2001).

336. *See* Pasqualucci, *supra* note 275, at 245–46 (showing that the Inter-American System is affected by its methods); *see also* Carmichael, *supra* note 91, at 158 (providing an overall picture of workings of the WTO). *See generally* Pasqualucci, *supra* note 334, at 810 (giving an overview of the Inter-American System).

337. *See* Carmody, *supra* note 40, at 639 (speaking directly on the role third parties play in the WTO); Peter Clark & Peter Morrison, *Key Procedural Issues: Transparency*, 35 INT'L LAW. 851, 858 (1998); Gaffney, *supra* note 85, at 1211 (discussing the rights of third parties in dispute resolution within the WTO framework).

338. *See* Carmody, *supra* note 40, at 639 (demonstrating the WTO's policy in regard to third parties); Gaffney, *supra* note 85, at 1211 (noting the wide discretion the court has in hearing disputes in the WTO).

339. *See* Pasqualucci, *supra* note 334, at 831 (describing how one can come before the committee in the Inter-American System). *See generally* Pasqualucci, *supra* note 275, at 245 (describing in general the procedures that the Inter-American System follows); Pasqualucci, *supra* note 221, at 15 (explaining how the Inter-American System works overall).

third party participation permeates all facets of the IA adjudication, from fact-finding to adjudication.[340] While it has been argued that the IA system's policy of allowing an undefined number of third parties to ultimately participate and mitigate their own violations,[341] the IA system runs counter to a rules-based approach which clearly defines the number of claimants.[342] More parties leads to a greater possibility of instability or "grandstanding."[343] Such participation can ultimately heighten the power debate.[344]

7. Jurisdiction

Admission into the WTO is based upon very strict rules of sponsorship and municipal law adherence to WTO policies.[345] In stark contrast, jurisdiction is temporary in the IA system,[346] leading to questions of enforceability.[347] The transitory nature of jurisdiction could easily fall prey to abuses in the power-based dynamic, since a country or nation may not always be subject to the control of the court.[348] Accountability over time is lost.[349] This exemplifies the argu-

340. *See* Pasqualucci, *supra* note 334, at (detailing the process through which one may seek judgment in the Inter-American system); *see also* Pasqualucci, *supra* note 275, at 248 (giving the general procedures of the Inter-American system); Pasqualucci, *supra* note 221, at 15 (portraying the workings of the Inter-American system).

341. *See* Standaert, *supra* note 140, at 521–522 (specifying that anyone may bring a claim to the American Convention on Human Rights and it will be reviewed by the Inter-American Commission on Human Rights); *see also* Pasqualucci, *supra* note 221, at 15 (explaining the Inter-American System); Standaert, *supra* note 140, at 541 (claiming that the courts themselves have no discretionary power over which parties may use the system).

342. *See* Standaert, *supra* note 140, at 533 (conveying criticism that the Inter-American System may find it difficult to limit the number of claims that come before them and should possibly change their criteria). *See generally* Inter-Am. Ct. H.R. *Rules of Procedure of the Inter-American Court of Human Rights in Effect as of January 1, 1997* (giving the procedure and protocol in the Inter-American court system), *available at* http://www1.umn.edu/humanarts/iachr/rule1-97.htm (last visited Jan. 1, 1997) (hereinafter "Rules of Procedure").

343. *See* Hudec, *supra* note 17, at 1 Inter-Am. Ct. H.R. 11 (explaining that the number of parties involved affects the stability of a system); *see also* Pasqualucci, *supra* note 221, at 15 (explaining the Inter-American System). *See generally Rules of Procedure*, *supra* note 342 (explaining the procedure of the Inter-American court); Standaert, supra note 140, at 541 (criticizing that the Inter-American System has no control over the parties involved in proceedings).

344. *See* Pasqualucci, *supra* note 221, at 15 (establishing an explanation of the workings of the Inter-American System). *See generally* Pasqualucci, *supra* note 334, at 811 (providing background as to the structure of the Inter-American System); *Rules of Procedure*, *supra* note 342 (providing insight into the makeup of the Inter-American court).

345. *See* Carmichael, *supra* note 91, at 156–58 (showing that the WTO is composed of a structure and the rules that follow from that structure). *See generally* Andrea M. Curti, *WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against Aids*, 27 AM. J.L. & MED. 469, 473–74 (2001) (explaining the WTO system's procedure for hearing and deciding cases); *WTO Organization Chart*, *supra* note 335 (demonstrating how the WTO works).

346. *See* Pasqualucci, *supra* note 275, at 245–46 (discussing the role of jurisdiction in the Inter-American System); *Rules of Procedure*, *supra* note 342 (showing the Inter-American System's procedures). *See generally* Pasqualucci, *supra* note 334, at 826 (outlining the jurisdiction of the Inter-American System).

347. *See* Pasqualucci, *supra* note 221, at 20–23 (discussing the Inter-American System's jurisdiction over issues); *see also* Pasqualucci, *supra* note 275, at 245 (describing in general the procedures that the Inter-American System follows); *Rules of Procedure*, *supra* note 342 (stating how the Inter-American System works).

348. *See* Pasqualucci, *supra* note 221, at 20–23 (explaining how the Inter-American System's jurisdiction works); *see also* Pasqualucci, *supra* note 275, at 248 (relating generally what the Inter-American System's procedures are); *Rules of Procedure*, *supra* note 342 (telling how the Inter-American System works).

349. *See* Pasqualucci, *supra* note 275, at 245 (relating generally what the Inter-American System's procedures are). *See generally* Pasqualucci, *supra* note 334, at 811 (explaining the Inter-American System); *Rules of Procedure*, *supra* note 342 (telling how the Inter-American System works).

ment that a system not governed by strict procedures is susceptible to abuse by powerful nations. A power-based dynamic may help alleviate these burdens by placing more responsibility on the violating nation to remedy the situation.

8. Retaliation

The WTO has elaborately defined the retaliatory measures allowed by its participating members.[350] The hierarchy of remedies grants a complainant options, which can act as a self-defense protection.[351] There is no such equivalent in human rights adjudication,[352] as the societal goals are vindication and catharsis, not solely remuneration.[353] Since there is no clear retaliation scheme in the IA,[354] vigilantism is often a by-product of human rights infractions. This further illustrates a power-based resolution, due to the lack of formal strictures.[355]

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350. *See* Schaefer, *supra* note 116, at 317 (defining retaliatory procedures and limitations that member states must follow); *see also* Kevin M. McDonald, *Unilateral Undermining of Conventional International Trade Law Via Section 301*, 7 J. INT'L L. & PRAC. 395, 398–99 (1998) (stating that the WTO members must follow certain procedures when seeking retaliatory measures); O'Neal Taylor, *Limits Of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*; 30 VAND. J. TRANSNAT'L L. 209, 259 (1997) (stating that the WTO places various limitations on retaliatory measures).

351. *See* Steve Charnovitz, *Law of Environmental "PPMS" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 76 (2002) (stating that under WTO rules, the complainant has the option of trade retaliation against a non-complying government). *See generally* John R. Kettle III, *To the Beat of a Different Drummer: Global Harmonization—and the Need For Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1083 (2002) (stating that ignoring a WTO ruling may result in serious cross-sector retaliation); Leyla Marrouk, *A Critique of the U.S. and EU Proposals for Improving International Enforcement of Antitrust Law*, 8 COLUM. J. EUR. L. 101, 115 (2002) (stating that WTO may sanction a country by allowing retaliation).

352. *See* Timothy J. Heverin, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits On Self-Defense*, 72 NOTRE DAME L. REV. 1277, 1307 (1997) (stating that self-defense is removed from humanitarian law); *see also* Alison Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, 31 CAL. W. INT'L L.J. 141, 142 (2000) (noting that human rights law provides few options to individuals in imminent danger). *See generally* Leslie Kurshan, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U. J. GENDER SOC. POL'Y & L. 353, 385 (2000) (stating that women living in countries that do not honor human rights have few legal options).

353. *See generally* Matthew W. Finkin, *Road Not Taken: Some Thoughts on Nonmajority Employee*, 69 CHI.-KENT L. REV. 195, 216 (1993) (stating that societal values depend on individual litigation for their vindication).

354. *See* Kym Anderson, *Pecularities of Retaliation in WTO Dispute Settlement*, Center For International Economic Studies (stating that the WTO retaliation process has ambiguities), *available at* http://www.adelaide.edu.au/CIES/0207.pdf (last visited Mar. 2002). *See generally* Steve Charnovitz, *WTO Dispute Settlement as a Model for International Governance* (discussing criticisms of WTO remedies including retaliation), *available at* http://www.gets.org/gets/library/admin/uploadedfiles/WTO_Dispute_Settlement_as_a_Model_for_Internat.doc (last visited Sept. 28, 2002); Parth J. Shah, *Disputes and the WTO*, ECONOMIC TIMES (identifying loopholes in the WTO Dispute Settlement process), *available at* http://www.ccsindia.org/people_pjs_dispute.htm (last visited June 2001).

355. *See* Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *Post-Conflict Transitional Administration of Kosovo and The Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 386 (2001) (stating that vigilantism and retribution are direct outgrowths of human rights infractions); *see also* Symposium, *State Reconstruction After Civil Conflict: Courts and Democracy in Post Conflict-Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64 (2001) (discussing human rights abuses and vigilantism in Africa). *See generally* Gregory Jowdy, Note, *Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in Guatemala*, 17 B.C. THIRD WORLD L.J. 285, 287 (1997) (stating that the new government in Guatemala must recognize human rights abuses to avoid vigilantism).

9. ADR

Lastly, ADR in the WTO DSP is used solely to clarify peripheral issues for the sake of efficiency.[356] ADR in the IA arena is equivalent, if not superior, to adjudication.[357] While the WTO requires first consultations between parties,[358] the onus of the negotiation does not rest with the DSB to foster an agreement.[359] However, in the IA system, the Commission bears responsibility for the success or failure of the required mediation.[360] Therefore the IA system heavily relies upon methods of ADR to reach an agreement.[361] While forms of ADR are neces-

356. *See generally* Victor Mosoti, *In Our Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; A View From Sub-Saharan Africa*, 19 B.U. INT'L L.J. 231, 232 (2001) (stating that out of the 275 Panel and Appellate Body decisions rendered within the WTO DSP since 1995, only three have involved disputants from sub-Saharan Africa); Stephen Reichert, John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, 22 MD. J. INT'L L. & TRADE 430, 430 (1998) (stating that the DSP within the WTO has successfully resolved international trade conflicts); Spierer, *supra* note 79, at 66–67 (describing the use of ADR in the WTO Dispute Settlement Process).

357. *See generally* Perry, *supra* note 225, at 53–54 (1998) (discussing alternative forms of dispute resolution to human-rights complaints); Standaert, *supra* note 140, at 536 (stating that the Inter-American Commission's friendly settlement mechanism gives the victim a chance to be heard and actually to control the outcome of its relationship with the state).

358. *See* Gary N. Horlick, *Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View*, 32 INT'L LAW. 685, 687 (1998) (stating that WTO requires consultation between the parties before requesting a panel); *see also* Jason F. Hellwig, Note, *Retreat of the State? The Massachusetts Burma Law and Local Empowerment in the Context of Globalization*, 18 WIS. INT'L L.J. 477, 502 (2000) (claiming that EU and Japan were required to attend consultations required by the WTO); Mari Presley, *Sovereignty and Delegation Issues Regarding U.S. Commitment to the World Trade Organization's Dispute Settlement Process*, 8 J. TRANSNAT'L L. & POL'Y 173, 181 (1998) (explaining that Venezuela requested consultation with the United States in accordance with WTO procedural requirements).

359. *See* Sue Ann Mota, *TRIPS-Five Years of Disputes at the WTO*, 17 ARIZ. J. INT'L & COMP. L. 533, 533 (2000) (explaining that a member may request a consultation with the DSB and subsequently request a panel if the dispute is not resolved). *But see* John Stephen Fredland, *Unlabel their Frankenstein Foods!: Evaluating A U.S. Challenge to the European Commission's Labeling Requirements For Food Products Containing Genetically-Modified Organisms*, 33 VAND. J. TRANSNAT'L L. 183, 193 (2000) (describing that DSB is responsible for consultations and dispute settlement); Misha Gregory Macaw, Note, *New Rum War: Havana Club as a Threat to the U.S. Interests in International Trademark Harmonization*, 18 B.U. INT'L L.J. 291, 309 (2000)(stating that settling disputes is the responsibility of the DSB).

360. *See generally* Cecilia Medina, *Toward Effectiveness in the Protection of Human Rights in the Americas*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 337, 351–52 (1998) (describing the workings of the Inter-American Commission on Human Rights); Symposium, *Indigenous Peoples, Environmental Torts and Cultural Genocide,* 24 HASTINGS INT'L & COMP. L. REV. 485, 487 (2001) (stating that IA unsuccessfully attempted to resolve the dispute through mediation); Richard J. Wilson, *Researching the Jurisprudence of The Inter-American Commission on Human Rights: A Litigator's Perspective*, AMER. UNIV. J. INT'L L. & POL'Y (describing the structure of the IA), *available at* http://www1.umn.edu/humanrts/iachr/first.html (last visited Sept. 27, 2002).

361. *See* Symposium, *supra* note 360, at 485 (explaining that IA uses mediation as an alternative dispute resolution); *see also* Patricia Thompson, *Rapporteur's Summary of the Deliberative Forum: Are Environmental NGOs Friends or Foes of Indigenous Peoples?*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 75, 85 (2002) (stating that IA used mediation, diplomacy and other methods of alternative dispute resolution to settle the dispute). *See generally* Ariel E. Dulitzky and Luguely Cunillera Tapia, *Non-Governmental Perspective Regarding the International Protection of Children in the Inter-American System of Human Rights*, 8 J. TRANSNAT'L L. & POL'Y 265, 267 (1999) (noting that Commission-led mediation may be requested to settle disputes).

sary in human rights abuse cases to accomplish its duty to the individual,[362] the "friendly settlement" mechanism hinders the IA system's accountability to society.[363] In the IA system, ADR settles matters of law, but by its very nature, ADR is more permeable to influence in the power dynamic to reach alternative solutions.[364]

V. Conclusion

In the Inter-American System, the dual nature of the Commission and the Court illustrates the rule-based versus power-based dichotomy. Due to the loose structure of the Commission as both negotiator and adjudicator, the ill-defined role of the Commission potentially undermines the legitimacy of the system, and therefore its efficacy.[365] The lack of discretion by the Commission to determine when and which suits can be either mediated or adjudicated allows for parties to manipulate the system in favor of the power dynamic.[366] Similar advisory/adjudicator provisions in the Inter-American Court negate its rule-based function, and thus are more susceptible to power dynamics.[367]

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362. *See* ADR Briefs, *U.S. Backs ADR Amidst Columbian Turmoil*, 18 ALTERNATIVES TO HIGH COST LITIG. 176 (2000) (stating that ADR was extensively used in human rights abuse cases in Columbia). *See generally* Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 375 (2000) (stating that ADR cannot redress human rights abuses that require policy changes and possibly some kind of restitution). *But see* Thomas D. Barton, *Creative Problem Solving and Human Rights*, 26 FALL HUM. RTS. 17, 17–18 (1999) (discussing problems that arise from using ADR in human rights cases).

363. *See* Symposium, *supra* note 360, at 485 (stating that IA employs friendly settlement mechanisms); *see also* Tapia, *supra* note 361, at 267 (showing that a friendly settlement mechanism can be used in the IA system). *See generally* Thompson, *supra* note 361, at 85 (stating that IA attempts to settle the dispute through mediation and diplomacy failed).

364. *See generally* Allison Ma'luf, Note, *A Mediation Nightmare?: The Effect of the North Carolina Supreme Court's Decision in* Chappell v. Roth *on the Enforceability and Integrity of Mediated Settlement Agreements,* 37 WAKE FOREST L. REV. 643, 648 (2002) (noting that the main purpose of ADR is to settle the dispute outside of the courtroom); William L. Norton, Jr., *Mass Claims Against the Chapter 11 Estate*, 6 NORTON BANKR. L. & PRAC. § 146:16 (2d ed. 2002) (stating that bankruptcy courts have used ADR to resolve significant amounts of personal injury and property damage claims); Martin Quinn, *Use of ADR to Resolve Individual Claims in Class Actions and Mass Torts*, 18 No. 3 ANDREWS PHARMACEUTICAL LITIG. REP. 15 (2002) (explaining that ADR may help eliminate some of the roadblocks to settlement in mass tort litigation).

365. *See* Pasqualucci, *supra* note 186, at 242–51 (analyzing the advisory practice of the Inter-American Court of Human Rights); *see also* Buergenthal, *supra* note 185, at 235–43 (describing the contentious and advisory jurisdiction of the Inter-American Court of Human Rights). *See generally* Parker, *supra* note 149, at 215–20 (reviewing the establishment of the Inter-American Court of Human Rights and discussing its functioning and effect on human rights in the Americas).

366. *But see* Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 218 (2001) (discussing that the Inter-American Commission on Human Rights may, at its discretion, forward a particular case to the IACHR); Standaert, *supra* note 140, at 525 (explaining that the Commission has discretion whether to mediate the case when the case is not likely to result in a friendly settlement); Van Schaack, *supra* note 153, at 164 (stating that IACHR at its discretion may forward a case to an Inter-American Court).

367. *See* Pasqualucci, *supra* note 186, at 242–51 (analyzing the advisory practice of the Inter-American Court of Human Rights); *see also* Thomas Buergenthal, *supra* note 185, at 235–43 (describing the contentious and advisory jurisdiction of the Inter-American Court of Human Rights). *See generally* Parker, *supra* note 149, at 215–20 (reviewing the establishment of the Inter-American Court of Human Rights and discussing its functioning and effect on human rights in the Americas.)

In contrast, the WTO's strict definitions and taxonomy of Agreements within the GATT system leave very little room for manipulation by parties.[368] Therefore, the intricate parameters of the WTO's dispute settlement procedures produce far greater procedural determinations that result from a nation-state's ability to cede sovereighty to its super-national adjudication system,[369] resulting in less abuse.[370]

A more structured system for human rights may present a solution to the present abuses in the IA system. If nations are confident that the proceedings would not be arbitrarily influenced under the power-based dynamic, nations perhaps would be more willing to cede some of their sovereignty to the IA system.[371] While the very nature of human rights and trade violations are vastly different, similar adjudicative proceedings may be useful in resolving disputes and enforcing remedial measures, thus promoting efficiency and proper resolution.

Thus, the codified rules governing the WTO contrast with the permeable regulations of the Inter-American System. While both trade and human rights are embedded in the international arena, the formal adjudication of trade differs from that of human rights in that nations fear ceding sovereignty in human rights instances due to the amorphous structures of human rights adjudication, which stands in contrast to the formal structures of trade adjudication.[372]

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368. *See* Van der Borght, *supra* note 17, at 1233 (asserting that the flexibility of the WTO dispute resolution process allows for abuse by parties); *see also* GATT, *supra* note 33, at 1227 (containing the WTO's rules for dispute resolution). *See generally* Pauwelyn, *supra* note 1, at 338 (noting some WTO rules do not elicit compliance from all parties).

369. *See* Bal, *supra* note 269, at 63 (noting the increasing significance of trade and human rights with respect to globalization and the arena of international trade); Schwartz, *supra* note 18, at 16 (discussing the relationship between human rights and international trade). *See generally* Garcia, *supra* note 258, at 85–86 (suggesting that the global community faces the challenge of accommodating both trade and human rights).

370. *See* Symposium, *Universal Declaration of Human Rights at 50 and The Challenge of Global Markets: The Globalization of Economic Rights*, 25 BROOK. J. INT'L L. 113, 115–121 (1999) (describing the tension between the pursuit of international trade and human rights). *See generally* Symposium, *Global Trade Issues and the New Millenium: A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537, 537–540 (1999) (examining the conflict between the pursuit of international trade and human rights in relation to the WTO); Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systematic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 680–682 (1999) (discussing the various problems with having multiple international tribunals).

371. *See* Pasqualucci, *supra* note 186, at 242–51 (analyzing the advisory practice of the Inter-American Court of Human Rights); *see also* Thomas Buergenthal, *supra* note 185, at 235–43 (describing the contentious and advisory jurisdiction of the Inter-American Court of Human Rights). *See generally* Parker, *supra* note 149, at 215–20 (reviewing the establishment of the Inter-American Court of Human Rights and discussing its functioning an effect on Human Rights in the Americas).

372. *See* Van der Borght, *supra* note 17, at 1233 (asserting that the flexibility of the WTO dispute resolution process allows for abuse by parties); *see also* GATT, *supra* note 33, at 1227 (containing the WTO's rules for dispute resolution). *See generally* Pauwelyn, *supra* note 1, at 338 (noting some WTO rules do not elicit compliance from all parties).

Appendix

Issue	*WTO*	*Inter-American System*
Procedural Criticisms	• Transparency—closed • Standing—states only • Procedural legitimacy of first-level panel	• Transparency—open • Standing—person, group persons, NGOs, states may file complaint • Procedural flaw of "friendly settlement" mechanism
Judicial Activism	• No judicial activism • Read letter of WTO law • Set number of judges	• Complete judicial activism through advisory function • Discretion to adjudicate, fact-find and negotiate • Ad hoc judges allowed
Third Party	• Can join formally, but limited admission of amicus briefs, if at all	• Yes—Commission is fact finder
Duty	• Society	• Individual and society
Jurisdiction	• Permanent	• Temporary
Retaliation	• Defined levels of retaliation	• None
ADR	• Settles minor issues	• Settles major issues of law

The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan

By Eric Ting-Lun Huang*

I. Introduction

In the past, contact between governments was essentially political.[1] However, in today's world, multilateral contacts and intergovernmental organizations provide channels involving matters such as commercial, economic, humanitarian, trade, cultural and environmental-protection issues[2] that have increased the cooperative machinery in our world community.[3] With these developments, what we have witnessed is the acceptance of obligations under the Articles of Agreement of the International Monetary Fund (IMF),[4] as well as the International Bank for

1. Thomas D. Grant, *Book Review: An Institution Restored? Recognition of Governments: Legal Doctrine and State Practice, 1815–1995. By M.J. Peterson. New York, New York: St. Martin's Press, Inc.; London: Macmillan Press Ltd. (1997)*, 39 VA. J. INT'L L. 191, 213 (1998) (stating that contact between governments was mostly political in the past).

2. *See* Luis Banck, *Feature: International Monetary Fund: Distributional Impacts of IMF-Supported Economic Reforms: A Case Study of Mexico*, 3 GEO. PUB. POL'Y REV. 115, 116–17 (1998) (describing the IMF as an intergovernmental organization involved in matters of international trade); *see also* Thomas D. Grant, *supra* note 1, at 213 (stating that today, contact between governments spans many matters such as the environment, pharmaceuticals, trade, cultural relations and technology); Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 243, 249 (1998) (discussing the South Pacific Regional Environment Program as an intergovernmental organization which deals with issues affecting the environment).

3. *See* Patricia Anne Kuhn, *Comment: Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. REV. 1011, 1066 (1989) (stating that international cooperation is increasingly important for a state to function effectively in the world community); *see also* Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. LAW 515, 579–80 (1998) (stating that states are increasingly willing to cooperate as interdependencies grow, using dispute settlement in the United Nations and the Single European Act as examples); Halle Fine Terrion, *Comment: United States v. Alvarez-Machain: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction*, 43 CASE W. RES. L. REV. 625, 650 (1993) (recognizing the fact that there have been years of growing international cooperation and an increasing world community).

4. *See* Sandra Blanco & Enrique Carrasco, *Symposium: Part One: Pursuing the Good Life: The Meaning of Development as It Relates to the World Bank and the IMF*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 67, 76 (1999) (stating that the number of countries adhering to the Article VIII obligations of the IMF is rising today); *see also* Carson W. Clements, *Note: A More Perfect Union? Eastern Enlargement and the Institutional Challenges of the Czech Republic's Accession to the European Union*, 29 SYRACUSE J. INT'L L. & COM. 401, 422–23 (2002) (stating that the Czech Republic formally accepted the Article VIII obligations of the IMF); Milena Makich-Macias, *Note and Comment: The Effect of the International Monetary Fund Bailout on Emerging Growth Countries*, 26 BROOKLYN J. INT'L L. 1755, 1776 (2001) (discussing how Russia joined 115 other countries when it accepted the obligations of Article VIII of the IMF).

* **L.L.B., Soo-chow University School of Law, Taiwan, ROC; L.L.M., and currently S.J.D. candidate, Golden Gate University School of Law, San Francisco, USA.** **The author would like to give special thanks to Professor Chris N. Okeke, Professor Van Walt Van Praag and Professor Sompong Sucharitkul. Without their thoughtful assistance and support, this article could not have been completed.**

Reconstruction and Development (IBRD).[5] There has been an acceptance of the regulations established by the World Health Organization (WHO)[6] and by the International Civil Aviation Organizations (ICAO),[7] as well as participation in the schemes of tariff reduction adopted under the General Agreement on Tariffs and Trade-the World Trade Organization system (hereinafter "GATT-WTO system").[8] In light of this progress, the power of states has been lim-

5. The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), also known as the Bretton Woods Institutions (BWIs), were formed in Bretton Woods in 1944 on the eve of the end of World War II. They were precursors to the United Nations and other multilateral institutions formed after World War II and reflected the new spirit of cooperation between nations, especially in economic matters. *See* John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331, 333 (2000) (discussing the IMF and IBRD as the Bretton Woods institutions and how they and similar organizations can now promote free market economics more vigorously than before). *See generally* Blanco & Carrasco, *supra* note 4, at 67 (discussing the origins of the IBRD and how today it is deeply involved in developing countries); Dominique Carreau, *Why Not Merge the International Monetary Fund (IMF) With the International Bank for Reconstruction and Development (World Bank)?*, 62 FORDHAM L. REV. 1989, 1989 (1994) (equating the IBRD with the World Bank and describing its origins and original function).

6. The World Health Organization, established by the late 1940's, is the specialized agency of the United Nations responsible for international health cooperation. *See generally* David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079 (1998) (discussing the creation of the WHO, and its role in international health activities); Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 5–6 (1994) (discussing the UN system as a whole, with specific reference to the WHO and the fact that many governments have incorportated WHO standards into their national regulations); Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301 (1992) (describing the WHO as a multilateral organization which addresses international disparities in health standards and health services and describing the legal duties of member nations).

7. The International Civil Aviation Organization is a specialized agency within the United Nations system. It was created during President Roosevelt's administration in 1944 by the Convention on International Civil Aviation, more commonly known as the Chicago Convention. Its membership consists of 160 countries. The purpose of the organization at that time was to establish common working rules for the operation of aircraft around the world. *See* Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 463 (1994) (stating that the ICAO was created at the Chicago convention in 1944 as an arm of the UN and that its purpose is to oversee and regulate international aviation); *see also* Lorne Clark and Jeffrey Wool, *Entry Into Force of Transactional Private Law Treaties Affecting Aviation: Case Study – Proposed Unidroit/ ICAO Convention as Applied to Aircraft Equipment*, 66 J. AIR L. & COM. 1403, 1415 (2001) (stating that the ICAO was created at the Chicago Convention and accepted worldwide); Wendy Giebler, Note, *Reclaiming the Skies from Terrorism: The Aviation Security Improvement Act of 1990*, 16 SETON HALL LEGIS. J. 757, 804 n.131 (1992) (describing the creation of the ICAO as an agency within the UN, the number of member countries (160), and the purpose behind the organization).

8. In 1944, at Bretton Woods, New Hampshire, a comprehensive economic and financial plan was proposed for post-World War II reconstruction and development. It was the formation of three international economic and financial institutions. Two of them, the World Bank and the International Monetary Fund, were created to address development and monetary issues. *See* Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT'L L.J. 421, 422 (1998). The International Trade Organization rounded out the institutional triad and GATT was first concluded in 1947 to serve as an interim agreement until the most important of the Uruguay Round agreements were concluded. The Uruguay Round agreements is the Agreement Establishing the World Trade Organization under which the institutional functions of GATT are replaced by the World Trade Organization. *See* Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT'L L.J. 421, 443 (1998). The function of the GATT-WTO system is to open international markets for goods, services, and capital. *See* GATT, Oct. 30, 1947, 61 Stat. (5), (6), 55 U.N.T.S. 194; Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1.

ited in the acceptance of the power of international organizations concerning the benefits accruing from their constantly developing relationships with other states.[9]

At this point, there is no doubt that now we are living in a world where states have increasingly used their power to limit their power.[10] Such limitations, however, do not affect the quality of the states.[11] For instance, the dissolution of the former Soviet Union[12] and the former Yugoslavia[13] led to the birth of numerous micro-states.[14] When speaking theoretically, interna-

9. S*ee* Jack J. Chen, *Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 FORDHAM L. REV. 1283, 1335 n.15 (1995) (discussing the proposed International Trade Organization and how in the past it was a novel idea for sovereign states to give an international organization the power to limit their power); *see also* John E. Noyes, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 240 (1999) (discussing another article which stated that nation-states are increasingly surrendering some of their power by joining together in international organizations).

10. *See* Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 730–31 (1999) (stating that when any state joins an international organization, it must agree to limits on some of its power).

11. *Id.*

12. The definitive stages of the breakup of the former Soviet Union began with the failed coup by hard-line Communists in August 1991 that sparked declarations of independence from all of the republics of the former Soviet Union except Russia and Kazakhstan. In the midst of these declarations of independence, the Soviet government formally recognized the independence of the Baltic states of Estonia, Latvia, and Lithuania on September 6, 1991, but attempted to keep the other twelve republics together in a Union of Sovereign States with both the Union and the individual republics maintaining international personalities. As a result of a referendum, affirming by a 90% vote that doomed the Union Treaty at the outset, the republics of Ukraine, Belarus, and Russia formally declared that the Soviet Union had disintegrated and announced the formation of the Commonwealth of Independent States. By December of 1991, all of the republics except Georgia had agreed to membership in the Commonwealth, which considered the former Soviet Union to have been dissolved. *See* Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 3 (1994) (describing the breakup of the Soviet Union and the resulting formation of independent states). *See generally* Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L. REV. 581, 670 (1992) (discussing the attempted coup to restore the union, the reasons it failed and how it backfired and hastened the end of communism).

13. *See* Williams, *supra* note 12, at 4–6; *see also* Svetozar Stojanovic, *The Destruction of Yugoslavia*, 19 FORDHAM INT'L L. J. 337, 358 (1995) (discussing that the secessions from Yugoslavia were viewed as self-determination movements); *see also* Gideon A. Moor, Note, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT'L L. J. 870, 873–74 (1995) (discussing the fall of communism in 1989, the changing face of Eastern Europe in the early 1990s and the nationalist self-determination movement). *See generally* John Tagliabue, *Conflict in Yugoslavia*, N.Y TIMES, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national aspirations as a way of casting off that which originally gave rise to communism).

14. *See* Alexander Biryukov, *The Doctrine of Dualism of Private Law in the Context of Recent Codifications of Civil Law: Ukrainian Perspectives*, 8 ANN. SURV. INT'L & COMP. L. 53, 57 (2002) (stating that shortly after the dissolution of the former Soviet Union, fifteen new states arose); *see also* Frank A. Misuraca, *Eastern Europe: An Environmental Emergency*, 3 D.C.L. J. INT'L L. & PRAC. 399, 399 (1994) (stating that after the Soviet Union was dismantled, the Commonwealth of Independent States was created); Phillip R. Trimble, *1997 Survey of Books Relating to the Law: VI. International and Comparative Law: Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) (mentioning that new states were created by the dissolution of Yugoslavia).

tional law must deal with the issues of state creation through self-determination,[15] as well as the challenges of nationalism and relations among groups within the state.[16] This concept is so important that international law created contemporary distinctions for the terms "sovereignty," "statehood," and "recognition."[17]

As the concept of sovereignty is still with us today, we cannot avoid any legal debate resulting from the use of the word "sovereignty." The situation in Taiwan[18] presents a very different international law problem at the outset. The two governments on each side of the Taiwan

15. *See* David Kennedy, *Symposium: International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 133 (1997) (stating that international law must deal with the creation of new states through self-determination); *see also* Benedict Kingsbury, *"Indigenous Peoples" In International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 437 (1998) (claiming that self-determination is one of three well-established strictures of general international law which is used with great frequency in claims involving indigenous people); Patricia Y. Reyhan, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 ALB. L. REV. 771, 781–82 (1997) (stating that self-determination is increasingly being accepted in international law as more than just a political issue).

16. *See* Philip Allott, Note, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764, 767 (1992) (stating that international society, through international law, has an interest in what happens within particular states and gives examples of the types of activities international society is interested in); *see also* David Kennedy, *supra* note 15, at 133 (stating that international law must deal with the challenges of nationalism); L. Amede Obiora, *Symposium: Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AM. J. COMP. L. 669, 672 (1998) (declaring that international law has broadened its parameters to include both relations within states and matters of domestic jurisdiction).

17. *See* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abu-Zeineh v. Federal Laboratories, Inc.,* 11 AM. U.J. INT'L L. & POL'Y 195, 237–38 (1996) (alluding to the fact that international law has fine distinctions as to sovereignty); *see also* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 1057 (1995) (discussing the treaty/customary rules of recognition and the Sub-Referential Threshold Relativity (STR) approach to recognition and mentioning the fact that international law has its own current rules of recognition); George Miron, *Memorandum of Law: Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?*, 17 AM. U. INT'L L. REV. 189, 279–80 (2002) (listing the requirements necessary to recognize statehood under international law).

18. The names "Taipei", the "Republic of China" (ROC), the "Republic of China on Taiwan," "Government of Taiwan," and "Nationalist China" are used interchangeably in this paper in order to introduce and analyze the legislation and judicial practice of the Republic of China. *See* Tzu-wen Lee, *Point-Counterpoint: The International Legal Status of Taiwan:The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOR. AFF. 351, 392 n.3 (1997) (utilizing "Republic of China", the "Republic of China on Taiwan", "Taiwan", "ROC" and "Nationalist China" interchangeably to refer to the territory under control of the Republic of China). All these terms refer to the ROC government that was established in 1912 by Dr. Sun Yat-sen and that has been governing Taiwan effectively since 1949, rather than the PRC government. The names "Beijing," the "People's Republic of China," "Mainland China," and "Communist China" refer to the separate geographical region of mainland China that was established in 1949 by Mao Ze-dong. Taiwan consists of the island of Formosa, the Penghu Islands (the Pescadores), Jinmen Island, and Matsu Island. *See* Rong-Chwan Chen, *A Boat on a Troubled Strait: The Interregional Private Law of the Republic of China on Taiwan*, 16 WIS. INT'L L.J. 599, 638 n.3 (1998) (stating that the "Republic of China" or "ROC" refers to the government put in place in 1912 by Dr. Sun Yat-sen which has been governing Taiwan since 1949, and that the "Peoples Republic of China" or "PRC" refers to the government Mao Ze-dong established in 1949).

Strait, Beijing and Taipei, are both claiming sovereignty over Taiwan at the same time.[19] While there is a strong argument that Taiwan should be regarded as a sovereign state in international law,[20] most countries do not regard Taiwan as a state.[21] Given these political realities, what legal basis would there be for regarding Taiwan as a sovereign state under international law? Now that the word sovereignty is used in a variety of shapes and sizes, should we draw a further distinction between a legal sovereign[22] and a political sovereign?[23] As a practical matter, particularly in the European Community/Union,[24] with regard to the concept "sovereignty," we can

19. See Christopher K. Costa, *One Country-Two Foreign Policies: United States Relations With Hong Kong After July 1, 1997*, 38 Vill. L. Rev. 825, 861 (1993) (discussing the relationship between the ROC and PRC regarding Taiwan and the fact that both governments claim that theirs is the legitimate government of China and therefore Taiwan); *see also* Lawrence L. C. Lee, *Adoption and Application of a "Soft Law" Banking Supervisory Framework Based on the Current Basle Accords to the Chinese Economic Area*, 16 Wis. Int'l L.J. 687, 738 n.20 (1998) (stating that both the ROC and PRC consider Taiwan to be an integral part of China and that each claims sovereignty over mainland China and therefore Taiwan); Jianming Shen, *Sovereignty, Statehood, Self-determination, and the Issue of Taiwan*, 15 Am. U. Int'l L. Rev. 1101, 1114–15 (2000) (arguing that after Japan renounced rights to Taiwan, the 1951 San Francesco Peace Treaty did not identify who Taiwan was to be returned to and therefore there is a question of who has sovereignty in Taiwan, the ROC or the PRC).

20. *See* Glenn R. Butterton, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 CATH. U. L. REV. 51, 67 (1997) (proffering the argument that Taiwan meets the de-facto requirements to be a sovereign state); *see also* Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's "One Country Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y 497, 499 (1997) (concluding that under international law, there is a good argument that Taiwan should be considered a sovereign state); Jianming Shen, *supra* note 19, at 1125 (arguing that Taiwan meets the international legal standard of statehood and therefore is already a sovereign state).

21. *See* Cooney, *supra* note 20, at 499 (stating that most countries do not recognize Taiwan as a state); *see also* Michael J. Kelly, *Political Downsizing: The Re-emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogeneous States*, 47 DRAKE L. REV. 209, 226 (1999) (stating that most countries consider Taiwan a subsidiary to the People's Republic of China, which is recognized as the legitimate government of China); Shen, *supra* note 19, at 1121 (asserting that 160 or more states do not recognize Taiwan as an independent state, but as part of China).

22. *See* Benedict Kingsbury, *Book Review and Note: Sovereignty: Organized Hypocrisy. By Stephen D. Krasner*, 94 AM. J. INT'L L. 591, 591 (2000) (discussing and defining legal sovereignty); *see also* Stephen D. Krasner, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements Between Sovereigns and Intermediate Sovereigns: Article: Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651, 655 (1997) (discussing the concerns of legal sovereignty); Robert A. Mundell, *Monetary Unions and the Problem of Sovereignty*, 579 ANNALS 123, 124 (2002) (defining legal sovereignty as the ability of a state to make its own laws with no pressure from any outside authority).

23. *See* John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 10 (1998) (asserting that a key element of political sovereignty is the state's ability to control anti-social behavior through the law); *see also* Steven Lee, *A Puzzle of Sovereignty*, 27 CAL. W. INT'L L.J. 241, 249 (1997) (recognizing differences between legal and political sovereignty and defining political sovereignty); Brian Orend, *Kant on International Law and Armed Conflict*, 11 CAN. J.L. & JURIS. 329, 341 (1998) (defining political sovereignty within a discussion of state rights as the freedom of self-governance in a global setting).

24. The European Union (EU) was set up after the Second World War. The process of European integration was launched in 1950 when France officially proposed to create the first concrete foundation of a European federation. Six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) joined from the very beginning. Today, after four waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 member states and is preparing for the accession of 13 eastern and southern European countries. For detail, see the EU Web site (www.europa.eu.int/abc-en.htm). *See also* William J. Parsons, *Trade and Sports: The Bosman Ruling: European Soccer—Above the Law?*, 1 ASPER REV. INT'L BUS. & TRADE L. 187, 187 (2001) (describing the EU as being officially created in the 1950s and currently consisting of fifteen member states); Markus G. Puder, *Salade Nicoise from Amsterdam Left-Overs—Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 COLUM. J. EUR. L. 53, 83 n.55 (2002) (listing the thirteen eastern and southern European countries that have applied for accession to the EU and the dates of their applications).

assess whether the reciprocal benefit that is derived from the correlative restriction upon the power of another state makes the loss of one's power acceptable.[25]

Since the Middle East peace treaty of 1979[26] and the Panama Canal Treaty of 1977,[27] there has been no negotiated settlement of a major territorial dispute involving sovereignty issues other than the 1997 Hong Kong model.[28] In this model, governments of both the

25. *See generally* Puder, *supra* note 24, at 66 (noting that power is shifted and the effects on countries with increased control).

26. *See* David R. Karasik, *Securing the Peace Dividend in the Middle East: Amending GATT Article XXIV to Allow Sectoral Preferences in Free Trade Areas*, 18 MICH. J. INT'L L. 527, 564 n.2 (1997) (noting that as of January 1, 1997, several significant peace agreements have been signed between Israel and the Arabs, including: Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, 18 I.L.M. 362; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, 34 I.L.M. 43; Israel-Palestine Liberation Organization: Declaration of Principles On Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525); Tanya Kramer, *The Controversy of a Palestinian "Right of Return" to Israel*, 18 ARIZ. J. INT'L & COMP. LAW 979, 986–89 (2001) (discussing the 1979 Middle East Peace treaty, the 1993 Declaration of Principles and the status of peace in the Middle East through the present). *See generally* Jill Allison Weiner, *Israel, Palestine and the Oslo Accords*, 23 FORDHAM INT'L L.J. 230 (1999) (focusing on Israel and Palestine in addressing the Middle East peace process by discussing the history of the land involved in the disputes, the various peace treaties signed by Israel, Palestine and other nations in the area, and concluding that to achieve peace, both sides will need to compromise);

27. *See* Panama Canal Treaty, United States-Panama, 193 Stat. 4521, 33 U.S.T. 39, T.I.A.S. No. 10030 (signed Sept. 7, 1977; entered into force Oct. 1, 1979) (declaring a treaty between the United States and Republic of Panama, which overrides all previous treaties concerning the Panama Canal and gives the United States the right to manage, operate, and maintain the canal until December 31, 1999); *see also* Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609, 627, n.2 (1991) (noting that the Panama Canal Treaty recognizes Panamanian sovereignty over the former Canal Zone, but allows the Panama Canal Commission, a U.S. government corporation, to continue operating the Canal itself until the year 2000, subject to requirements of paying at least $10 million annually to Panama in toll revenues, increasing Panamanian employment in operating the Canal, and having a Panamanian Administrator for the Canal Commission as of Jan. 1, 1990); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 680–81 (1995) (calling the Panama Canal Treaties the best example of a treaty designed to allow one state to protect interests that state may have within another state; in the treaties, the U.S. acknowledged Panamanian sovereignty over the Canal and Panama granted the U.S. the right to protect and defend the Canal).

28. In the 19th century, Great Britain acquired Hong Kong from China pursuant to three treaties, which are (1) the 1842 Treaty of Nanking, which ceded Hong Kong Island and some adjacent territory in perpetuity to Great Britain; (2) the 1860 Convention of Beijing, which ceded Stonecutters Island and a portion of Kowloon Peninsula in perpetuity to Great Britain; (3) the 1898 Convention of Beijing, which leased the rest of Kowloon and the New Territories to Great Britain for 99 years. *See* John H. Henderson, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 508–509 (1995) (describing in detail the three treaties by which Great Britain acquired Hong Kong). The two treaties, the 1842 Treaty of Nanking as well as the 1869 Convention of Beijing, account for the cession of an area of about 8 percent of the total area of what is now Hong Kong, and the 1898 Convention of Beijing accounts for an area of about 92 percent of the total area of what is now Hong Kong. *Id* at 542 n.18 (describing Stonecutters Island as a small area of land between Hong Kong Island and the Kowloon Peninsula and describing the Kowloon Peninsula as approximately one mile from Hong Kong Island. Based on these descriptions, it can be inferred that Hong Kong Island is much larger than the Kowloon Peninsula and Stonecutters Island, which were acquired via the 1860 Convention of Beijing). In 1984, the United Kingdom concluded a joint declaration with the People's Republic of China to relinquish its claim of an enforceable legal right to Hong Kong and Kowloon (hereinafter "Hong Kong"), and transfer its full authority over Hong Kong to PRC after the year 1997. *See* Marsha Wellknown Yee, *Hong Kong's Legal Obligation to Require Fair Trial for Rendition*, 102 COLUM. L. REV. 1373, 1377 (describing the 1984 joint declaration on Hong Kong and its terms).

United Kingdom (UK) and the People's Republic of China (PRC) signed a joint declaration in 1984,[29] ratified in 1985,[30] to decide the future status of Hong Kong after 1997.[31] This can be valued as a peaceful solution to a major territorial dispute.[32] Indeed, Hong Kong's handover was the focus of international attention because "one country, two systems"[33] was bold and

29. *See* M.J.A. Cooray, *Book Review: Hong Kong in China: The Promise of "One Country, Two Systems." A Review of Roda Mushkat, One Country, Two International Personalities: The Case of Hong Kong*, 42 MCGILL L.J. 751, 752 (1997) (declaring the "Hong Kong Question" settled when the Joint Declaration was concluded on December 19, 1984); *see also* Vincent W. Lau, *Post-1997 Hong Kong: Will Sufficient Educational Autonomy Remain to Safeguard Academic Freedom?*, 20 B.C. INT'L & COMP. L. REV. 187, 192 (1997) (stating that Great Britain and Hong Kong came to an agreement on Hong Kong and initialed the Joint Declaration in September 1984); Father Thomas P. O'Malley, *Symposium: Minority Rights: Constitutional Protection of Minorities: Perspectives from Three Legal Systems*, 19 LOY. L.A. INT'L & COMP. L.J. 743, 760 (1997) (stating that negotiations over Taiwan were successfully concluded upon the signing of the Joint Agreement in 1984).

30. *See* Cooray, *supra* note 29, at 752 (stating that the ratifications on the Joint Declaration were exchanged on May 27, 1985); Lau, *supra* note 29, at 192–93 (stating that ratification of the Joint Agreement between Great Britain and Hong Kong occurred in June 1985); Father Thomas P. O'Malley, *Symposium: Minority Rights: Constitutional Protection of Minorities: Perspectives from Three Legal Systems*, 19 LOY. L.A. INT'L & COMP. L.J. 743, 760 (1997) (stating that the Joint Declaration was ratified on May 27, 1985).

31. *See* George E. Edwards, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan*: *Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China?*, 32 NEW ENG. L. REV. 751, 758 (1998) (stating that after the signing of the joint declaration as a matter of necessity, some model for the governance of Hong Kong had to be constructed because it was clear that Hong Kong could not be easily converted to China's system); *see also* John Dermott, *July 1, 1997*: *Hong Kong and the Unprecedented Transfer of Sovereignty*: *The "Rule of Law" in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L. REV. 263, 267 (1997) (noting that the Joint Declaration was a vaguely worded agreement stating the basic policies the PRC would follow in governing Hong Kong); Yu Ping, *Policy Approaches and Human Rights Concerns*: *Will Hong Kong Be Successfully Integrated into China? A Human Rights Perspective*, 30 VAND. J. TRANSNAT'L L. 675, 676 (1997) (arguing that after transfer of Hong Kong over to China on July 1, 1997, there was still "much speculation" about its future).

32. *See* Kevin M. Harris, *The Hong Kong Accord As a Model for Dealing with Other Disputed Territories*, 80 AM. SOC'Y INT'L L. PROC. 348, 352 (1986) (noting that the Hong Kong Accord ought to serve as a template for drafting other legislation aimed at dealing with disputed territories); *see also* Angeline G. Chen, *Taiwan's International Personality*: *Crossing the River by Feeling the Stones*, 20 LOY. L.A. INT'L & COMP. L. J. 223, 251 (1998) (showing that on several occasions the Chinese government threatened to use force to establish its claim of sovereignty over Taiwan). *See generally* Robert C. Berring, *Hong Kong and the Unprecedented Transfer of Sovereignty*: *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L. REV. 431, 431 (1997) (noting that the handover of Hong Kong to China represented the "best of international law and policy" because there was no bloodshed).

33. Upon China's resumption of sovereignty in 1997, Hong Kong becomes a special administration region, and then should be directly under the authority of the Central Government of China. *See* George E. Edwards, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan*: *Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China?*, 32 NEW ENG. L. REV. 751, 751 (1998) (discussing the celebrations in China after Hong Kong became a Special Administrative Region). Yet, Hong Kong can enjoy a high degree of autonomy except in foreign affairs and defense matters, which are the responsibility of the central government. That is, Hong Kong can retain the status of a free port, a separate customs territory, and an international financial center. *See* Anna M. Han, *Hong Kong's Economy Under Chinese Rule*: *Prosperity And Stability?*, 22 S. ILL. U. L.J. 325, 328 (1998) (noting that after 1997 the Basic Law represented China's intentions for Hong Kong. This included China's desire to maintain Hong Kong as an "international finance centre"). The status of Hong Kong, a quasi-autonomous entity of a semi-capitalist nature within the framework of a socialist polity, is what has been called "one country, two systems." The issues related to "one country, two systems" will be discussed later in part V of this article. *See* Frances H. Foster, *Translating Freedom For Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113, 113 (1998) (stating that the "one country, two systems" ideology was based on the notion of maintaining both Hong Kong's policies and way of life).

unprecedented.[34] In considering the Hong Kong model, which deals with disputed territories under international law,[35] it is debated whether it is a workable model for settlement of other territorial disputes.[36] There are also debates on whether and how the Hong Kong model is feasible to apply to Taiwan.[37] Would the status of Taiwan also be that of a special administrative region under which Taiwan could be reunified with mainland China?

Regardless of whether the government in Taiwan can be regarded as a sovereign state, the movement toward this status could occur in a number of ways. For example, it could be forcibly re-integrated into Beijing's political system by the military capability of Beijing authority.[38] It could also result from the ability of Taipei authority to continue to expand its international influence and eventually request independence from other states.[39] Finally there is the option

34. *See* Han, *supra* note 33, at 325 (noting how the world's eyes were on the events that took place on July 1, 1997, when Hong Kong returned to Chinese rule); *see also* Daniel R. Fung, *Foundation for the Survival of the Rule of Law in Hong Kong: The Resumption of Chinese Sovereignty*, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 283–84 (stating that on July 1, 1997, Hong Kong embarked on an "unprecedented journey."); *See also* Robert C. Berring, *July I, 1997*: *Hong Kong and the Unprecedented Transfer of Sovereignty*: *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L. REV. 431, 431 (1997) (noting that the return of Hong Kong to China represented the "best and worst of the modern international legal system.").

35. *See* John Dermott, *July 1, 1997*: *Hong Kong and the Unprecedented Transfer of Sovereignty*: *The "Rule of Law" in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L. REV. 263, 266–67 (1997) (discussing how after the Joint Declaration was reached between Hong Kong and China there was concern as to its enforceability under international law); *see also* Cooray, *supra* note 29, at 758 (arguing that the Joint Declaration is a binding treaty which should be analyzed in accord with the "settled principles and practices of international law"); Elfed Vaughan Roberts, *The Future of Hong Kong*: *Introduction: Political Developments in Hong Kong*: *Implications of 1997*, 547 ANNALS 24, 27–28 (1996) (stating that after the return of Hong Kong to China the treaties ceding Hong Kong to Britain would be invalid under international law).

36. *See* Xiaobing Xu & George D. Wilson, *The Hong Kong Special Administrative Region as a Model of Regional External Autonomy*, 32 CASE W. RES. J. INT'L L. 1, 1 (2000) (discussing how the potential for the Hong Kong model to serve as a tool for solving problems with other parts of the world was recognized during the initial negotiation of the Joint Declaration); *see also* Edwards, *supra* note 33, at 752 (stating that the Chinese government has hoped to use the "One Country, Two Systems" Model for reunification with Taiwan); Frances M. Luke, *Notes and Comments*, *The Imminent Threat of China's Intervention in Macau's Autonomy*: *Using Hong Kong's Past to Secure Macau's Future*, 15 AM. U. INT'L L. REV. 717, 718 (noting that the Macau Joint Declaration "followed in the footsteps" of Hong Kong and became China's second Special Administrative Region).

37. *See* Su Wei, *Some Reflections on the One-China Principle*, 23 FORDHAM INT'L L.J. 1169, 1169 (2000) (discussing the possible change in policy of the Chinese government toward reunifications with Taiwan. Thus an attempt to mold the "one country, two systems" principle to fit the needs of Taiwan); *see also* Cooney, *supra* note 20, at 499 (discussing how the government in Taiwan rejects the "one country, two systems" model, based on the idea that Taiwan is not part of the PRC); Edwards, *supra* note 33, at 757 (arguing that although the Chinese government perceived the reunification with Hong Kong as a success, Taiwan's view of the July 1, 1997, events was more skeptical. Taiwan views the countries as very different entities with mutually exclusive histories, geographic layout and political systems).

38. *See* Chen, *supra* note 32, at 251 (noting that there were several instances where the Chinese government threatened to use force to establish its sovereignty over Taiwan); *see also* Cheri Attix, *Between the Devil and the Deep Blue Sea*: *Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357, 358–59 (1995) (recognizing that as Beijing has repeatedly vowed that if Taiwan were to declare independence it would invade); Zhengyuan Fu, *The International Legal Status of Taiwan*: *China's Perception of the Taiwan Issue*, 1 UCLA J. INT'L L. & FOREIGN. AFF. 321, 325 (1997) (stating that in the early 1950s Mao planned to "liberate Taiwan" by force).

39. *See* Chen, *supra* note 32, at 239–40 (noting how the Taiwanese government has successfully achieved membership in several IGOs and was admitted to the World Trade Organization); *see also* Attix, *supra* note 38, at 365–66 (stating that due to continuing growth as a result of foreign trade, Taiwan has the twentieth largest GDP in the world which has strengthened its argument for independence from mainland China); Fu, *supra* note 38, at 340–41 (recognizing that since the 1960s, Taiwan has made great strides in its economic development).

of pursuing Taiwan's reunification with mainland China on the same "one country, two systems" basis as Hong Kong.[40]

In spite of the international community's general recognition of the PRC as the sole legitimate government representing China as a whole,[41] most countries maintain not only unofficial trade, but also political and cultural relations with Taiwan as though Taiwan was a sovereign nation.[42] While the recognition of Taiwan as the Republic of China continues to draw tremendous attention because proper recognition may be in doubt,[43] the international politics of recognition is the main determinant of whether and to what extent recognition is turned by states from de facto into formal recognition.[44] In this respect, how we should deal with the extent of recognition to a satisfactory resolution of the relationship between the concepts of "statehood" and "recognition" is a critical point here.[45] Maybe it is difficult to evaluate this charge absolutely, but at least it is essential to generate a legal analysis to systematize the evolution and

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40. *See* Edwards, *supra* note 33, at 752 (noting that after the reunification with Hong Kong, Beijing became convinced that an adaptation of the "one country, two systems" model would be the answer to the Taiwan question); s*ee also* Cooney, *supra* note 20, at 498–507 (discussing both points of view regarding the application of the "one country, two systems" model to Taiwan); Fu, *supra* note 38, at 327–28 (recognizing that due to the growing independence of Taiwan, China changed to a "one country, two systems" policy regarding reunification).

41. *See* Frank Chiang, *State, Sovereignty, and Taiwan*, 23 FORDHAM INT'L L.J. 959, 980 (2000) (stating that on December 30, 1978, the United States formally recognized the PRC as the sole government of China); *see also* Chen, *supra* note 32, at 225–26 (noting that a majority of nations officially recognize PRC as the representative government of China). *See generally* Attix, *supra* note 38, at 360 (illustrating that during the ongoing controversy regarding the international recognition of China and Taiwan, the international community chose to recognize China as the sole representative).

42. *See* Chen, *supra* note 32, at 225–26 (noting that a majority of nations "maintain 'unofficial' trade, political and cultural relations with Taiwan as though Taiwan was a sovereign nation"); *see also* Attix, *supra* note 38, at 364–66 (discussing how despite its lack of recognition Taiwan continued to prosper in international trade markets); Tzu-Wen Lee, *supra* note 18, at 352 (stating that Taiwan has an economy, GNP, trade volume, and level of foreign investment that ranks 20th, 18th, 14th, and 7th, respectively, on a global scale. At the same time, Taiwan is making efforts to end its diplomatic isolation and to have proper representation in multilateral international agencies).

43. *See* Chiang, *supra* note 41, at 981 (discussing how although Taiwan has all the makings of an independent state it has never attempted to officially declare itself one); *see also* Chen, *supra* note 32, at 226–27 (noting that since Taiwan established its democratic government, international attention regarding its recognition has increased). *See generally* Fu, *supra* note 38 (stating that the uncertainty surrounding the status of Taiwan is one of the "most enduring problems in contemporary international law and politics").

44. *See* Chen, *supra* note 32, at 225–26 (stating that Taiwan has attempted to receive international recognition through membership to the United Nations); *see also* Chiang, *supra* note 41, at 982 (discussing how the UN rejection of Taiwan was based on the fact that under international law a state can only have one recognized government in order to be recognized); Lee, *supra* note 42, at 365 (noting that in order to gain international recognition admission to the UN was crucial).

45. *See* Attix, *supra* note 38, at 266–67 n.80 (1995) (citing Convention on the Rights and Duties of States, done at Montevideo, Uruguay, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, defining statehood as: (1) a defined territory, (2) a permanent population, (3) an effective government and (4) the capacity to enter into relations with other states); *see also* Chiang, *supra* note 41, at 966–67 (noting that a political entity without sovereignty cannot enter into formal relations with other states); Lee, *supra* note 42, at 370–71 (noting that international law determines the conditions under which a community is a state, and subject to international law. Recognition implies that the state granting it accepts the legitimacy of the new state, with all the rights and duties that international law prescribes).

chart the path of legal development. Only then will we be able to have a better look at Taiwan's status by examining its factual background. Also, there may be some guidelines that indicate how the international community might react if Taiwan were to assert its independence,[46] either upon its own volition, or subsequent to a military incursion by Beijing.[47] In the past and even today, there has been an attempt to reassure states that under international law their national sovereignty will continue to be guaranteed.[48]

As noted earlier, many doubts have been raised as to whether Taiwan already satisfies the criteria for statehood and, therefore, independence. It is also possible that Taiwan is something less than an independent state, an entity entitling it to a certain degree of international recognition.[49] This issue involves not only the sovereignty and statehood of Taiwan, but also borders on the practice of recognition of Taiwan's government and the exercise of its sovereign power.[50]

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46. *See* Attix, *supra* note 38, at 363–64 (noting that although Taiwan was no longer represented in the U.N., it was not isolated. Several states continue to carry on extensive unofficial relations with Taiwan. These nations officially recognize the PRC's claim to sovereignty over Taiwan and freely recognize the KMT as the legitimate government of Taiwan); *see also* Stephen Lee, *American Policy Towards Taiwan*: *The Issues of the De Facto and De Jure Status of Taiwan and Sovereignty*, 2 BUFF. J. INT'L L. 323, 325–37 (1996) (recognizing that due to the United States' position as the "international policeman," the eventual recognition of Taiwan as a *de jure* independent nation should not be opposed); James W. Soong, *Perspective*: *Taiwan and Mainland China*: *Unfinished Business*, 1 U.C. DAVIS J. INT'L L. & POL'Y 361, 364 (1995) (arguing that due to the increasing stature of Taiwan as an International trading partner the international community will most likely be unwilling to "turn its back" on it in the future).

47. *See* Chen, *supra* note 32, at 251 (noting that there have been several instances where the Chinese government has threatened to use force to establish its claim of sovereignty over Taiwan. However, on a number of occasions the United States responded to the Chinese illegal threat); s*ee also* Chiang *supra* note 41, at 1004 (arguing that allied powers, especially the United States, were instrumental in creating the uncertainty regarding Taiwan's current predicament. Thus, they have an obligation to support Taiwan's quest for independence and recognition in the face of a possible military incursion by China); Fu, *supra* note 38, at 325 (stating how in the early 1950s Mao planned to "liberate Taiwan" by force, but due to the increased presence of the United States in the Taiwan Strait the possibility of a full-scale war was averted).

48. *See* Robert D. Slone, *The Changing Face of Recognition in International* Law: *A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 145 (2002) (recognizing that even in the face of domestic turmoil under international law, however, neither China's military conquest nor the 17-Point Agreement could deprive Tibet of *de jure* statehood); *see also* Chiang, *supra* note 41, at 1004 (noting that "State recognition is permanent and cannot be withdrawn unless the recognized state becomes extinct"); Fu, *supra* note 38, at 375–76 (stating that under Article 52 of the 1969 Vienna Convention of the Law of Treaties, the International Court of Justice concluded that "under contemporary international law, an agreement concluded under the threat or use of force is void." Thus, any forcible agreements to remove or create a state's national sovereignty will be not be upheld).

49. *See* Chen, *supra* note 32, at 227 (discussing how the establishment of its democratic government and its recognition of international law in regard to human rights creates a strong presumption of an independent state); *see also* Attix, *supra* note 38, at 365–66 (1995) (stating that due to the continuing growth as a result of foreign trade, Taiwan has the twentieth largest GDP in the world, which has strengthened its argument for independence and international recognition); Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 465 (2000) (noting that although Taiwan may not be officially recognized as a state its status as a self-governing entity in conjunction with its economic interactions with numerous other state and its admission to the WTO has elevated it to a status that requires recognition by the international community).

50. *See* Chen, *supra* note 32, at 239 (arguing that as Taiwan fulfills the effective government requirement of the sovereignty test, it is entitled to receive international recognition); *see also* Attix, *supra* note 38, at 374 (stating the establishment of a non-communist government by Taiwan led to an increase in political and military support by the United States); Lee, *supra* note 42, at 352 (recognizing that the election of a state president in March 1996 bolsters Taiwan's claim for international recognition).

Some of the doubts might derive from the situation where a decision has to be made as to whether Taiwan should limit its powers in relation to a particular subject matter, leading to a reduction in national sovereignty.[51] Although it is a meaningful contribution to the above debates, the point here is this: the reference to national sovereignty is a reference to national power.[52]

Primarily, this article will analyze the legal issues regarding the attempt by Taiwan to move its current status over the cusp and into the realm of independence. It also examines China's attempt to make Taiwan into one China with the "one country, two systems" policy. However, in performing such an analysis, we cannot ignore the significant and practical evolution of the concepts of "sovereignty," "statehood," and "recognition."

This article will begin with the issue of sovereignty, which is covered by Part II. My point here is to focus on international law and explain the development of the concepts of sovereignty and statehood. Part III will discuss the formal and informal concept of recognition, which has been a significant evolution in this field. I will attempt to discuss this issue not only from a legal perspective, but also in terms of policy considerations and pragmatic imperative; the issue here may turn more on the states' practices than on legal considerations. Part IV focuses on the current position of Taiwan and discusses the significant differences that exist between the authority in Beijing and the authority in Taipei regarding the view of Taiwan's status. Part V discusses the issues related to the "Hong Kong" or the "one country, two systems" model, which is used by the PRC as a basis for the prospective reunification of Taiwan and mainland China. I argue that this model remains inappropriate to Taiwan because of the differing positions of the governments on both sides of the Taiwan Straits. The real issue is whether a socialist government like the PRC can govern such non-socialist enclaves as Taiwan within its borders in the future. Applying this analysis to Taiwan, Part VI of this article will turn to some precedents of divided statehood such as Germany, Yemen and Korea so as to define the current position of Taiwan and its relation with China. By this logic, any decision regarding recognition of Taiwan, vis-à-vis the People's Republic of China, where the will of the people in Taiwan is involved is a matter that should not be ignored. More specifically, any attempt at linking the international status of Taiwan without, at the same time, considering the will of the people of Taiwan, would amount to an abuse of international law.[53]

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51. *See* Charney & Prescott, *supra* note 49, at 475 (arguing that reunification with China would lead to a divide in authority over foreign affairs, economic affairs, and human rights, thus implicitly undermining Taiwan's independence and sovereignty); *see also* Sean Cooney, *supra* note 20, at 531 (arguing that under the "one country, two systems" model Taiwan would be "denie[d] . . . the right . . . to conclusively determine their governmental framework" and thus lose its status as an independent entity); Edwards, *supra* note 33, at 759 (stating implicitly that under the "one country, two systems" model Taiwan would lose its full democratic status and thus its independent identity).

52. *See* Chen, *supra* note 32, at 233–39 (stating that due to its "explosive economic progress" Taiwan has demonstrated significant economic power, thus establishing itself as a "separate and sovereign" state "apart from mainland China"); *see also* Cooney, *supra* note 20, at 533–34 (noting that a return to Chinese rule would undermine Taiwan's autonomy and thus limit its "existing powers of executive government"); Edwards, *supra* note 33, at 775 (arguing that if Taiwan was to reunify with China it would be at the cost of losing its governmental integrity which in turn would mean the loss of a pursuit of sovereignty).

53. *See* Chiang, *supra* note 41, at 973 (discussing that under international law the assertion of statehood is based primarily on the "common will of the people residing in the territory . . . ."); *see also* Chen, *supra* note 32, at 227 (noting that Taiwan's right to sovereignty includes principles under international law such as self-determination); Cooney, *supra* note 20, at 507 (arguing that under the "one country, two systems" model, Taiwan would lose not only its way of life but also its basic human rights).

II. The Modern Concepts of Sovereignty and Statehood

The term "sovereignty" has had a long and varied history during which it has been defined in a variety of ways depending on the context and the objectives of those using the word.[54] In the most significant doctrine of international law, sovereignty itself means not simply the power of an independent state, but the ultimate power of the state,[55] which is absolute within its territory[56] and equal in its relations with other sovereigns.[57] Accordingly, sovereignty in this sense is important in that it is a relevant concept to describe the right of a state to freely exercise its power within its territory.[58] It is also the right of a state to exclude from its territory the exercise of power by any other state without permission to do so.[59] As such, the sovereign's will was the only one that was legally relevant, i.e., the power of sovereigns and their political authority

54. *See* Chiang, *supra* note 41, at 964 (stating that the concept of state autonomy is inherent in sovereignty); *see also* Glen St. Louis, *The Tangled Web of Sovereignty and Self-Governance*: *Canada's Obligation to the Cree Nation in Consideration of Quebec's Threats to Secede*, 14 BERKELEY J. INT'L L. 380, 387 (1996) (stating that historically sovereignty was defined as "a body of free men consensually united for common enjoyment and advantages that provided power to enact and execute its own laws"); P. Mweti Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement*: *A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 583 (1999) (defining sovereignty, under international law, as the power to govern within state boundaries and the power to form relations between one nation and another).

55. *See* Chiang, *supra* note 41, at 965 (noting that since it is necessary for a state to be autonomous in order to be recognized as a sovereignty, it is therefore necessary for the state to have "unlimited power"); *see also* Chen, *supra* note 32, at 239 (arguing implicitly that as the Taiwanese government has the power to enact legislation and rules of order which govern Taiwan, it possesses the de facto power of a state); Shen, *supra* note 19, at 1131 (recognizing that an essential factor of statehood is the ability to create a stable central governing body that exercises "effective public power . . . over a permanent population").

56. *See* Chiang, *supra* note 41, at 965 (noting that power of a state based on sovereignty is primarily based on its ability to "rule or govern the people within its territory . . . ."); *see also* Chen, *supra* note 32, at 239 (stating that as China has no input into the drafting or implementation of any of Taiwan's policies, it possesses absolute power of its people); Shen, *supra* note 19, at 1131 (recognizing that sovereignty requires the ability to "exercise effective public power within a defined territory . . . .").

57. *See* Chiang, *supra* note 41, at 964 (noting that the concept of state autonomy that is indicative of sovereignty is paramount in allowing two states to engage in relations on an equal footing); *see also* Charney & Prescott, *supra* note 49, at 465 (arguing that under international law sovereignty is best found when analyzing a state's relations with other sovereign states); Chen, *supra* note 32, at 239 (stating that since Taiwan has the ability to enter into trade deals with other nations, it has implicitly achieved an equal status in the eyes of the international community and thus the level of sovereignty).

58. *See* Chiang, *supra* note 41, at 965 (noting that one of the requirements of sovereignty under international law is the ability to self-limit and self-regulate); *see also* Chen, *supra* note 32, at 239 (arguing that as Taiwan has the ability to enact laws and govern its people independent from mainland China, it has reached the required level of autonomy that is required for recognition as a sovereign nation); Shen, *supra* note 19, at 1131 (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 31–34 (1979)) (stating that it is also important for an established government to not only exercise its power of the people but also to have a right to exercise that right).

59. *See* Chiang, *supra* note 41, at 965 (noting that primary to the notion of sovereignty is the requirement that each state be autonomous, and therefore not subject to the rules imposed by other states); *see also* Shen, *supra* note 19, at 1129 (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 31–34 (1979)) (stating that in order to be recognized as a sovereign entity its territory must be "essentially free from claims by any other entity"). *See generally* Oscar Schachter, *International Law*: *The Right of States to use Armed Force*, 82 MICH. L. REV. 1620, 1625 (1984) (stating that under the UN Charter art. 2, para. 4., a state may use force to protect its territory).

must be respected.[60] Although the creation of a state is different, the concept of the state is closely linked to the concept of sovereignty.[61] A political entity without power is not a state in the sense that international law defines the term.[62]

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States[63] provides four requirements for de facto status as a state.[64] These four requirements are: (1) the existence of a stable population; (2) a defined territory; (3) a functioning, governing government; and (4) the capacity to engage in foreign relations.[65] From the view of international practice it is understood that a political entity without statehood has no sovereignty and cannot enter into relations with other states.[66] Moreover, the equal status with other states in the concept of sovereignty is meaningful when the state deals with other states.[67]

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60. *See* Chiang, *supra* note 41, at 965 (noting implicitly that in order to engage in relations with other states, there must be a recognition of the two states' sovereignty and thus mutual respect for each other's standing); *see also* Christopher J. Carolan, *The "Republic of Taiwan": A Legal-History Justification for Taiwanese Declaration of Independence*, 75 N.Y.U. L. REV. 429, 455–56 (2000) (arguing that Taiwan's respect for the international law regarding human rights is an "irrefutable argument" for its legal recognition of sovereignty); Shen, *supra* note 19, at 1136–37 (stating that a sovereign state must have "legal competence" and recognition by other states).

61. *See* Chiang, *supra* note 41, at 967 (noting that the "sovereignty and the state are inseparable," therefore a political entity without statehood has no standing as a sovereign nation); *see also* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 409 (1999) (discussing the link between sovereignty and statehood); Shen, *supra* note 19, at 1134 (arguing that only when an entity possesses all the qualities of sovereignty can it be recognized as a state).

62. *See* Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477, 1482 (2001) (describing that such power may come from a democratic as well as totalitarian regime); *see also* Joshua S. Bauchner, *State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate*, 26 BROOKLYN J. INT'L L. 689, 692 (2000) (explaining that "[a] sovereign state is an entity that has defined territory and permanent population, under control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities") (quoting A.L.I. Restatement (Third) of the Foreign Relations Law of the United States § 201 (1985)); Jeffrey Wutzke, *Dependent Independence: Application of the Nunavit Model to Native Hawaiian Sovereignty and Self-Determination Claims*, 22 AM. INDIAN L. REV. 509, 513 (1998) (explaining the concept of sovereignty).

63. *See* Convention on the Rights and Duties of States, art. 1, 49 Stat. 3097, 3100, T.S. No. 881 (1933).

64. *See* Lee, *supra* note 18, at 387 (stating the accepted criteria for statehood); *see also NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?*, 2001 ARMY LAW. 1, 13 (2001) (listing customary characteristics of statehood); Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 28 (2000) (acknowledging that there are four requirements of statehood).

65. *See* Lee, *supra* note 18, at 387 (defining statehood by "(a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states"). *See also NATO, supra* note 64, at 13 (briefly discussing the factors); van der Vyver, *supra* note 64, at 28 (listing the four factors laid out by the Montevideo Convention of 1933).

66. *See* Parris Chang & Kok-ui Lim, *International Legal Status of Taiwan: Taiwan's Case for United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 399 (1996) (stating that statehood not only requires presence of the four traditional factors but of democracy as an additional requirement); Peter Daniel Dipaola, *Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4 IND. J. GLOBAL LEGAL STUD. 435, 447 (1997) (offering that statehood can result from recognition by other states); Shen, *supra* note 19, at 1126 (finding that Taiwan does not "satisfy the criteria for statehood and thus does not stand as a State").

67. *See* Chiang, *supra* note 41, at 965 (describing that "[t]he level of equality inherent in the concept of sovereignty is meaningful only when the state deals with the states"); *see also* Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L L. 655, 674 (1993) (listing relations among states as a concept of sovereignty); Shen, *supra* note 19, at 1137 (explaining that an entity subordinate to another state's sovereignty cannot be of equal status).

As Dr. James Crawford noted, legal title, or legitimacy, refers to the government's exclusive sovereignty and the legal right to govern a territory under international law.[68] Sovereignty is an indispensable requirement for statehood.[69] Notably, the power of a state is closely linked to its territory.[70] It is possible that this territory came into acquisition by way of occupation, prescription, succession or cession by the former sovereign of the territory.[71] Judging the actual exercise of authority, the concept of territorial sovereignty limits the power of a state to exercise its authority within its borders.[72] At this point, territory is the space within which the state can exercise absolute power and that separates one sovereign state from another.[73] It seems obvious that, by defining the use of territory, a sovereign state registers absolute and exclusive jurisdiction under international law.[74] In this respect, one sovereign state cannot bind another to its

68. *See* JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW (5th ed., 1998), at 77; s*ee also* Chiang, *supra* note 41, at 965 (stating that each sovereign state has the power to govern the people within its territory). *See generally* Osterland, *supra* note 67, at 674 (describing the concepts of autonomy and sovereignty with respect to Slovakia).

69. *See* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 967 (1997) (stating that "[t]here appears to be no alternative means for inclusion in the absence of statehood, and statehood's essential element, sovereignty, is determined in accordance with the international system itself"). *See generally* Grant, *supra* note 61, at 409 (describing the evolving notions of statehood and sovereignty); Erik Alexander Rapoport, *Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997*, 4 ASIAN L.J. 135, 135 (1997) (admitting that sovereignty is typically associated with the definition of statehood).

70. *See* James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 427 (1994) (finding that states have full and complete power within their own territory); Hurst Hannum, *Papers From the American Indian Law Review's 25th Anniversary Symposium: Sovereignty and its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 493 (1998) (listing the control of one's own territory as a primary goal of a sovereign indigenous government); Robert L. Muse, *International Symposium on the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)*, 30 GEO. WASH. J. INT'L L. & ECON. 207, 237 (1996) (concluding that sovereignty is the "supreme legitimate authority within a territory").

71. *See* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 2 (2000) (stating that "[t]here are notably five traditional ways through which states can acquire territory: discovery and occupation, cession, accretion, conquest, and prescription"); *see also* Shen, *supra* note 19, at 1132 (pointing toward a government's exclusive sovereign and legal right to govern such acquired territory).

72. *See* Julie Cassidy, *Sovereignty of Aboriginal People*, 9 IND. INT'L & COMP. L. REV. 65, 79 (1998) (finding that sovereignty acts as a territorial limitation on the exercise of jurisdiction over others); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 2 (1998) (comparing that sovereignty also permits a state to alienate a portion of its territory); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 271 (1986) (stating that Indian tribes, located within its territory, come under the sovereignty of the United States).

73. *See* Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1836 (1993) (explaining that "[a] sovereign [has] exclusive jurisdiction over its domestic affairs"); *see also* Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 313 (1995) (including exclusive jurisdiction over a territory and its permanent inhabitants as a key concept of sovereignty); Orentlicher, *supra* note 72, at 37 (stating that a sovereign state has a protective sphere of exclusive jurisdiction).

74. *See* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 27 (1999) (finding that the exclusive "jurisdiction over territory takes precedence over jurisdiction over citizens."); *see also* Kennedy, *supra* note 15, at 124 (stating that sovereign states have absolute and exclusive jurisdiction with territorial boundaries); Tracy A. Sundack, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U. L. REV. 225, 230 (1988) (discussing how "nations ordinarily maintain absolute jurisdiction within their own territory").

law,[75] and absent the implication of consent, a sovereign is immune from the jurisdiction of another.[76] As Dr. Robert Lansing noted:

> "It is an accepted principle of the law of nations that every state, whatever may be its population, power and resources, is the political equal of every other state, and that its sovereign is independent and supreme within the state. There is no such thing as degrees of sovereignty among states." [77]

As the exercise of sovereign jurisdiction within its territory should be rooted in the effect of the sovereign state concerned, the consolidation of an absolute sovereignty would create a need for doctrines regarding the binding effects of treaties and custom.[78] Accordingly, international law is created by consensus of the states to restrain or limit their own power.[79]

As a result of improvements in communications and the development of international trade, states have become more interdependent.[80] This means that it is impossible to see how

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75. *See* Lee Caplan, *Constitution and Jurisdiction Over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 379 (2001) (stating that sovereignty provides states with absolute independence and self-imposed limitations); *see also* Daniel C. K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 405 (1987) (arguing that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"); Kevin Leung, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunities Act's Commercial Activities Exception in Context*, 17 LOY. L.A. INT'L & COMP. L.J. 701, 704 (1995) (finding the key concepts of absolute jurisdiction and foreign sovereign immunity present in the instant case).

76. *See* Caplan, *supra* note 75, at 380 (describing a "waiver of exclusive jurisdiction"); *see also* Chow, *supra* note 75, at 406 (stating that one sovereign cannot persuade another to bring about a desired result and the "decree of the sovereign makes [the] law"). *See generally* 28 U.S.C. § 1605(a)(1) (1994 & Supp. IV 1998) (listing the so-called "waiver exception," under which a foreign state may be deemed to have waived its sovereign immunity defense by consent).

77. Robert Lansing, *Note on Sovereignty in a State*, l AM. J. INT'L L. 105, 124 (1907).

78. *See* Derek Jinks, *Legalization of World Politics and the Future of U.S. Human Rights Policy*, 46 ST. LOUIS L.J. 357, 357 (2002) (explaining that "[g]lobal governance is mediated through international institutions whose design, legitimacy, and purpose originate in and derive from the authority of sovereign states"); *see also* Kennedy, *supra* note 15, at 130 (mentioning "new models for international legal activism in arbitration and disarmament at the Hague"). *See generally* Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559, 685 n.296 (discussing the concept of "consolidation of sovereignty" to exercise final control over disputes).

79. There are three principal sources of international law, namely, international convention, international custom and the general principles of law recognized by nations. *See* Statute of the Int'l Court of Justice, art. 38, 59 Stat. 1055, T.S. No. 993. These sources are all based on the self-limitation and self-regulation of states, and the basis of international law is consent. Treaties or international conventions are most explicit on consensus; this is because they are signed by the contracting states. S*ee also* Chiang, *supra* note 41, at 965 (finding that "international law [has] emerged by consensus of the states to restrain or limit their own power"). *See generally* Arthur M. Weisburd, *Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1206 (1988) (stating the sources of international law).

80. *See* Michael P. Avramovich, *Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?,* 31 J. MARSHALL L. REV. 1201, 1201 (1998) (discussing international trade and international investment); *see also* Mark G. Gobbi, *Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response*, 6 TUL. J. INT'L & COMP. L. 57, 69 (1998) (evaluating judicial activism with respect to international law); Michael D. Pendleton, *A New Human Right—The Right to Globalization*, 22 FORDHAM INT'L L.J. 2052, 2058 (1999) (promoting sovereignty and international law because "the more economically interdependent a state is with another state, the less likely its interests will be advanced by warfare").

any state can live without relations with another.[81] In this sense, international law must evolve a new pattern field of sovereignty.[82] The vehicles of this development were international treaties,[83] particularly those treaties that established international organizations to promote and coordinate state endeavor in diverse fields.[84] These fields include peace, security, economic development and international finance.[85] Hence, in this progression, a system of institutions must be linked to a consciousness of methodology under international law.[86] Therefore, international law can become substantive, and deal directly with war and peace to avoid conflicts arising out of sovereign states.[87]

If there were differences in rules applicable to different parts of the world, it would be appropriate in international legal literature to suggest that international law might be different in the various regions of the world.[88] For example, there could be African, Asian, European or

81. *See* Bauchner, *supra* note 62, at 689 (stating how the Internet has broken down traditional boundaries with respect to sovereignty and international law); *see also* Shen, *supra* note 19, at 419 (giving weight to the interdependent relationship between sovereignty and its corollaries); Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 111 (2002) (describing the relationship between China and Tibet).

82. *See* Chiang, *supra* note 67, at 974–78 (urging an advancement of international law and sovereignty in reference to the relationship between China and Taiwan); Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced,* 77 B.U. L. REV. 429, 441 (1997) (requesting a new pattern of sovereignty with respect to refugees); Shen, *supra* note 66, at 1139–40 (arguing that, because the traditional concept of sovereignty fails when applied to Taiwan, other considerations have to be made).

83. *See* Chiang, *supra* note 41, at 966 (describing treaties as the most explicit source of international law); *see also* Gobbi, *supra* note 80, at 69 (talking about necessary changes in New Zealand's treaty-making process); Berman, *supra* note 73, at 1836 (discussing the "minority protection treaty" established in Poland); Kennedy, *supra* note 15, at 125 (examining the importance of treaties as one expression of international law).

84. *See* Kennedy, *supra* note 15, at 126 (calling for a "corollary sharpening of the distinction between public and private [law], and between municipal and international [law]"); Jinks, *supra* note 78, at 357 (explaining that "the accelerating pace of globalization and economic liberalization have placed traditional conceptions of state sovereignty under unprecedented strain"); Weisburd, *supra* note 79, at 1206 (differentiating between treaties and customary international law).

85. *See* Avramovich, *supra* note 80, at 1205 (discussing the impact due to improvements in travel, communications and computer technology); Gobbi, *supra* note 80, at 69 (stating that "improvements in transportation and communication have dramatically increased the interaction of people throughout the world and, as a result, international trade in goods and services"); Pendleton, *supra* note 80, at 2055 (contrasting positive improvements with the emergence of environmental and ecological problems that transcend state boundaries and therefore require international dispute resolution).

86. *See generally* Avramovich, *supra* note 80, at 1258 (discussing the need for changes in the system).

87. *See* Pendleton, *supra* note 80, at 2058 (stating sovereignty and international law because "the more economically interdependent a state is with another state, the less likely its interests will be advanced by warfare"); *see also* Chiang, *supra* note 41, at 973 (describing that since the early days, people formed states to protect themselves); Ruddick, *supra* note 82, at 442 (considering the general conflicts arising out of sovereign states with respect to international refugee law).

88. *See* Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355, 1370–71 (suggesting that gender issues need to be considered in critical treatments of sovereignty); Donat Pharand, *Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint*, 20 CAN.-U.S. L.J. 19, 29–30 (examining the need for international humanitarian law to form a legal basis for "relief actions"); Roy E. Thoman, Ph.D., 30 GEO. WASH. J. INT'L L. & ECON. 583, 586 (1996) (reviewing MICHAEL R. FOWLER & JULIE M. BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (1995)) (explaining "the traditional legal concept of sovereign immunity has evolved from a virtually absolute principle to a remarkably constrained theory").

American international law.[89] But, of course, there is but one international law, wherever two sovereigns are gathered in its name,[90] and there can be only one government in a state which represents the state and exercises its sole sovereign power.[91] As a result, all sovereign states, in relations with one another, would be subject to the same international law.[92] The very concept of international law requires that one state be separate from any other state,[93] and by doing so, international law can enforce the boundaries between sovereign states.[94] This explains the expectations of one sovereign's absolute right for the behavior of another.[95]

Sovereignty becomes not only a description of ultimate political discretion, but also a legal idea of independence.[96] Indeed, it is law that provides a language to explain, ratify, and protect the sovereignty that is so essential for statehood.[97] As noted above, to qualify as a sovereign

89. *See* Pharand, *supra* note 88, at 33 (discussing the future of sovereignty in Europe); J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 159 (1999) (stating concepts of sovereignty and self-determination with respect to Africa); Hannum, *supra* note 70, at 492–493 (examining sovereignty with respect to Native Americans).

90. *See* Bauchner, *supra* note 62, at 691 (basing the "success of international law as a political and intellectual discipline . . . [on the law's] utility in regulating and cementing a world political system based more or less on sovereign states"). *But see* Chang, *supra* note 64, at 401 ("While national sovereignty is the foundation on which international law is built, it is not absolute."); Orentlicher, *supra* note 72, at 2 (discussing territorial integrity as one of international law's bedrock principles).

91. *See* Williams, *supra* note 72, at 271 (noting that Indian tribes, for example, "come under the territorial sovereignty of the United States and their exercise of separate power is constrained"); Gordon, *supra* note 73, at 313 (finding that sovereignty, defined as a totality of powers states hold under international law, is an evolving concept); Kennedy, *supra* note 15, at 119 (finding that "international law countenance[s] but one form of political authority").

92. *See* Weisburg, *The Executive Branch and International Law*, 41 VAND. L. REV. at 1206 (explaining that "public international law, through its rules regulating the dealings between independent nations, purports to impose limitations on the actions of all governments, including those of the United States"); Pendleton, *supra* note 80, at 2055 (discussing that "the nature of state sovereignty, the very basis for the political and juridical concept of a nation, is evolving towards a notion of non-sovereign, interdependent states."); Bauchner, *supra* note 62, at 689 (stating that states have a common goal, for example, in attempting to regulate the Internet).

93. *See* Chiang, *supra* note 41, at 963 (finding that the external feature of sovereignty includes the autonomy of each state). *But see* Oloka-Onyango, *supra* note 89, at 167 (contrasting the supposed separation with the impact of international business, which has prompted states to liberalize trade policies, deregulate their economies, and privatize their enterprises); Hannum, *supra* note 70, at 492 (noting that "[t]he myth of theoretical sovereign equality is increasingly difficult to maintain").

94. *See* Chiang, *supra* note 41, at 963 (noting how the state has the power to govern aliens within its borders); *see also* Anne Hsiu-An Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, 32 NEW ENG. L. REV. 715, 727 (1998) (noting how the law regulates the violation of international boundaries). *See generally* Shen, *supra* note 19, at 1111 (mentioning how international law can only enforce boundaries if we are dealing with sovereign states).

95. *See* Michael W. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990) (noting the UN's goal of of developing friendly relations between states); *see also* Chang & Lim, *supra* note 66, at 399 (discussing the expectations between sovereign states). *See generally* Shen, *supra* note 19, at 1111 (explaining how one sovereign state can expect absolute right for the behavior of another sovereign state).

96. *See* Chang & Lim, *supra* note 66, at 400 (stating that sovereignty and independence are intertwined); Shen, *supra* note 19, at 1104 (discussing how sovereignty represents independence). *See generally* Chen, *supra* note 32, at 233 (describing how a claim for self-determination includes the idea of independence).

97. *See* David Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts,* 64 TUL. L. REV. 1033, 1040 (1990) (discussing how law protects the sovereignty that is required for statehood); Joel R. Paul, *Comity In International Law*, 32 HARV. INT'L L.J. l, 4 (1991) (mentioning how law, sovereignty, and statehood are related).

state, a political entity that acquires the criteria for statehood does not become a state unless it declares that it is an independent sovereign state.[98] This is derived from international custom that a declaration of the establishment of a state is necessary to create a new state.[99] The process often used is a declaration of independence, such as the United States from England in 1776[100] and Belgium from the Netherlands in 1831.[101] While discussing the historical evolution of the concept of "sovereignty," both the American Revolution[102] and the French Revolution[103] are prominent examples of progression to the modern concept of sovereignty.[104] Since then, to commence a subsequent democratic government has turned out to be a comprehensive way to confirm the modern concept of sovereignty.[105] For example, political legitimacy derives from

98. *See* Attix, *supra* note 38, at 369 (stating that an additional requirement for statehood is a declaration by the entity that it is a state). *See generally* Chang & Lim, *supra* note 66, at 370 (discussing the requirement of a declaration by the entity that it is a state); Chiang, *supra* note 41, at 969 (describing China's situation and how the president of China declared "the Republic of China is a state with independent sovereignty").

99. *See* Carolan, *supra* note 60, at 450 (discussing the international custom that an entity declare itself a state in order to become a state); *see also* Kathryn M. Mckinney, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATTLE U. L. REV. 93, 124 (1994) (noting that achieving the objective requirements of statehood will be closer to being met after the interim period if everything contemplated in the Declaration of Principles is actually accomplished). *See generally* Chiang, *supra* note 41, at 972–74 (noting that "there are two characteristics of a declaration of the establishment of a state. First, it is a claim of statehood. Second, it is an announcement to the international community that the entity is a state from the time of the declaration").

100. *See* Chiang, *supra* note 41, at 969 (stating that the U.S. Declaration of Independence is widely utilized by political entities trying to establish independent sovereign states). *See generally* Carolan, *supra* note 60, at 431 (mentioning how declarations of independence are often used as a declaration for becoming a state); Chang & Lim, *supra* note 66, at 403 (noting that the U.S. Declaration of Independence as an example of a declaration to become a state).

101. *See* Chiang, *supra* note 41, at 970 (noting that although not as popular as the U.S. Declaration of Independence, the Belgium Declaration of Independence often serves as a point of reference for political entities seeking to form sovereign states); *see also* Chang & Lim, *supra* note 66, at 402 (noting the Belgium Declaration of Independence as an example of a declaration for becoming a state). *See generally* Lee, *supra* note 18, at 372 (mentioning how declarations of independence are often used as a declaration for becoming a state).

102. *See* Reisman, *supra* note 95, at 877 (stating that many people consider the American Revolution a prime example of a fight to attain sovereignty); *see also* Chang & Lim, *supra* note 66, at 403 (noting the American Revolution as an example of the modern notion of sovereignty). *See generally* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Reinterpretation*, 76 WASH. L. REV. 701, 723 (2001) (arguing that "the Declaration was an act of all the American people, creating an entity, the United States of America, which presented itself as one nation to the world").

103. *See* Hannum, *supra* note 70, at 289 (stating that the French Revolution, like its American counterpart, is continuously cited by legal scholars in discussing the concept of sovereignty); *see also* Reisman, *supra* note 95, at 877 (defining the term sovereignty). *See generally* Chiang, *supra* note 41, at 972 (noting the French Revolution as an example of the modern notion of sovereignty).

104. *See* Reisman, *supra* note 95, at 878 (stating that both the American and French Revolutions have had a tremendous impact in shaping the modern concept of sovereignty); *see also* Chiang, *supra* note 41, at 971 (noting the American and French Revolutions as examples of what the modern notion of sovereignty should be). *See generally* Chang & Lim, *supra* note 66, at 403 (defining the modern concept of sovereignty).

105. *See* Chen, *supra* note 32, at 233 (noting that the establishment of a democratic government helps to attain a sovereign state); *see also* Carolan, *supra* note 60, at 447 (indicating that the principle of democracy and the notion of sovereignty are closely intertwined). *See generally* Chang, Lim, *supra* note 66, at 404 (stating an additional requirement that a democratic government be in place in order to become a sovereign state).

popular support,[106] and governmental authority is based on the consent of the people in the territory in which a government purports to exercise power.[107] The claim of statehood is based on the common will of the people residing in the territory.[108]

During a century beset by imperialism, colonialism and fascism, popular sovereignty was firmly rooted, by the end of the Second World War, as one of the fundamental postulates of political legitimacy.[109] With regard to this evolution, the United Nations Charter (hereinafter "UN Charter") has deemed one of the purposes of the United Nations to be the development of friendly relations between states.[110] Furthermore, relations are to be based on respect for the principle of equal rights and self-determination of peoples.[111] This significant statement in the UN Charter is of such universal value that it is expressed in a fundamental international constitutive legal document.[112]

In an effort to affirm the concept of popular sovereignty, the UN, the international lawmaking system,[113] proceeded to prescribe criteria for appraising the conformity of internal governance with international standards of democracy.[114] At present, international and regional

106. *See* Chiang, *supra* note 41, at 972 (noting that a political entity becomes a state when the people consent to statehood and declare it a state); *see also* Valerie Epps, *Self-Determination in the Taiwan/ China Context*, 32 NEW ENG. L. REV. 685, 695 (1998) (discussing the importance of popular support). *See generally* Shen, *supra* note 19, at 1112 (mentioning how political legitimacy and popular support are related).

107. *See* Edwards, *supra* note 33, at 769 (outlining the guidelines under Basic Law Article 68 for Legislative Council elections, to determine if there is enough support for statehood); *see also* Chiang, *supra* note 41, at 977 (stating that governmental authority is based on the consent of the people). *See generally* Chang & Lim, *supra* note 66, at 404 (noting the significance of the popular support to a government).

108. *See* Chiang, *supra* note 41, at 976 (noting that the name of the government can easily be changed by the U.N. Security Council, but statehood is an issue for the people of that country); *see also* Epps, *supra* note 106, at 687 (stating that the concept of self-determination embodies the principle that the people have the right to freely determine their political status); Shen, *supra* note 19, at 1113 (discussing how popular support will determine if an entity can become a state).

109. *See* Reisman, *supra* note 95, at 867 (describing that government authority is derived from the consent of the people); *see also* Chang & Lim, *supra* note 66, at 400 (discussing how popular sovereignty was a prerequisite to political legitimacy). *See generally* Shen, *supra* note 19, at 1111 (mentioning the relationship between popular sovereignty and political legitimacy).

110. *See* Nedzad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 5 (2002) (quoting Article I and stating that the purpose of the UN Charter was based on self-determination and fostering relationships between states); *see also* Araujo, *supra* note 62, at 1492 (discussing how one of the purposes of the UN is to help develop friendly relations between states). *See generally* Schachter, *supra* note 6, at 11 (mentioning that a purpose of the UN is to help states develop friendly relations).

111. See UN Charter, art. 1 (June 26, 1945), U.S.T.S. 993, 59 Stat. 1031.

112. Reisman, *supra* note 95, at 868; *see also* Basic, *supra* note 110, at 6 (discussing the significance of the UN trying to establish friendly relations between states). *See generally* Shen, *supra* note 19, at 1111 (mentioning the significance of the UN trying to establish friendly relations between states).

113. *See* Ibrahim J. Gassama, *Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT'L L.J. 287, 297 (1997) (referring to the United Nations as the international lawmaker); *see also* Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 595 (1990) (mentioning the UN's international lawmaking powers). *See generally* Oscar Schachter, *supra* note 6, at 11 (referring to the UN's lawmaking abilities).

114. The UN has adopted numerous resolutions to confirm the popular sovereignty. *See* Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power, U.N. G.A. Res. 40/34 (1985); Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment, U.N. G.A. Res. 39/46 (1984); Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. G.A. Res. 36/55 (1981).

organizational monitors use the international standard of democracy in observing critical national elections so as to ensure that they are free and fair.[115] For instance, a UN observation mission for the verification of elections in Nicaragua (ONUNEN) was set up there in December 1989 to observe and monitor the 1990 elections.[116] As a matter of fact, it was during this period that the common will of the people served as evidence of popular sovereignty[117] and had "become the basis for international endorsement of the elected government."[118] A similar case is the UN observation mission in 1999 in East Timor.[119] This effort, in functional terms, would lay the groundwork for the international community to develop a type of inclusive international collective-recognition,[120] harmonizing reciprocal differences among states.[121]

As mentioned above, in spite of the fact that sovereignty itself continues to be used differently due to national legal cultures and political influences,[122] there is no doubt that the inter-

115. See Gassama, *supra* note 113, at 287 (stating how a free and fair election is the first order of business in countries); *see also* Cutler, *supra* note 113, at 582 (stating that democracy is used in observing elections to ensure that they are free and fair elections). *See generally* Gregory H. Fox, *The Role of International Law in the Twenty-First Century: Multinational Election Monitoring: Advancing International Law on the High Wire*, 18 FORDHAM INT'L L.J. 1658, 1663 (1995) (referring to how the UN has observed national elections in order to make sure that they are free and fair).

116. This international legal supervision of elections was designed to include an adequate period for candidacies to be developed and to allow campaigning, so that voters could make the informed choice that was at the center of free and fair elections. *See* Cutler, *supra* note 113, at 595; *see also* Gassama, *supra* note 113, at 300 (clarifying that the purpose of the UN supervision of these elections was to allow the voters to have the opportunity to make an informed decision on who they want to elect). *See generally* Fox, *supra* note 115, at 1663 (stating that the UN observed the 1990 elections in Nicaragua).

117. *See* Gassama, *supra* note 113, at 300 (noting how democracy has become a popular revolution); *see also* Cutler, *supra* note 113, at 583 (mentioning how the will of the people represented the popular sovereignty). *See generally* Fox, *supra* note 115, at 1664 (discussing how the people determine popular sovereignty).

118. Reisman, *supra* note 95, at 868; *see also* Cutler, *supra* note 113, at 592 (discussing how public opinion can determine if the elected government will be internationally recognized). *See generally* Fox, *supra* note 115, at 1671 (referring to the importance of public opinion to elected governments).

119. *See* Mark Rothert, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257, 257 (2000) (describing how the UN passed resolutions regarding intervention in East Timor); *see also* Jennifer Toole, Notes and Comments, *A False Sense of Security: Lessons Learned from the United Nations Organization and Conduct Mission in East Timor*, 16 AM. U. INT'L L. REV. 199, 199–200 (2000) (noting how the UN had a chance to bring peace to a conflict in Timor). *See generally* Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 85 (2001) (referring to the 1999 UN observation mission in East Timor).

120. *See* Ian Brownlkie, *Principles of Public International Law*, at 96–98 (4th ed., 1990) (describing the relationship between the international community and recognition); *see also* P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW, at 51–54 (Edwin Mellen Press, 1994) (mentioning how recognition is related in the international community). *See generally* Charney & Prescott, *supra* note 49, at 466 (noting how the UN mission in East Timor would serve as an example for similar situations in the future in the international community).

121. *See* Rothert, *supra* note 119, at 266 (discussing how the UN mission in East Timor would serve as an example of how to handle differences among states); *see also* Toole, *supra* note 119, at 199 (mentioning how the East Timor mission could help with regard to solving differences between states in the future). *See generally* Matheson, *supra* note 119, at 88 (referring to the UN mission in East Timor and how that could help in future missions).

122. *See* Araujo, *supra* note 62, at 1485 (noting that political and cultural rights are related to sovereignty); *see also* Reisman, *supra* note 95, at 877 (noting that the policital situation has an impact with sovereignty). *See generally* Geoff Larson, *The Right of International Intervention in Civil Conflicts: Evolving International Law on State Sovereignty in Observance of Human Rights and Application to the Crisis in Chechnya*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 251, 258–59 (2001) (discussing why sovereignty has different meanings).

national law of value still protects sovereignty as a "people's sovereignty" rather than a "sovereign's sovereignty."[123] As sovereignty comes to be conceptualized more sharply, we find that theoretical disputes concern the distinctions between "people's sovereignty" and "sovereign's sovereignty."[124] This evolution in content of the term "sovereignty" has also raised a new concern as to who can violate that sovereignty.[125] The reality of the situation is that those who possess legal sovereignty may not always be able to effectively exercise their legal sovereignty.[126] Rather, the effectiveness of legal sovereignty is dependent on the will of the people.[127] That is, international law is concerned with the protection of sovereignty,[128] but, in the contemporary sense, the objective of protection is not the power base of the tyrant who rules directly by naked

123. *See* Reisman, *supra* note 95, at 869 (noting that "[w]hat happens to sovereignty, in its modern sense, when it is not an outsider but some home-grown specialist in violence who seizes and purports to wield the authority of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list (often the only choice)? Such a seizure of power is not entitled to invoke the international legal term "national sovereignty" to establish or reinforce his own position in international politics"); *see also* Araujo, *supra* note 62, at 1490 (noting that there one must understand the differences between "people's sovereignty" and "sovereign's sovereignty"). *See generally* Larson, *supra* note 122, at 258 (referring to how sovereignty is a concept that focuses on the people's will).

124. *See* Araujo, *supra* note 62, at 1493 (notig that we have to understand the State's constitutional law to understand the differences between the two sovereignty's); *see also* Reisman, *supra* note 95, at 877 (describing the fact that sovereignty is distinguishable). *See generally* Larson, *supra* note 122, at 259 (clarifying the theoretical disputes about sovereignty).

125. *See* Reisman, *supra* note 95, at 869–870 (noting that "This contemporary change in content of the term 'sovereignty' also changes the cast of characters who can violate that sovereignty"); *see also* David M. Kresock, *"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 205–206 (1994) (stating that there is now the right of the people to determine the character of their own government). *See generally* Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 381, 384–385 (2000) (stating that sovereignty belongs to the people).

126. *See* Christyne J. Vachon, *Sovereignty Versus Globalization: The International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons*, 26 DENV. J. INT'L L. & POL'Y 691, 720 (1998) (stating that governments are not immune from international accountability for domestic actions upon their own citizens); *see also* Ivan Simonovic, *From Sovereign Equality to Equally Reduced Sovereignty*, 24 FLETCHER F. WORLD AFF. 163, 171–172 (2000) (stating that new development of international legal regime imposes limits upon the exercise of sovereignty of individual states). *See generally* Simonovic, *supra* note 125, at 384–385 (stating that international organizations limit the exercise of sovereignty of individual states).

127. *See* Simonovic, *supra* note 125, at 384–385 (stating that sovereignty belongs to the people); *see also* Kresock, *supra* note 125, at 205–206 (stating that "It is for people to determine the destiny of the territory and not the territory the destiny of the people"). *See generally* Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1290–1291 (1991) (stating that it is "[w]idely regarded as declaratory of customary international law, this is the very essence of 'popular sovereignty' of people: authority comes from people and rests upon the people as a whole, not a handful of purported rules").

128. *See* Reisman, *supra* note 95, at 872 (stating that "International law is still concerned with the protection of sovereignty"); *see also* Kresock, *supra* note 125, at 214 (describing the relationship between international law and sovereignty). *See generally* Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOKLYN J. INT'L L. 417, 419 (2000) (noting that "[i]n contemporary conditions, neither States nor international law can exist without the other").

power or through the apparatus of a totalitarian political order.[129] Instead, it is a continuing capacity of a population freely to express and effect choice about the identities and policies of its governors.[130] It is also clear that popular sovereignty is violated when an outside force invades and imposes its will on the people.[131] For example, such was the case in the Soviet invasion of Afghanistan in 1979[132] or in Iraq's invasion of Kuwait in 1990.[133]

In the European Community, the underlying concern in relations between sovereignty and membership of the fifteen-state Community presents a matter that international law will develop by solidifying its cooperative machinery.[134] Evidently, in the European Community, states can accept major limitations of national power politically without losing their sovereign

129. *See* Reisman, *supra* note 95, at 872 (describing how "[i]nternational law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors"); *see also* Ruddick, *supra* note 82, at 440–441 (stating that outside intervention is permissible to return the sovereignty to the people). *See generally* Kresock, *supra* note 125, at 214 (stating how "the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors").

130. *See* Reisman, *supra* note 95, at 872 (noting that international law is still concerned with the protection of sovereignty); *see also* Kresock, *supra* note 125, at 214 (discussing international law in relation to sovereignty). *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (stating that governments derive their power from the consent of the governed).

131. *See* Reisman, *supra* note 95, at 869–870 (noting that "popular sovereignty is violated when an outside force invades and imposes its will on the people"); *see also* Major Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 20 (2001) (stating that "[t]o use force offensively against a party to the conflict would violate the sovereignty of a state and constitute unauthorized intervention in violation of UN Charter Articles 2(1) and 2(7) which assume that all Member States are equal sovereigns"). *See generally* Frederick J. Petersen, *The Facade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. LAW 871, 872 (1998) (stating that "[i]n an attempt not to violate sovereignty, U.N. member states cannot legally intervene into other states' domestic affairs unless invited or authorized to do so by the Security Council").

132. Since the Soviet invasion of Afghanistan in 1979, the United Nations had repeatedly criticized the Soviet presence and called for withdrawal by affirming the principle that "the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference," UN Doc. S/13729(1980); GA Res. ES-6/2 (Jan. 14, 1980). *See* Reisman, *supra* note 95, at 869 (stating that "popular sovereignty is violated when an outside force invades and imposes its will on the people); *see also* Schachter, *supra* note 59, at 1622 (stating that the invasion of Afghanistan by the U.S.S.R. had a long-term negative effect on its claim as a champion of national sovereignty).

133. In response to Iraq's aggression against Kuwait in 1990, the United Nations, for the second time in its history (the first time was in response to the Communist invasion of South Korea in 1950), authorized the deployment of armed forces to stop an aggressor nation. By adopting numerous resolutions (i.e., the UN Security Council resolutions 660, 661, 662, 663, 664, & 678), the UN condemned Iraq's invasion of Kuwait and declared its annexation "illegal," as well as took all necessary steps to demand Iraq's immediate and unconditional withdrawal. *See* Petersen, *supra* note 131, at 885 (stating that the 1991 invasion of Kuwait by Iraq violated international law); *see also* Reisman, *supra* note 95, at 869 (describing the invasion of Afghanistan in 1979 and Kuwait in 1990).

134. *See* Perrez, *supra* note 3, at 579 (stating that there is a trend away from nationalism and toward seeking collective solutions); *see also* Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law,* 36 COLUM. J. TRANSNAT'L L. 7, 11 (1997) (describing how "[a] conspicuous transfer of authority from states to an international legal regime has been the European Union, and to a lesser degree, the economic integration institutions in other areas"). *See generally* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiary in the European Union*, 44 AM. J. COMP. L. 537, 549 (1996) (stating that the subsidiary principle is central in the development of the European Union).

identity in a system of absolute territorial sovereignty.[135] Therefore, the consequence of a number of significant developments relating to the concepts of "sovereignty" and "statehood" is clearly beneficial to the new value of the international legal system.[136] In this case, the prospective emergence of a new regional society in the European Community exposes a future possibility that the sovereignty that people appeared to have in mind is no longer what it once was thought to be.[137] What does matter is that states may have fewer powers and freedoms in exchange for certain benefits they receive at the same time.[138]

In support of a national interest, states have the right to use force, other than by way of self-defense,[139] and this is deemed an important element of national sovereignty.[140] The state has compromised its national sovereignty by its acceptance of a limitation on the right to resort

135. *See* Danielle S. Petito, *Sovereignty and Globalization: Fallacies, Truth and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139, 1140–1142 (2001) (stating that the new development of international law does not do away with nation-states, but transfers national authority to international authority); *see also* Reisman, *supra* note 95, at 867–868 (stating that nation-states still exist but that they are now defined by popular sovereignty). *See generally* Shen, *supra* note 128, at 419 (stating that international legal regimes and nation states cannot exist without each other).

136. *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 529–530 (1993) (stating that international law only works when states agree to be bound); *see also* Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics,* 38 VA. J. INT'L L. 107, 142–144 (1998) (stating that the concept of sovereignty is one of the fundamental assumptions underlying international relations). *See generally* Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U.J. INT'L L. & POL'Y 1, 1 (1993) (stating that states play less of a role than they used to in the expanding international legal regime, but that states still play a beneficial role).

137. *See* Eric Stein, *International Integration and Democracy: No Love at First Cite*, 95 AM. J. INT'L L. 489, 502 (2001) (stating that the European Community, via the principle of direct legal effect, has changed notions of sovereignty in Europe); *see also* Youri Devuyst, *The European Union's Constitutional Order Between Community Method and AdHoc Compromise*, 18 BERKELEY J. INT'L L. 1, 5–6 (2000) (stating that the European Union requires its member states to adhere to certain values). *See generally* Larry Cata Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 195–196 (2001) (stating that the European Union is beginning to resemble a federalized Europe).

138. *See* Grossman, *supra* note 136, at 2 (stating that international organizations have some power to compel member states to comply with their rules and decisions); *see also* Schachter, *supra* note 134, at 7 (stating that no nation state is entirely autonomous and free from some of the constraints of international law). *See generally* John O. McGinnis, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: Contribution: The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 903 (1996) (stating that the power of the nation-state is in decline with the continuing emergence of international rules).

139. *See* Bialke, *supra* note 131, at 1–3 (stating that the U.N. member states must be proactive in maintaining peace and authority); *see also* Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F.L. REV. 255, 235 (1997) (stating that multinational forces now have a role in sustaining international peace); *see generally* Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 834–835 (1999) (stating that states can go to war either in self-defense or pursuant to an authorization from the UN Security Council).

140. *See* Brown, *supra* note 139, at 255 (giving examples of peacekeeping actions around the world over the past few decades); *see* also Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT. L. REV. 203, 204–205 (1992) (explaining that a proactive stance toward international human rights is changing the character of international law). *See generally* Gassama, *supra* note 113, at 294–96 (stating that the right to political participation is now an entitlement).

to force when the state has accepted the duty to refrain from the use of force.[141] Much the same can be said for the variations according to the extent that states are parties to human rights conventions.[142] In this context they are members of a free trade area,[143] a common market,[144] or otherwise find themselves in a situation, where, by reason of some international obligation, their national freedom of action is severely curtailed.[145] Regarding regional security and prosperity as a whole, to develop a modern sovereignty of value in the functional views of globalization is just a matter of time.[146] As Professor David Kennedy suggested, "[i]nternational law has taken us from coexistence to cooperation, and from autonomy to community."[147] With regard

141. Iraq was subject to extensive measures of international investigation and supervision following its aggression against Kuwait and consequent UN action. Even given the fact that Iraq continues to exist as a state with sovereignty, it had to agree that it would destroy all chemical and biological weapons and ballistic missiles with a range of more than 150 kilometers, as well as nuclear weapons. The fulfillment of these obligations was supervised by a special international commission which can be regarded as a compromise of sovereignty. *See* Anthony Clark Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491, 497–98 (1993) (giving example of international compulsion of Iraq to dispose of its weapons of mass destruction); *see also* Bialke, *supra* note 131, at 1–2 (discussing that the U.N. prohibits the use of force except where internationally mandated). *See generally* Ruth Wedgwood, Note, *Beyond Confrontation: International Law for the Post-Cold War Era*, 92 AM. J. INT'L L. 150, 151 (1998) (noting that caution is warranted whenever a state seeks to exercise non-internationally mandated force in the name of self defense).

142. *See* Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUMAN RIGHTS L. REV. 81, 82–83 (1999) (discussing that supranational and regional institutions require that member states respect human rights); *see also* Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts On the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 112 (1996) (stating that the U.N. International Covenant on Economic, Social and Cultural Rights requires that member states afford their citizens certain basic human rights). *See generally* Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT'L L. REV. 71, 76 (2000) (claiming that human rights concerns have risen to the level of an international obligation).

143. *See* Charles Levy, *When Sovereignties May Collide—Sovereignty and the Regulation of International Business in the Intellectual Property Area: An American Perspective*, 20 CAN.-U.S. L.J. 185, 187–88 (1994) (giving examples of free trade areas around the world); *see also* Finn Laursen, *Civil Society and European Integration*, 565 ANNALS 66, 67 (1999) (stating that while many countries have moved beyond free trade areas, free trade areas still exist around the world). *See generally* Captain O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 2, 7 (1994) (discussing the effects of free trade areas on sovereignty).

144. *See* Shen, *supra* note 19, at 1134–35 (discussing customs unions and their implications for national sovereignty); *see also* Laursen, *supra* note 143, at 69–70 (explaining the European customs union). *See generally* Ilann Margalit Maazel, *What is the European Union?*, 16 BYU J. PUB. L. 243, 250–51 (2002) (noting the effects of the European customs union on European national sovereignty).

145. *See* Moore, *supra* note 142, at 82–83 (explaining the effects of post-World War II supranational organizations on national sovereignty); *see also* Weisburd, *supra* note 142, at 112 (discussing the effect of the International Covenant on Human Rights on national sovereignty). *See generally* Morais, *supra* note 142, at 76 (stating that the evolution of the United Nations has placed restraints on national sovereignty).

146. *See* Simonovic, *supra* note 126, at 169–70 (arguing that the concept of sovereignty is changing in the face of increasing globalization); *see also* Ronald A. Brand, *The Role of International Law in the Twenty-First Century: External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1694–1695 (1995) (stating that the world is heading toward the possibility of an adoption of a wider multilateral rule of law). *See generally* Jost Delbruck, *A More Effective International Law or a New "World Law"—Some Aspects of the Development of International Law in a Changing International System*, VOL. JOURNAL 705–706 (1993) (noting that the international system has been growing since the end of the Cold War).

147. *Symposium, International Law and the Nineteenth Century: History of Illusion*, 17 QUINNIPIAC L. REV. 99, 100 (1997).

to the evolution of the concepts of "sovereignty" and "statehood," they must be seen largely as foreseeable.[148] In other words, the state remains a sovereign state under international law and continues to be able to guide its future destiny within the limits that it has itself accepted.[149]

III. Formal and Informal Recognition: Legal Doctrine and States' Practices

The term "recognition" has a broad meaning in international law.[150] In addressing the matter of recognition in legal doctrine and state practice, the term "recognition" is understood to cover two senses.[151] First, there is the "state recognition" which is the recognition of other states as an equal with the recognizing state.[152] This is not only permanent, but cannot be withdrawn unless the recognized state becomes extinct.[153] Second is "government recognition," which is recognition by a recognizing state of a certain government as the legitimate representative of another state.[154] This type of recognition may be withdrawn or repudiated.[155] During a civil war, recognition *de facto* would give the rebels the status of an independent administering

148. *See* Simonovic, *supra* note 126, at 169–70 (showing evidence of a continuing trend of evolution toward a broader concept of international law); *see also* Brand, *supra* note 146, at 1694–95 (discussing the past evolution of international law and predicting that the evolution will continue).

149. *See* Delbruck, *supra* note 146, at 705–706 (claiming that states still exist and use international legal regimes for purposes of retaining peace and security); *see also* Simonovic, *supra* note 126, at 169–70 (noting that individual states still play an important role in the international legal regime). *See generally* Stein, *supra* note 137, at 492–93 (explaining that the state remains an important player, but is now subject to some restrictions of international law).

150. *See* Benedict Kingsbury, *Book Review and Note: Sovereignty: Organized Hypocrisy, by Stephen D. Krasner*, 94 A.J.I.L. 591, 594–95 (2000) (discussing statehood and recognition); *see also* Edward G. Lee, *Book Review and Notes: Recognition of Governments in International Law: With Particular Reference to Governments in Exile, by Stefan Talmori*, 93 AM. J. INT'L L. 261, 262 (1999) (explaining recognition and the reasons for recognition). *See generally* Sloane, *supra* note 81, at 113 (stating that "the concept of recognition in international law is notoriously murky").

151. *See* Sloane, *supra* note 81, at 112–14 (arguing the distinction between the recognition of states and governments); *see also* Chiang, *supra* note 41, at 968–69 (relating the differences between state and government recognition). *See generally* Jianming Shen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT'L LEGAL THEORY 15, 24 (2000) (discussing the differences between state and government recognition).

152. *See* Sloane, *supra* note 81, at 115–16 (defining state recognition); *see also* Chiang, *supra* note 41, at 968–69 (defining state recognition). *See generally* Graham H. Stuart, *Book Review: Sovereignty, International Relations Theory, and International Law: Sovereignty: Organized Hypocrisy*, 52 STAN. L. REV. 959, 961 (2000) (explaining state recognition).

153. *See* Sloane, *supra* note 81, at 112–14 (stating that state recognition does not end until a state becomes extinct); *see also* Chiang, *supra* note 41, at 968–69 (noting that "state recognition is permanent and cannot be withdrawn unless the recognized state becomes extinct"). *See generally* M. J. Peterson, *Recognition of Government Should Not Be Abolished*, 77 AM. J. INT'L L 31, 49 (1983) (claiming that state recognition does not end until a state becomes extinct).

154. *See* Sloane, *supra* note 81, at 120 (describing government recognition in relation to other states); *see also* Chiang, *supra* note 41, at 968–69 (defining government recognition). *See generally* Wendy T. Wylegala, *Book Annotation: Recognition of Governments in International Law*, 31 N.Y.U. J. INT'L L. & POL. 675, 675–76 (1999) (explaining the concept of government recognition).

155. *See* Chiang, *supra* note 41, at 968–69 (noting the importance of recognizing a government in order to become a legitimate and equal state); *see* also Sloane, *supra* note 81, at 120 (stating that government recognition is optional at the will of the state).

authority,[156] but not a government.[157] The legitimate government would then be recognized as the *de jure* government of the whole state.[158] Thereafter, the *de jure* government would be considered responsible only for acts performed in that part of the territory under its *de facto* control.[159]

These two major meanings of "recognition" may occur at the same time when a new state is just established,[160] such as in the case of Israel.[161] In 1948, Israel was recognized as a new state by other states after its established statehood by the Declaration of the Establishment of State of Israel.[162] Recognition means the willingness of the recognizing government to establish

156. *See* Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 130 (2000) (describing belligerency form of recognition that has as its requirements a semblance of government or administration in the rebel-controlled territory); *see also* Thomas D. Grant, Comment, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STAN. J. INT'L L. 305, 322 (1997) (characterizing recognition toward rebels in a civil war). *See, e.g.*, Jorge L. Esquirol, *Can International Law Help? An Analysis of the Columbian Peace Process*, 16 CONN. J. INT'L L. 23, 39–40 (2000) (citing a case in the Columbian civil war when rebels claimed a status of belligerency that would place them as equals with the Columbian government).

157. *See* Grant, *supra* note 156, at 320–21 (noting that entry into negotiations or functional acknowledgement does not imply full recognition). *See, e.g.*, Wippman, *supra* note 27, at 627–28 (stating that even in the event of recognition of the insurgent group, the international community has accepted the incumbent government as the legitimate government of the state). *See generally* David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 439–42 (1996) (noting the international implications of civil war, and how it affects political recognition of the warring factions).

158. *See* Wippman, *supra* note 157, at 442 (characterizing the incumbent government as the *de jure* government during the intermediate state of insurgency); Robert W. Gomulkiewicz, *International Law Governing Aid To Opposition Groups in Civil War: Ressurecting the Standings of Belligerency*, 63 WASH. L. REV. 43, 46–47 (1988) (outlining the traditional laws of civil war, and gradations within it, such as rebellion, insurgency, and belligerency). *See generally* Wippman, *supra* note 27, at 625–27 (answering the question of who speaks for the state in times of peace and in times of civil war).

159. *See* Lootsteen, *supra* note 156, at 109 (describing the concept of belligerency in civil war where rebels meeting certain conditions are given certain recognition and implying the government also retains its recognition); MARYAN GREEN, INTERNATIONAL LAW 38–39, (3d ed. 1987) (suggesting that there would appear to be no difference between recognition *de facto* and *de jure* in international law so far as the legal consequences are concerned); Wippman, *supra* note 157, at 442 (stating when a state insurgency becomes a state of belligerence, sovereignty between the insurgents and the incumbents rests in their respective spheres of control).

160. *See* Chiang, *supra* note 41, at 968–69 (stating when a new state is established both state and government recognition can take place); *cf.* Sloane, *supra* note 81, at 113; *Article*, *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, 5 D.C.L. J. INT'L L. & PRAC. 417, 424 (1996) (explaining that at the moment of formal recognition the *de jure* character of recognition is given, but that the necessary de facto existence of the state may not be in place yet).

161. *See* Chiang, *supra* note 41, at 969 n.48 (noting Israel as a recognized state); *see* Weiner, *supra* note 26, at 234 (stating Israel was formed in 1948); Declaration of the Establishment of the State of Israel, the Israeli Government official Web site by the Ministry of Foreign Affairs, *at* http://www.mfa.gov.il/mfa/go.asp?MFAH000hb0 (last visited Oct. 15, 2002) (declaring the birth of the state of Israel on May 14, 1948, when it was recognized by the United States and, three days later, by the Soviet Union).

162. *See* Chiang, *supra* note 41, at 969 n.48 (declaring Israel as a state possessing both government and state recognition); Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3 (1948) (declaring the birth of the state of Israel on May 14, 1948, with recognition by the United States and, three days later, by the Soviet Union).

official relations with a state or a certain government.[163] This recognizing government has conveyed its subjective opinion on the legal status of the recognized state or the recognized government.[164] This may be based on the minimum criteria for status as a state or a legitimate government prescribed by international law.[165] However, in view of the evolution over time in actual practices, the concept of whether to recognize a regime (either a new state or a certain government) often depends on political policy rather than the ability to meet the objective test as set under international law.[166] Hence, the law of recognition is a highly politicized part of public international law.[167] This is why the question of recognition of states and governments has not been solved smoothly either in theory or in practice.[168]

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163. *See* Tzu-Wen Lee, *supra* note 18, at 385 n.68 (stating that recognition implies the granting of legitimacy to the new state by the granting state); *see also* Chiang, *supra* note 41, at 968 (contrasting state recognition as a willingness of a recognizing state to enter willingly into diplomatic relations and view each other as equals, with government recognition); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 NW. J. INT'L L. & BUS. 130, 139 (1998) (declaring that the full legal consequences of legitimate existence will be accepted with recognition).

164. *See* Sloane, *supra* note 81, at 121 (positing recognition from a state is a normative judgment and subjective opinion on another state's legal status); *see also* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 29–30 (Ian Brownlie ed., Oxford University Press 1998) (writing that a government conveys its own subjective opinion on the government it has chosen to recognize); Wylegala, *supra* note 154, at 677 (positing that recognition has a second meaning involving a subjective opinion on the government being recognized).

165. *See generally* Talmon, *supra* note 164, at 39–40 (noting whether the opinion of states concerning existence of governments should comply with rules of international law); Article, *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, 5 D.C.L. J. INT'L L. & PRAC. 417, 423 (1996) (noting certain capacities of traditional states); *see* Montevideo Convention On the Rights and Duties of States (listing the requirements or elements that would constitute a qualification towards statehood), *at* http://www.taiwandocuments.org/montevideo01.htm (last visited Oct. 15, 2002).

166. *See* Sloane, *supra* note 81, at 114 (stating a move away from criteria that govern recognition would bring conformity to principles of legitimacy which in turn are defined by policies toward democratic governance and self-determination); *see also* Bradford Williams, *The Aftermath of Matimak Trading Co. v. Khalily: Is the American Legal System Ready for Global Interdependence?*, 23 N.C.J. INT'L L. & COM. REG. 201, 210 (1997) (noting the court's deference to political branches of government to determine whether a state is recognized); Jennifer P. Harris, *Kosovo: An Application of the Principle of Self-Determination: Second Article in a Two Part Series on the Kosovo Crisis*, 6 HUM. RTS. BR. 28, 30 (1999) (outlining the EC's political considerations for recognition).

167. *See* Armen Tamzarian, *Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-determination*, 24 SW. U. L. REV. 183, 211 (1994) (claiming state recognition as a product of political expediency rather than principles of law); Sloane, *supra* note 81, at 117–18 (summarizing the arguments about the overly political nature of the recognition question). *See generally* Michael E. Field, Comment, *Liberia v. Bickford: The Continuing Problem of Recogntion of Governments and Civil Litigation in the United States*, 18 MD. J. INT'L L. & TRADE 113, 115 (1994) (noting recognition is a political question in the United States).

168. *See* Hungdah Chiu, *The International Law of Recognition and the Status of the Republic of China*, 3 J. CHINESE L. 193, 195 (1989) (noting that recognition is a question of politics rather than legal principles; *see also* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 65 (1947) (stating that "[a]ccording to what is probably still the predominant view in the literature of international law, recognition of states is not a matter governed by law but a question of policy"); Sloane, *supra* note 81, at 113–14 (describing inconsistencies of recognition throughout history and practice) .

Notwithstanding, states under traditional international law are free to choose their own municipal systems,[169] and also free to choose whether or not to deal with another state.[170] The legal development of this practice in most recognition decisions is always based on the rule that recognition should be restricted to its legal, functional role—that the government does, in fact, control its state.[171] There are instances of refusal to recognize a government because it is a result of foreign imposition.[172] This was the case of Manchukuo's secession from China.[173] Another notable case of this is Iraq's annexation claims to Kuwait, which violated international law.[174]

There are two dominant views on the effect of recognition.[175] One is the "constitutive theory," which regards recognition as indispensable in establishing the international legal personality of the state and the competence of a government.[176] The other view, the "declarative

169. *See* Wippman, *supra* note 27, at 668 (referring to the opinion of the International Court of Justice in Nicuaragua II, the view that each state is free to choose its form of government); *see also* Thomas D. Grant, *supra* note 1, at 210 (noting states are free to choose their municipal systems); Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. LAW 463, 480 (1996) (referring to South Africa's interim constitution allowing freedom to choose their own government).

170. *See* Sloane, *supra* note 81, at 119 (noting that a state need not extend formal recognition to any state); *see also* Restatement (Third) Foreign Relations Law of the United States § 202 (declaring that a state need not give formal recognition to another state, but is required to treat as a state any entity that meets the requirements of section 201); Grant, *supra* note 169, at 210 (stating states are free to choose whether to deal with another state).

171. *See* Thomas D. Grant, *supra* note 1, at 210 (noting that recognition should be comprised of identifying effective governments); Sloane, *supra* note 81, at 122 (setting forth the traditional Tinoco test, that requires effective governmental control of the state).

172. *See* Harris, *supra* note 166, at 30 (listing the requirements for state recognition adopted by the European Community in the 1991 document requiring non-recogntion for entities resulting from aggregation); *see also* THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 91 (Praeger, ed. 1999) (noting states formed with *jus cogens* violations have traditionally been denied recognition); Peterson, *supra* note 153, at 49 (positing in the debate whether to do away with government recognition appealed to those who believe in non-recognition of regimes formed by aggression to sustain government recognition).

173. In 1931, the League of Nations rejected Manchuria's declaration of independence from China due to Japan's involvement in Manchuria's secession. The author believes that the recognition should be denied to regimes that are imposed by foreign intervention, base themselves on policies of racial discrimination, represent counterrevolutionary movements, or commit massive violations of human rights in the course of consolidating power. *See* Grant, *supra* note 172, at 91 (referring to Manchukuo's non-recognition as the prime example of a *jus cogens* violation, and foreign imposition); *see also* M. Kelly Malone, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflct*, 6 TEMP. INT'L & COMP. L.J. 81, 85 (1992) (members of the League of Nations refused to endorse Manchuria's claim to independence in 1931 because of Japan's involvement and continued presence in its liberation movement).

174. *See* Talmon, *supra* note 164, at 161 (writing that the United Nations called upon states to refuse to recognize Iraq's annexation of Kuwait); S.C. Res 662, U.N. SCOR, 2934th Sess. (calling on nations to refuse to recognize or to act in a way that may imply recognition toward Iraq's annexation of Kuwait), *at* http://www.un.org/Docs/scres/1990/scres90.htm (last visited Oct. 15, 2002). *See generally* Kuwait Information Office—USA, History of the Kuwait-Iraq Border Dispute, (summarizing the history and the background of the Iraqi-Kuwaiti border dispute dating back to the Ottoman Empire), *available at* http://www.kuwait-info.org/Gulf_War/history_iraq_border_dispute.html (last visited Oct. 15, 2002)

175. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 87–106 (Oxford Univ. Press 1990) (describing the different aspects of recognition, mainly the two dominant theories of declarative and constitutive recognition); *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 255–75 (3d. ed. 1991) (summarizing recognition in international law). *See generally* H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 66–73 (AMS Press 1978) (describing the procedure of recognition).

176. *See* L. OPPENHEIM, INTERNATIONAL LAW VOL. II 109–113 (9th ed. 1992) (describing the key points in Constituent Theory); see also Brownlie, *supra* note 175, at 88–91 (outlining the constitutive theory); Sloane, *supra* note 81, at 116 (noting the important tenets in the constitutive theory of recognition).

theory," rejects the "constitutive theory"[177] but embraces the point that a new state exists prior to and independent of recognition.[178] Under the declaratory view, a state may exist without being recognized,[179] and if it does in fact exist, whether or not it has been formally recognized by other states, it has a right to be treated as a state.[180] The main function of recognition here is "to acknowledge the fact of the state's political existence and to declare the recognizing state's willingness to treat the entity as an international person with the right and obligations of a State."[181]

The different views of recognition have given rise to the discussion of whether an entity that fulfills the criteria for statehood is disqualified as a state merely because of the lack of recognition.[182] Should the international community recognize an entity that fulfills the criteria for statehood as a state?[183] Although the declarative theory is in the majority, and both the Mon-

177. Dr. James Crawford criticized the constitutive theory, that "it does not indicate the number of states required to recognize a new political entity before the latter become a state, it does not explain the character of the agreements signed by the new political entity with other states before it becomes a state." *See* Chiang, *supra* note 160, at 1005 n.53; *see also* Baker, *supra* note 163, at 141 (contrasting the opposing views of declarative theory of recognition and the constitutive theory of recognition); Thomas D. Grant, Note, *Between Diveristy and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. J. INT'L L. & POL'Y 629, 685 n.94 (1997) (noting the importance of recognition in protecting states from abuses by the international community).

178. *See* Baker, *supra* note 163, at 141 (characterizing state recognition as a confirmation of statehood of any entity meeting the requirements of section 201 of the Restatement (Third) of The Foreign Relations of the United States); *see also* Chiang, *supra* note 41, at 970 (writing that the existence of a political entity is a state independent of recognition from other states); Grant, *supra* note 172, at 4 (describing the declaratory theory of recognition as only an acknowledgment of statehood already achieved by meeting certain requirements).

179. *See* Baker, *supra* note 163, at 141 (stating that recognition by existing states only acknowledges a new state rather than bestows statehood on the new state); *see also* Chiang, *supra* note 41, at 969 (declaring that states exist before recognition); Grant, *supra* note 172, at 4–8 (outlining the Montevideo criteria supported by declarativists to define statehood).

180. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 244 (3d ed. 1993) (stating the declarative theory's position that rights of states exist before recognition); JAMES BRIERLY, THE LAW OF NATIONS 138–39 (6th ed. 1963) (declaring the better view toward recognition is the declarative view); *see also* Grant, *supra* note 156, at 326 (describing Judge Kreca's alignment with the declarative view of recognition).

181. Makau Wa Matua, *Why Redraw the Map of Africa? A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1124–1125 (1995) (repeating that the main function of recognition is acknowledgement of the state's political existence and willingness to treat this existence as an international person/state); *see* Henkin, *supra* note 180, at 231 (positing that the main function of recognition is "to acknowledge the fact of the state's political existence and to declare the recognizing state's willingness to treat the entity as an international person with the right and obligations of a State.").

182. *See* Brown, *supra* note 140, at 217 (highlighting the modern debate on recognition is not limited to whether there is a state before recognition by other states but also now encompassing breakaway states even before de facto independence). *See generally* Grant, *supra* note 172, at 1–11 (discussing the great debate between the declarative and constitutive views of recognition); Chiang, *supra* note 41, at 969–71 (summarizing contrasting schools of thought and the key points of the debate between constitutivists and declarativists).

183. *See* Shen, *supra* note 19, at 1124–25 (explaining that non-recognized states are without international legal effect); *see also* David O. Lloyd, Comment, *Succession, Seccession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761, 764 (1994) (stating that the relationship between statehood and recognition is complex, and scholars have long debated between the declarative theory of statehood and the constitutive theory of statehood); Grant, *supra* note 177, at 678 (discussing that the terms of the old debate—constitutive and declarative—have been retained, though scholars are now less interested in the nature of recognition as a concept).

tevideo Convention on Rights and Duties of States[184] and the Restatement of the Foreign Relations Law of the United States[185] adopt this theory, the practice of states does not absolutely support the view that they have no legal existence before recognition.[186]

The doctrine of non-recognition[187] in the late 1970s may certainly be in fact an acceptance of the constitutive theory.[188] It is also a notable example in the issue of Chinese representation in the United Nations.[189] In that case, the PRC did not join the UN as a new member but replaced the ROC to sit in China's seat.[190] In 1971, the PRC was successful in maintaining

184. *See* Matthew N. Bathon, Comment, *The Atypical International Status of the Holy See*, 134 VAND. J. TRANSNAT'L L. 597, 620 (2001) (announcing that the four-part test set out in the Montevideo Convention, establishing objective criteria only, thus reflects the declarative theory of statehood); D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 102 (5th ed. 1998) (explaining how the Montevideo Convention itself is generally accepted as reflecting the requirements of statehood in customary international law); *see also* Sloane, *supra* note 81, at 117 (denoting the declarativist view is the predominant view today).

185. *See* Restatement (Third) of the Foreign Relations Law of the United States § 202, Cmt. A (noting that "definition of state in Restatement is nearly identical to that in Article 1 of the Montevideo Convention"); *see also* Baker, *supra* note 163, at 141 (stating that the Restatement (Third) of Foreign Relations Law of the United States, follows the declarative view); Grant, *supra* note 61, at 415 (offering that the United States Department of State, for example, traditionally looked to the establishment of certain facts pursuant to the Montevideo Convention to determine statehood and recognition).

186. *See* Tzu-Wen Lee, *supra* note 18, at 383–86 (stating that in practice, states do not support the view that there is no legal existence without recognition); *see also* Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 81 (1997) (noting that Lauterpacht attempts to reconcile the declaratory and constitutive approaches); Grant, *supra* note 156, at 320–21(posting an example of necessary but non-recognition-laden interaction between entities).

187. *See* L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 199 (Sir Robert Jennings & Sir Arthur Watts eds. 1992) (pointing out that "generally a situation denied recognition, and the consequences directly flowing from it, will be treated by non-recognizing states as without international legal effect"); *see also* Michael Shane French-Merrill, Note: *The Role of the United States in Sovereignty Determinations: How Australia Breached its Internal Obligations in Ratifying the Timor Gap Treaty*, 8 CARDOZO J. INT'L & COMP. 285, 301 (2000) (discussing the role of non-recognition as prerequisite for states and governments to achieve international recognition); Alfred P. Rubin, *Recognition Versus Reality in International Law and Policy*, 32 NEW ENG L. REV. 669, 673–74 (1998) (suggesting that recognition or non-recognition may be irrelevant or detrimental to true legal relationships).

188. *See* van der Vyver, *supra* note 64, at 29 (noting that the overwhelming majority of international law experts favor declarative theory over constitutive theory); *see also* Tzu-Wen Lee, *supra* note 18, at 383 (explaining why the declarative theory may be superior to constitutive theory in recognizing a state); Thomas D. Grant, Review Article: *Between Diversity and Disorder: A Review of Jorri C. Dursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U.J. INT'L L. & POL'Y 629, 679 (1997) (asserting that the "constitutive" theory has been used to refer to specific events such as the recognition of Bosnia-Herzegovina rather than the nature of state recognition in general).

189. *See* Hungdah Chiu, Essay: *The Right of the Republic of China and its 21 Million Chinese People to Participate in the United Nations*, 28 J. MARSHALL L. REV. 247, 251 (1994) (noting that the Republic of China was the first country to adopt the United Natons as the country's foreign policy in its constitution); *see also* Christa Tzu-Hsiu Lin, Comment: *The International Criminal Court: Taiwan's Last Hope?*, 6 PAC. RIM L. & POL'Y J. 755, 760 (1997) (explaining that China and other communist countries are suspicious of impartiality in the International Court of Justice in which the majority of judges are capitalist states); Jiangyu Wang, Article: *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT'L L. & COM. 135, 140 (2001) (stating that while China was admitted to the United Nations in 1971, the country did not focus its attention on human rights until 1979, when it began to attend meetings of the U.N. Human Rights Commission as an observer).

190. Despite the fact that Taiwan has fulfilled all the requirements of an independent nation in population, size, and maintenance of a centralized government, the country lost its membership in the United Nations when the PRC replaced the ROC. *See* Chiang, *supra* note 41, at 976 (explaining that the General Assembly was authorized to issue a resolution replacing the ROC with the PRC without prior approval by the Security Council because it was a question of representation, not membership); Charney & Prescott, *supra* note 49, at 463 (explaining that the PRC has used diplomacy and minor military actions to advance its claim to Taiwan).

a majority against seating delegates of the ROC in the UN General Assembly.[191] This was evidence that a state may have only one legitimate government.[192] The withdrawal of recognition of the ROC as the legitimate government of China occurred because the ROC did not effectively control mainland Chinese territory.[193] In this respect, it is implied that recognizing a government is a duty as soon as facts indicate that it held effective power over the territory of the state it represented.[194]

It should be noted that, by declaring "a state" rather than "a government" an international person capable of directly implicating international law, a government succeeds only in acting as the human agent responsible for conducting the affairs of the state in the international community.[195] As such, recognition of a government is the legal institution through which the human agent, with authority to act on behalf of each state, can be identified.[196] In such situa-

191. *See* Chen, *supra* note 32, at 234 (stating that "[s]eventy-six countries voted in favor of Taiwan's ouster, with seventeen abstaining and thirty-five voting against the ouster"); *see also* Chiu, *supra* note 189, at 247 (explaining that when the General Assembly voted the ROC out, none of the countries demonstrated that the ROC committed consistent violations of any UN Charter principles); Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China and the Former Soviet Republics,* 1992 COLUM. BUS. L. REV. 19, 23 (1992) (noting that China's legal situation with respect to GATT is independent of the country's membership in the UN under PRC representation).

192. *See* Tzu-wen Lee, *supra* note 18, at 353 (noting that international powers had experienced problems in terms of recognizing either the ROC or PRC because both asserted that there was only one China and each claimed to be the sole legitimate government of the state of China); *see also* Hsiu-An Hsiao, *supra* note 94, at 736 (explaining that none of the countries which recognize the PRC as the sole legitimate government of China have established relations with Taiwan); Chen, *supra* note 18, at 606 (discussing the "one China" policy of the ROC and its implications for interregional conflict and relations).

193. For the resolution on presentation of China, see United Nations General Assembly, Oct. 25, 1971. G.A. Res. 2758, 26 GAOR Supp. 29 (a/8429), at 2; *see also* Mark S. Zaid, *Taiwan: It Looks Like It, It Acts Like It, But Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations*, 32 NEW ENG. L. REV. 805, 811 (1998) (discussing recent recognition of the PRC instead of the ROC by several countries, including South Africa and the Bahamas); Chang & Lim, *supra* note 66, at 425 (explaining that Taiwan's chances of attaining membership are hampered by a "divided" China much like the case of the two Germanys and two Koreas).

194. *See* Grant, *supra* note 1, at 197 (discussing the constitutive and declarative views on the legal personality and competence of the government); *see also* Chiang *supra* note 41, at 968 (noting that when a new state is established, both state and government recognition occur simultaneously); Field, *supra* note 167, at 117 (stating that the Supreme Court has deemed recognition to be a political question for the political branches, rather than for the judiciary).

195. *See* Orna Ben-Naftali and Antigoni Axenidou, Article: *"Accredito" Ergo Sum: Reflections on the Question of Representation in the Wake of the Cambodian Representation Problem in the Fifty-Second Session of the General Assembly*, 27 DENV. J. INT'L L. & POL'Y 151, 156 (1998) (discussing the challenges to the representative authority of purported governments where competing authorities both claim to be the agent for the state); *see also* Robert B. Porter, Article: *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y 97, 126 (1999) (explaining that the U.S. federal government was the de facto arbiter of competing claims to the Seneca Nation government); Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law,* 40 VA J. INT'L L. 115, 139 (1999) (noting that since a state is viewed as a legal person in the international sense and the government is viewed as the agent of the state, even major change in the structure of government will not ruin the state's status).

196. *See* Black's Law Dictionary, 7th Edition, Bryan A. Garner, Ed., at 703 (defining government as the structure of principles and rules determining how a state or organization is regulated); Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 877 (2000) (noting that the Taliban, which recognized the Chechen government, was not widely viewed to have authority to act on behalf of Afghanistan); Bathon, *supra* note 184, at 614 (explaining that the Holy See constituted a valid government over the territory of the Vatican City despite being the leader of the worldwide church).

tions, to recognize a government means that a state has used diplomatic relations to express the political positions it once used to recognize foreign governments.[197] For example, it might be a form of a joint communiqué announcing the establishment of diplomatic relations,[198] or it might be a public statement that the government is the effective ruler of its state.[199] Accordingly, the failure to recognize a government, in this sense, denies the state its right to participate in international affairs because such participation is only possible through a government.[200]

Thus, in view of the difference that states give to the principle of recognition, this kind of request for recognition is considered a matter of a state's rights and duties under international law.[201] However, how a government becomes competent to represent the state in international society becomes a critical issue when considering the state's right to participate in international affairs.[202]

There is no consensus on how to implement the forms of recognition.[203] There is precedent surrounding the dissolution of the Socialist Federal Republic of Yugoslavia, which is evi-

197. *See* Peterson, *supra* note 153, at 46 (diplomatic relations between the U.S. and Cuba were carried out by third parties as the U.S. had not recognized Cuba); Williams, *supra* note 12, at 24 (discussing a letter from President George H.W. Bush to Boris Yeltsin in 1991 for U.S. recognition of Russia as an independent state and that the U.S. would engage in diplomatic relations with Russia); Tzu-wen Lee, *supra* note 18, at 365–66 (noting that diplomatic relations between countries and the ROC decreased after the 1971 ouster of the ROC).

198. *See* Colin P. A. Jones, *United States Arms Exports to Taiwan Under The Taiwan Relations Act: The Failed Role of Law in United States Foreign Relations*, 9 CONN. J. INT'L L. 51, 59 (1993) (discussing the 1982 joint communique issued by the U.S. and the PRC which effectively reduced arms supplies to Taiwan); *see also* Costa, *supra* note 19, at 862 (noting that the Joint Communique in 1978 established U.S. and PRC relations despite earlier communications between the two entities); Roberto Laver, *The Falklands/Malvinas: A New Framework for Dealing with the Anglo-Argentine Sovereignty Dispute*, 25 FLETCHER F. WORLD AFF. 147, 152 (2001) (discussing a joint communiqué in 1989 between Argentina and Britain to improve relations between the two countries).

199. *See* Grant, *supra* note 196, at 869 (stating that the Taliban's foreign minister, on behalf of the Afghan government, recognized Chechnya's secessionist movement as well as its statehood); *see also* Wylegala, *supra* note 154, at 675–76 (reviewing STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW, 1998) (noting that recognition of states rather than of governments may result in downplaying formal public statements of recognition); Ben-Naftali & Axenidou, *supra* note 195, at 198 (explaining criticism of an ad-hoc system for recognition of states).

200. *See* Field, *supra* note 167, at 118 (noting that non-recognition as opposed to a severance of diplomatic relations will prevent governments from litigating in the U.S.); *see also* Nhan T. Vu, *The Nondemocratic Benefits of Elections—The Case of Cambodia*, 28 CASE W. RES. J. INT'L L. 395, 443 (1996) (explaining that factions would not relinquish control if the government was not properly recognized as being legitimate); Kofi Oteng Kufuor, Critical Essay: *The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future*, 17 AM. U. INT'L L. REV. 369, 383 (2002) (noting that unrepresentive governments in Africa, including military dictators or civilian presidents-for-life, were still able to participate in the OAU).

201. *See* Tzu-wen Lee, *supra* note 18, at 384 (noting that even before recognition, each state has the right to defend its independence); *see also* Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273, 306 (2000) (analyzing the "self-executory" rule which suggests that states have the duty of non-recognition); Sloane, *supra* note 81, at 120 (discussing approaches to state policy objectives regarding the duty of recognition).

202. *See* Allot, *supra* note 16, at 767 (explaining that international society has a direct interest in the abuse of government powers with respect to human rights, democracy, and economic behavior); David P. Fidler, *International Human Rights Law in Practice: The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137, 145 (2001) (discussing pluralism and solidarism in inter-state governance).

203. *See* Field, *supra* note 167, at 120–21 (discussing the differences between developing nations and world powers with respect to recognition practice); *see also* Tzu-wen Lee, *supra* note 18, at 354 (noting that Taiwan has implicitly recognized the PRC as part of an effort to attain diplomatic ties to foster recognition); Kofi Oteng Kufuor, *supra* note 200, at 378 (discussing recognition with regards to the military regime in Uganda).

dence that recognition can be decided by states together.[204] In the European Union (EU), governments endeavored to coordinate their recognition policy. [205] There was no doubt that the concessions made were not traditional but a new approach to the forms of recognition.[206] This was due to the fact that they did not run to the direct material benefit of the states offering recognition.[207] Instead, they concerned minority rights, other human rights, and state secessions, especially with regard to financial obligations and duties under force reduction.[208]

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204. *See* Marc Weller, *Current Development: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 581 (1992) (explaining that recognition would be granted where there existed a loose association of independent republics, human rights guarantees were instilled, and there were no unilateral changes made in the republics' borders); *see also* Vladislav Jovanovic, *The Status of the Federal Republic of Yugoslavia in the United Nations*, 21 FORDHAM INT'L L.J. 1719, 1725 (1998) (noting how the right to secede was seen as more important then the right of loyalty to the state); Peter Radan, *Post-Secession International Borders: A Critical Analysis pf the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 51 (2000) (discussing the EC Declaration on Yugoslavia and subsequent Declaration on Recognition and accompanying Guidelines on Recognition in 1991).

205. *See Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,"* 31 INT'L LEGAL MATERIAL 1485, 1485 (1992) (laying the foundation for self-determination with respect to former communist bloc countries who sought independence); *see also* Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 833 (1999) (discussing how the "Guidelines" make clear that political membership in the European-Atlantic community requires minimum guarantees for the rights of minority populations); *Political Cooperation: EEC Moves to Recognise Georgia*, EUROPEAN REPORT, Mar. 25, 1992, at 13 (stating that Georgia has met the stated requirements in the Guideline on Recognition of New States in Eastern Europe and the Soviet Union and proceeded with recognition).

206. *See* Bulent Aras, *Point-Counterpoint: The Importance of Turkey to Relations Between Europe and the Turkic Republics of the Former Soviet Union*, 2 UCLA J. INT'L & FOR. AFF. 91, 93 (1997) (describing the EU's motivation to recognize the former Soviet republics based on goals of transforming the structural transformation in those countries as well as increasing economic activity by nationals in the republics); *see also* Bathon, *supra* note 184, at 624 (explaining the U.S. criteria for recognizing statehood and aims for ensuring democratic regimes in the recognized states); Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 815 (1996) (noting that Serbia Montenegro's claim for being the successor to Yugoslavia was directly in conflict with recognition principles because a true successor would not need to make such a proclamation).

207. *See generally* Charter of the Organization of American States, ch. 1, Nature and Purposes, art. 2 (noting that the essential purposes include the promotion of economic, social, and cultural development and the eradication of extreme poverty in the states), *available at* http://www.oas.org/juridico/english/charter.html (last visited Oct. 13, 2002); *see also* Sloane, *supra* note 81, at 115–16 (noting that recognition of a state under the Montevideo Convention presupposes the state's capacity to enter into relations with other states); Wendy T. Wylegala, *supra* note 199, at 677–78 (discussing potential benefits of recognition for governments in exile, including the ability to make treaties and conduct foreign relations with other states, access to state property abroad and protection of nationals); Sloane, *supra* note 81, at 115–16 (noting that recognition of a state under the Montevideo Convention presupposes the state's capacity to enter into relations with other states).

208. *See* Nedzad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 30, 31 (2002) (discussing the potential for peaceful resolution of disputes among multiethnic states based on adherence to maintaining peace and advancing human rights and development); Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301, 302 (2001) (noting that the EU's policy and law reflect concern over the protection of human rights); *see also* Ebenroth, *supra* note 206, at 818 (explaining that succession questions revolve around human rights, property rights, debts, and treaty responsibilities).

Another notable evolution of recognition involves the cases of the United States' recognition of Israel in 1948[209] and India's recognition of Bangladesh in 1972.[210] Those entities may not have met certain criteria traditionally viewed as prerequisite to statehood,[211] but recognition gave those entities access to foreign aid.[212] This may have helped them to consolidate their territories and to enhance their legitimacy with the population.[213] As Milenko Krec, judge ad hoc of the International Court of Justice, added in a dissenting opinion to a recent decision in the genocide case, "[t]he pretension of an entity to represent a State, and even recognition by

209. *See* Kramer, *supra* note 26, at 984 (noting that on May 14, 1948, a provisional Zionist national council announced the establishment of the state of Israel); *see also* Charles Bryan Baron, *The International Legal Status of Jerusalem*, 8 TOURO INT'L L. REV. 1, 24 (1998) (explaining that lack of UN opposition to Israel's declaration of Jerusalem as its capital in the 1950s may be seen as "implicit recognition of Israeli sovereignty over Western Jerusalem"); Yoav Tadmor, Comment: *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 TEMP. INT'L & COMP. L.J. 403, 423 (1994) (stating that international recognition of Israel's boundaries is evidenced by Security Council Resolution 242 of November 22, 1967).

210. *See* Andrew M. Beato, *Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT'L L. & POL'Y 525, 546 (1994) (noting that despite East Pakistan breaking away from West Pakistan to form the autonomous state of Bangladesh, the new state had to uphold preexisting treaties with the predecessor state); *see also* Barry M. Benjamin, Note: *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 133 (1993) (suggesting that India intervened with military pressure to suppress human rights abuses occurring in East Pakistan after the UN failed to address the situation); Michael Scharf, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROB. 41, 49 (1996) (explaining that India and Bangladesh promised not to prosecute Pakistanis for genocide and humanity crimes if Pakistan would politically recognize Bangladesh).

211. *See* Lloyd, *supra* note 183, at 791 (noting that a secessionist entity, such as Bosnia-Herzegovina, whose statehood is in doubt will still be promptly recognized if this is necessary to fulfill the purposes of the Charter). *See also* Grant, *supra* note 61, at 403 (suggesting that there is no clear definition of a "state"); Bathon, *supra* note 184, at 599 (discussing the atypical international legal status for the Holy See).

212. *See* Kimberly Medlock Wigger, Comment: *Ethiopia: A Dichotomy of Despair and Hope*, 5 TULSA J. COMP. & INT'L L. 389, 411 (1998) (suggesting that Ethiopia, which has consistently relied on foreign aid, should take steps to achieve economic, political, and social reform); *see also* Meri Melissi Hartley-Blecic, Note and Comment: *The Invisible Women: The Taliban's Oppression of Women in Afghanistan*, 7 ILSA J. INT'L & COMP L. 553, 580 (2001) (noting that the Taliban, which is not recognized by the U.S., has prevented its women from attaining the foreign assistance they need); Karl J. Irving, *The United Nations and Democratic Intervention: Is "Swords into Ballot Boxes" Enough?*, 25 DENV. J. INT'L L. & POL'Y 41, 49 (1996) (explaining that foreign aid and membership in intergovernmental organizations have been linked with adhering to principles of democracy).

213. *See* Paola Michelle Koo, Note: *The Struggle for Democratic Legitimacy Within the European Union*, 19 B.U. INT'L L.J. 111, 116 (2001) (discussing that the legitimacy of the EU will come from the legitimacy of the individual member states which comprise the union); *see also* Nhan T. Vu, *supra* note 200 at 414 (explaining that a legitimate functioning government will hold political elections); Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. LAW 117, 124–25 (1997) (suggesting that normative effects on the rules of international law will result from legitimation of government).

other States, is not, in the eyes of the law, sufficient on its own to make it a State within the meaning of international law."[214] This is deemed a very flexible definition of sovereignty.[215]

In recent decades, multilateral conferences and intergovernmental organizations provided channels through commercial, economic, humanitarian, technical, and various ad hoc contacts[216] that have multiplied far beyond their numbers of a hundred years ago. Soon, technological matters, trade, the environment, and all manner of regulatory fields will mean that governments will have to stay in more constant and more varied contact with one another.[217] A need to maintain relations with other states has sometimes been interpreted as an administrative matter, separate from political decisions[218]—for example, entering into formal diplomatic relations with another government.[219] The growth of nonpolitical contacts among govern-

214. *See* July 11, 1996, I.C.J. No. 91 (Krec, J., dissenting opinion at para. 2); Milenko Krec admitted representatives of the Serb ethnic group in Bosnia to the peace negotiations at Dayton and Paris, and the Contact Powers (United States, United Kingdom, France, Russia, and Germany) were tacitly recognizing the Republika Srpska; *see also* Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 251 (2001) (stating that establishment of a state is not dependent on recognition from other states); Thomas D. Grant, *States Newly Admitted to the United Nations: Some Implications*, 39 COLUM. J. TRANSNAT'L L. 177, 180–81 (2000) (explaining that several small "colonial" states which attained recognition in the 1970s and 1980s have been limited in their foreign policy activism).

215. *See* Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CAN.-U.S. L.J. 9, 11 (1994) (noting that application of "sovereignty" in international relations has become controversial); *see also* Kanishka Jayasuria, Symposium: *The Rule of Law in the Era of Globalization: Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425, 426 (1999) (explaining that with globalization has come the notion that not all law must originate from a central decision-making political authority); Ian Robinson, Symposium: *NAFTA at Age One: A Blueprint for Hemispheric Integration? II. The Labor Side Agreement: The NAFTA Labour Accord in Canada: Experience, Prospects, and Alternatives*, 10 CONN. J. INT'L L. 475, 504 (1995) (discussing the international recognition of state sovereignty with respect to contributing to international peace and popular sovereignty).

216. *See* Jodie Hierlmeier, Note: *Unep: Retrospect and Prospect—Options for Reforming the Global Environmental Governance Regime*, 14 GEO. INT'L ENVTL. L. REV. 767, 770 (2002) (noting that international governance has grown to include influential civil society interest groups, academia, MNCs, global mass media); *see also* Jeffrey Wool, *The Case for a Commercial Orientation to the Proposed Unidroit Convention as Applied to Aircraft Equipment*, 31 LAW & POL'Y INT'L BUS. 79, 79–80 (1999) (discussing intergovernmental relations with respect to aircraft and aviation); Stephen Skinner, Article: *The Third Pillar Treaty Provisions on Police Cooperation: Has the EU Bitten Off more than It can Chew?* 8 COLUM. J. EUR. L. 203, 219–20 (2002) (suggesting that EU cooperation increasing police powers may lead to disregarding proper safeguards).

217. *See* Alfred C. Aman, Jr., Symposium: *Globalization, Accountability, and the Future of Administrative Law: The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379, 381 (2001) (noting that cooperation for international governance has also worked at the domestic governance level); *see also* Audrey L. Allison, Article: *Meeting the Challenges of Change: The Reform of the International Telecommunication Union*, 45 FED. COMM. L.J. 491, 492 (1993) (discussing the cooperation among various actors, including sovereign states, private contracts, regional, and intergovernmental organizations in international telecommunications law); Chantalle Forgues, Note: *A Global Hurdle: The Implementation of an International Norm Protecting Women From Gender Discrimination in International Sports*, 18 B.U. INT'L L.J. 247, 270 (2002) (noting the efforts of modern world conferences devoted to eradicating gender discrimination in international sports).

218. *See* Peterson, *supra* note 153, at 33 (noting that the need for contact encouraged definition of many activities as administrative matters separate from political decisions); *see also* Lee, *supra* note 18, at 352 (noting Taiwan's lack of formal relations and distinguishing political aspects of recognition). *See generally* Shen, *supra* note 19, at 1121–22 (noting the ability of Taiwan's regime to maintain a number of diplomatic relations with other states).

219. *See* Peterson, *supra* note 218, at 33 (noting that diplomatic relations with another government are defined as administrative matters); *see* Lee, *supra* note 18, at 387–88 (noting Taiwan's ability to enter into diplomatic relations with other governments). *See generally* Shen, *supra* note 218, at 1121–22 (stating that even though most states have officially recognized China's sovereignty over Taiwan, Taiwan is still able to enter into diplomatic relations with some states).

ments for economic, technical, cultural, humanitarian, and other purposes has marginalized political non-recognition, as in the case of the relations between the U.S. and Iran.[220] This tendency has caused a great expansion in the definition of recognition that makes the traditional concept of recognition on political matters seem less important than before.[221] Witnessing the requests for recognition from the recently dissolved states of the former Soviet Union and Yugoslavia, it is believed that developments in the structure of international society have altered recognition as an institution of international law.[222]

Membership in international organizations is not dispositive to determine whether an international entity has acquired the status of statehood.[223] However, weight is given to membership which serves as an indicator of such recognition.[224] "In most multilateral undertakings, decisions about who can participate are made by a simple or qualified majority of the members."[225] A government might take it as a duty to consider matters regarding financial benefit

220. *See* Thomas D. Grant, *supra* note 1, at 218 (considering the United States and Iran—this is a situation in which two governments have expressed disapproval toward one another by cultivating mutual diplomatic isolation yet in which both governments never ceased to recognize one another); Peterson, *supra* note 153, at 33 (noting that international cooperation in the fields of economic enterprises, health, scientific research, and social services meant that governments had to stay in constant contact with each other). *See generally* Katherine Tonnas, Comment, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295, 323 (1993) (illustrating the notable case of the relations between Cuba and the United States, noting that although Cuba and the United States established reciprocal diplomatic offices in 1977, the two nations have not resumed full diplomatic relations).

221. *See* Grant, *supra* note 220, at 223 (noting the refusal to use recognition as a response to changes of government may have two grounds, one resulting from doubts over effectiveness of a regime, the other one resulting from political objections); s*ee also* Peterson, *supra* note 218, at 36–37 (noting that because the effects of non-recognition are narrow, recognition makes little difference); Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-recognition of Foreign Governments*, 26 STAN. J. INT'L L. 435, 467–68 (1990) (noting the executive branch approach in dealing with "recognition" statements).

222. Concerned about increased claims for recognition in Eastern Europe and in the former Soviet Union in the early 1990s, the member states of the European Community adopted guidelines on the recognition of new states in Eastern Europe and in the Soviet Union to respect those claims and to constitute the general criteria on the process of recognizing such new states. For the "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," see Extraordinary EPC Ministerial Meeting, Brussels, 16 Dec. 1991, EC Bulletin 12-1992, p. 119; UN Doc. S/23293 of 17 Dec. 1991, Annex II; 31 I.L.M. 1486 (1992); *see also* Grant, *supra* note 61, at 442–44 (discussing democracy as a factor that has been added to the definition of statehood and that it has become a criterion for recognition). *See generally* Sloane, *supra* note 81, at 113–16 (discussing the developments and factors of international society that have impact on recognition).

223. *See* Chen, *supra* note 32, at 239 (noting that membership in either IGOs or NGOs in not dispositive in determining the status of the state); *see also* Hannum, *supra* note 70, at 488 (discussing the possibility of non-sovereign entities acquiring membership in international organizations); Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1156–57 (1961) (explaining that some entities may satisfy the requirements of statehood when the claim is for limited participation).

224. *See* Chen, *supra* note 32, at 239 (stating that membership in either IGOs or NGOs serves as a strong indicator of recognition); *see also* Ebenroth, *supra* note 206, at 818 (relaying that under the constitutive theory of state succession, recognition of a new state effectively determines its rights and duties). *See generally* Lawrence M. Frankel, *International Law of Secession: New Rules for New Era*, 14 HOUS. J. INT'L L. 521, 528 n.16 (1992) (noting that U.N. membership is the primary criterion for determining whether an entity is or is not a state).

225. *See* Peterson, *supra* note 153, at 33 (expressing that in most multilateral undertakings, decisions about who could participate were made by a simple or qualified majority); s*ee also* Saxer, *supra* note 12, at 696–97 (stating that membership in the U.N. is subject to approval of the majority); Stephen A. Silard, *The Global Environment Facility: A New Development in International Law and Organization*, 28 GEO. WASH. J. INT'L L. & ECON. 607, 639–40 (1995) (noting that World Bank's decisions are made by the majority vote).

or other humanitarian issues with another it does not recognize,[226] unless it can get enough other members to agree that the latter ought not to be allowed to participate.[227] What is so clear in this connection is that any government deserves to participate in a multilateral organization or conference in its quest for recognition,[228] and that it meets the criteria of both controlling a territory and a population that is subject to effective government.[229] This observation is particularly relevant to diplomats and consuls[230] who pursue a wider variety of negotiations and have wider eligibility to conclude agreements.[231] Under these circumstances, the conclusion of a bilateral treaty regulating relations between the state and the new entity should be considered as the requisite intent for expressing or implying recognition.[232] The expression of intent would serve as a basis for applying the substantial rights and duties of statehood or governmental legitimacy to a state's relations with an unrecognized entity.[233]

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226. *See* Peterson, *supra* note 225, at 33 (1983) (stating that a government might be forced to consider political matters with another it did not recognize); *see also* Hsiu-An Hsiao, *supra* note 94, at 739 (noting that although the United States does not consider Taiwan to be a state, it regards Taiwan as an entity with treaty-making capacity). *See generally* Grant, *supra* note 1, at 201–202 (explaining that humanitarian and various other contacts have become part of daily life, and it is unthinkable to preclude them pursuant to a non-recognition policy).

227. *See* Peterson, *supra* note 226, at 33 (stating that government could avoid consideration of relations with another government it did not recognize if it could get enough other members to reject participation of the latter); Thomas D. Grant, *Hallstein Revisited: Unilateral Enforcement of Regimes of Non-recognition since the Two Germanies*, 36 STAN. J. INT'L L. 221, 221 (2000) (noting that states wishing to prevent the recognition of other entities must enlist other states in their policy of non-recognition); *see generally* J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 34 (1991) (discussing non-recognition principles in the context of the UN).

228. *See* Peterson, *supra* note 226, at 34 (discussing that an unrecognized government was able to participate in multilateral organization); *see also* Grant, *supra* note 225, at 201 (noting that multilateral relations affect recognition policies). *See generally* Matt Griffin, *Recognition of Governments: Legal Doctrine and State Practice*, 29 N.Y.U. J. INT'L L. & POL. 647, 648 (1997) (stating that participation in international organizations is more important than recognition).

229. *See* Matthew N. Bathon, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597, 619 (2001) (noting that Franz von Liszt declared that independence and supremacy over a territory were indispensable requirements of statehood, and Georg Jellinek required a territory, a people, and a government for recognition as a state); *see also* Attix, *supra* note 38, at 366 (stating the requirements for statehood including a defined territory, a permanent population, and an effective government); Peterson, *supra* note 153, at 37 (expressing the rule on whether to grant or refuse recognition to a new state: a criterion is whether a government effectively controls its state).

230. *See* Peterson, *supra* note 226, at 34 (noting that diplomats and consuls pursued a wider variety of negotiations with unrecognized governments); *see also* Grant, *supra* note 1, at 201 (stating that contact between diplomats does not disturb non-recognition). *See generally* Grant, *supra* note 227, at 228 (discussing the establishment of diplomatic relations consistent with non-recognition of the East German state).

231. *See* Peterson, *supra* note 226, at 34 (noting that diplomats and consuls had wider freedom to conclude agreements); *see also* Grant, *supra* note 230, at 201 (implying that conclusion of agreements does not disturb non-recognition). *See generally* Grant, *supra* note 230, at 228 (discussing diplomatic agreements within the context of non-recognized states).

232. *See* Attix, *supra* note 38, at 380 (explaining that the conclusion of the bilateral treaty is an exception to the general rule, which states that due to the nature of the international system, recognition is rarely implied); *see also* Lee, *supra* note 150, at 262 (stating that conclusion of a bilateral treaty indicates a tacit recognition); Dalia N. Osman, *Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 COLUM. J. TRANSNAT'L L. 969, 977 (1999) (noting that bilateral treaties are definitive measures of tacit recognition; this has been generally accepted since the 19th century).

233. *See* Attix, *supra* note 38, at 380 (stating that due to the nature of the international legal system, in which sovereign states enjoy a high degree of freedom from imposed obligations, recognition is rarely implied, although there are exceptions to this general rule); *see also* Lee, *supra* note 232, at 262 (discussing that the conclusion of a bilateral treaty indicates a tacit recognition); Osman, *supra* note 232, at 977 (noting that bilateral treaties are definitive measures of tacit recognition; this has been generally accepted since the 19th century).

In international practice decisions about "recognition" usually are put in a position where bilateral relations cannot always be kept separate from multilateral ones.[234] Thus, we must advocate ending the confusion of recognition by minimizing the difference among members of an organization to recognize a government once its delegates are admitted to participation.[235] Whatever concern we have about the legal implications of recognition policies of other states, greater integration does raise serious questions. Is it possible today for a country simply to dismiss from the traditional concept of political recognition those from whom it finds itself benefiting to continue any kind of relationship? In this sense, the precedent of collective recognition within the EU might be employed using the same logic here.[236]

International relations operate not only through official channels[237] but also on the basis of semi-official norms and prevailing practices guided by pragmatism.[238] Foreign nationals, courts and agencies of foreign governments can determine on their own who rules where and act accordingly.[239] The widening of modern intergovernmental contacts has had a striking impact on the legal effect of recognition in international society.[240] In this regard, the world

234. *See* Peterson, *supra* note 153, at 33 (stating that bilateral relations could not always be kept separate from multilateral ones); *see also* Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 41 (2000) (noting that even in bilateral relations consideration of interests of the entire community of states should be taken into account). *See generally* Elizabeth Shaver Duquette, *Human Rights in the European Union: Internal versus External Objectives*, 34 CORNELL INT'L L.J. 363, 380 (2001) (illustrating European Community participation as a whole in development of bilateral relations by imposing conditions).

235. *See* Peterson, *supra* note 153, at 33 (noting that some legal scholars advocated ending the confusion by requiring all members of an organization to recognize a new government once its delegates are admitted to participation); *see also* van der Vyver, *supra* note 227, at 16–19 (discussing the constructive theory of recognition advocated by Lauterpacht); *see generally* Q. Wright, *Some Thought about Recognition*, 44 AM. J. INT'L L. 548, 552 (1950) (noting that recognition by UN ordinarily constitutes "general recognition," which signifies that the international community of states as a whole regards the political entity concerned as a state).

236. *See* Richard B. Bilder & Valerie Epps, Note, *The Recognition of States: Law and Practice in Debate and Evolution*, 95 AM. J. INT'L L. 252, 254 (2001) (book review) (explaining the EU's approach to collective recognition); *see also* Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19 WIS. INT'L L.J. 295, 302–303 (2001) (describing collective recognition as one of the components of international norms). *See generally* Grant, *supra* note 1, at 225–26 (discussing process of collective recognition).

237. *See* Lee, *supra* note 18, at 352 (expressing that international relations operate not only though official channels of international law and international organizations); *see also* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 669 (2002) (noting that states formerly dealt with one another through centralized agents). *See generally* Costa, *supra* note 19, at 856 (discussing the invitation of The United States-Hong Kong Policy Act of 1992 to maintain official organizations and missions).

238. *See* Lee *supra* note 18, at 352 (analyzing that international relations operate on the basis of semi-official norms and prevailing practices guided by pragmatism); *see also* Spiro, *supra* note 237, at 669 (noting that central governments increasingly interact though a variety of decentralized networks outside of foreign ministries). *See generally* Costa, *supra* note 19, at 856 (explaining the invitation of The United States-Hong Kong Policy Act of 1992 to maintain semi-official organizations and missions).

239. *See* Peterson, *supra* note 153, at 36 (noting that it's up to governments to determine the ruling party). *See generally* Chiu, *supra* note 168, at 202 (illustrating NATO recognition of the PRC over the ROC); Monroe Leigh, *Federal Jurisdiction—Non-recognition of Foreign State Governments—Entitlement of Citizens of Foreign State to Sue in U.S. Courts*, 91 AM. J. INT'L L. 954, 954–55 (1987) (discussing U.S. court determination of recognition of foreign states).

240. *See* Josef L. Kunz, *The International Law of Recognition*, 65 HARV. L. REV. 713, 713–14 (1952) (drawing a distinction between recognition in a political sense, and recognition in a legal sense); *see also* Lee, *supra* note 150, at 262 (examining the effect, its importance and legal consequences of recognition on legal status of governments). *See generally* Grant, *supra* note 1, at 219–21 (discussing legal problems of recognition).

community needs to consider ways of managing other forms of recognition.[241] Thus, the effects of recognition on political matters are becoming relatively narrow.[242] After all, unrecognized states are still obligated to abide by international law as much as recognized states.[243]

It is true that recognition is never a guarantee of meeting the requirements of statehood,[244] but it creates a viable future in the attempted integration of international law and international relations.[245] As the Charter of the Organization of American States provides:

> The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law. [246]

In this respect, the contacts between one government acting on behalf of its state and another government acting on behalf of its state fulfill an important principle of the United

241. *See* Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 182 (2001) (noting the movement to consider management of alternative form of recognition); *see also* Chiu, *supra* note 168, at 202–203 (discussing the need to support alternative means to recognition in case of Taiwan). *See generally* Grant, *supra* note 1, at 199–200 (discussing the acts that convey recognition).

242. *See* Peterson, *supra* note 153, at 36 (noting that because the effects of non-recognition are relatively narrow, recognition of governments seems to make little difference); *see also* Edwin L. Fountain, *Out From the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473, 491 (1989) (noting that political non-recognition serves only narrow purposes). *See generally* Grant, *supra* note 1, at 218–19 (discussing the effects of recognition on political matters).

243. *See* Winston Hsiao, Comment, *The Development of Human Rights in the Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement*, 5 PAC. RIM. L. & POL'Y J. 161, 196–97 (1995) (stating that customarily international law applies to states, without distinction between recognized and unrecognized states); Chang & Lim, *supra* note 66, at 421 n.113 (stating that unrecognized states are obligated under customary international laws as much as recognized states are bound to uphold it); *see also* Michael Byers, *Custom, Power, and the Power of Rules of Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 157 (1995) (noting that unrecognized states have rights and are subject to obligations under international law).

244. *See* Grant, *supra* note 61, at 446–47 (discussing that recognition has itself been proposed as a criterion for statehood); *see also* Bathon, *supra* note 229, at 619–20 (expressing that recognition of the state meeting to meet certain requirements for statehood would be invalid); Susan L. Ronn, *Jane Doe, on Behalf of Herself and all Others Similarly Situated: Radovan Karadzic in United States District Court*, 19 SEATTLE U. L. REV. 289, 313 (1996) (analyzing that recognition does not confer statehood).

245. *See* Grant, *supra* note 1 at 212 (stating that recognition could be used to achieve advantages in international relations); *see also* Grant, *supra* note 61, at 446 (noting that recognition can be important in the process of state creation); Mckinney, *supra* note 99, at 95 (noting that an entity becomes a state through recognition by other states, regardless of whether that entity meets four objective requirements).

246. *See* The Charter of the Organization of American States, art. 12, 119 U.N.T.S. 3 (1951); *see also* van der Vyver, *supra* note 227, at 12 (stating that several international law instruments proclaim that the political existence of a state shall be independent of recognition by other states); Malone, *supra* note 173, at 94 (noting that international iaw draws no distinction between de facto state entities and recognized states, stating that the right of self-defense was advanced to non-recognized states).

Nations.[247] It is an aspiration for wealth redistribution among nations that states assist in the development of other states' interaction with one another.[248] Only by reducing differences between relations with recognized governments, and with unrecognized regimes in the coming years, will we be able to prevent any power state from using the denial of recognition as a tool of political hostility.[249] For instance, in the case of Chechnya, the Baltic states (Estonia, Latvia, and Lithuania) expressed interest in recognizing the secessionist republic of Chechnya.[250] Russia, continuing to claim Chechnya,[251] made clear that any movement to recognize Chechnya would elicit censure and perhaps embargo.[252] Consequently, the Baltic states then failed to express their recognition of Chechnya.[253]

> After further analysis of legal doctrine and states' practices, there is a comprehensive imperative that once a regime possesses a territory and a popula-

247. *See* Peterson, *supra* note 153, at 48 (stating that the state communicates and fulfills its obligations though its government, thus it is through the contact between the governments that international relations are carried out); *see also* Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles under a NAFTA-based System*, 36 HARV. INT'L L.J. 127, 136 n.54 (1995) (stating that most of international economic relations are carried out through bilateral government channels). *See generally* Grant, *supra* note 1, at 212 (discussing structure of international relations between governments).

248. *See* Thomas D. Grant, *supra* note 1 at 211 (noting United Nation's aspirations to require wealth redistribution among the nations). *See generally* Joy A. Weber, *Famine Aid to Africa: an International Legal Obligation*, 15 BROOK. J. INT'L L. 369, 389–90 (1989) (illustrating an accompanying duty imposed upon states to provide developmental aid such as famine aid to Africa). *See, e.g.*, Charter on Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., arts. 17, 22, U.N. Doc. A/RES/3281 (1975). The Charter complemented the Declaration and the Programme of Action on the Establishment of a New International Economic Order.

249. *See* Sloane, *supra* note 81, at 174 (stating that both the United Nations and its members use recognition as a political tool); *see also* Jennifer L. Coviello, Comment, *Access Denied: A Case Comment on* Matimak Trading Co. v. Khalily, 18 N.Y.L. SCH. J. INT'L & COMP. L. 435, 435 (1999) (noting the importance of the executive branch of government in the recognition of foreign states); Weller, *supra* note 204, at 587 (noting the political use of recognition in dealing with the former Yugoslavia).

250. *See* Grant, *supra* note 1, at 215 (stating the Baltic states were interested in recognizing Chechnya); *see also* Grant, 36 STAN. J. INT'L L. 221, 241 (noting there was interest in recognizing Chechnya by some Baltic states). *See generally* Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 117 (1999) (discussing if Chechnya should even be considered for recognition).

251. *See* Grant, 15 AM. U. INT'L L. REV. 869, 872 (noting Russian claims that Chechnya is still a part of its territory); *see also* Elliot Stanton Berke, Recent Development, *The Chechnya Inquiry: Constitutional Commitment or Abandonment?*, 10 EMORY INT'L L. REV. 879, 904 (1996) (noting Russian steadfastness in its claim over Chechnya). *See generally* Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 815 (1995) (discussing the absence of a valid claim to statehood by Chechnya).

252. *See* Grant, *supra* note 1, at 215 (stating that Russia threatened to censure an embargo against countries recognizing Chechnya); *see also* Grant, 15 AM. U. INT'L L. REV. 869, 880–81 (noting that Russia would sever ties with countries that recognized the independent state of Chechnya); Thomas D. Grant, 40 VA. J. INT'L L. 115, 116 (noting the Russian threat to end diplomatic relations with countries recognizing Chechnya).

253. Since the early 1990s, Chechnya has attempted to establish statehood independent from Russia. Authorities of the Russian Federation claim that Chechnya is part of Russia and that any other claim to title in the territory must be denied recognition. As the world chose to characterize the secessionist struggle in Chechnya as an internal matter of the Russian Federation, no state recognized Chechen independence. *See* Hollis, *supra* note 251, at 815 (discussing the validity of Chechnya's claim for independent); *see also* Grant, 36 STAN. J. INT'L L. 221, 241 (discussing the recognition history regarding Chechnya). *See generally* Yuri V. Ushakov, *Humanitarian and Legal Aspects of the Crisis in Chechnya*, 23 FORDHAM INT'L L.J. 1155, 1156 (2000) (discussing Chechnya's struggle for statehood).

tion that is subject to the legal and effective control of a government[254] and is willing to abide by the U.N. Charter,[255] it is entitled to request recognition from other states and international organizations.[256] By using this approach, a legal regime should first meet the threshold for recognition as a government to act on behalf of its state.[257] Since the recognition is only discretionary,[258] its legal effects must be minimal in the international legal order. [259]

IV. A Legal Analysis of the Current Position of Taiwan

A. The Nature of the Taiwan Issue: Some Factual Background

Historically, during the seventeenth, eighteenth, and nineteenth centuries, Taiwan was under continuous colonial rule by the Portugese, Dutch, and then Japan.[260] The Dutch controlled the island of Taiwan until 1662 when Cheng Ch'eng-kung, a Ming loyalist and military leader, expelled them.[261] In 1683, the Manchu Ch'ing Dynasty attacked Taiwan and claimed

254. *See* Peter D. Trooboff, Decision, *Recognition of Governments—Standing of Foreign States to Sue in U.S. Courts—Diversity Jurisdiction*, 83 AM. J. INT'L L. 368, 368 (1989) (noting the parts of the legal definition of a state under international law); *see also* Biancheria, *supra* note 17, at 235 (noting the characteristics of a state consist of territory, a permanent population, and government control); Suellen Ratliff, Comment, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 CALIF. L. REV. 1207, 1235–36 (1999) (discussing the United Nations credentials for statehood).

255. *See* Lloyd, *supra* note 183, at 792 (discussing that the recent practice of the United Nations has been to recognize secessionist entities when they have fulfilled two criteria: they must be "states" and they must be willing to abide by the U.N. Charter); *see also* Ratliff, *supra* note 254, at 1236 (expressing that states should be willing to work with the UN in attempting to achieve recognition); Ben-Naftali & Axenidou, *supra* note 195, at 160–61 (discussing the general requirements of would-be states in attempting to gain recognition).

256. *See* Trooboff, *supra* note 254, at 368 (stating that to become a recognized state, they must be able to engage in relations with other states and international organizations); *see also* Biancheria, *supra* note 17, at 235 (explaining that they should have the capacity for international relations); Ratliff, *supra* note 254, at 1236 (noting that they should be willing to work in the international community).

257. *See* Ben-Naftali & Axenidou, *supra* note 195, at 160–61 (noting that the regime should have the obedience of the people it is trying to govern); *see also* Trooboff, *supra* note 254, at 368 (noting the government should have control of its own permanent population); Ratliff, *supra* note 254, at 1235–36 (stating one of the parts of a test of recognition is the regime's control of its population).

258. *See* Isaak I. Dore, Book Review, *South African Yearbook of International Law*, 81 AM. J. INT'L L. 813, 814 (1987) (explaining that recognition of statehood is a wholly discretionary activity); *see also* Okafor, *supra* note 213, at 121 (noting that discretionary recognition may have limitations); Hollis, *supra* note 251, at 814–15 (discussing the criteria involved in recognition).

259. *See* van Der Vyver, *supra* note 64, at 30 (stating that to recognize a political community as a state is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing states are under the duty to grant recognition); *see also* Rubin, *supra* note 187, at 674 (noting that because of the discretionary nature of recognition, it must have only minimal effects); Berke, *supra* note 251, at 894 (stating that when international recognition is given, its effects are minimal).

260. *See* Chang & Lim, *supra* note 66, at 405 (discussing Taiwan's colonial period); *see also* Chen, *supra* note 32, at 241 (stating that the Dutch, Portuguese, and Japanese settlers at various points in history maintained ports and colonies throughout Taiwan); Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 VAND. J. TRANSNAT'L L. 481, 525 n.24 (2001) (outlining the colonial history of Taiwan).

261. *See* Charney & Prescott, *supra* note 49, at 454 (noting the Dutch control of Taiwan); *see also* Chang & Lim, *supra* note 66, at 418 (noting that in 1662 China established a regime on Taiwan); Shen, *supra* note 19, at 1106–107 (noting the 1662 expulsion of the Dutch).

Taiwan as part of the Chinese Empire.[262] The international community did not dispute China's claim of sovereignty over Taiwan until the end of the Sino-Japanese war.[263] However, keeping a close eye on the relations between Taiwan and mainland China, some historical evidence taught us that Taiwan has not always been an integral part of China.[264] For example, in 1874, in response to a legal claim brought by the Japanese, the Manchu Ch'ing Dynasty declared Taiwan to be outside of Chinese jurisdiction.[265] It refused to assume responsibility for the massacre of shipwrecked Japanese sailors killed by Taiwanese aborigines.[266] In an interview regarding the issue of how Taiwanese people had to conform to Japanese ways, Mao Zedong, the former top leader of Communist China, indicated that "[i]f the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help in their struggle for independence."[267] The same thing applies for Taiwan (Formosa).[268] Taiwan had been formally occupied and colonized by Japan since the time when the Manchu Ch'ing Dynasty in China was forced to surrender Taiwan "in perpetuity" to Japan after its defeat in the 1894 Sino-Japanese War. [269] Consequently, after deep despair and indignation, the attempt by

262. *See* Charney & Prescott, *supra* note 49, at 454–55 (stating the Ch'ing Dynasty attacked Taiwan in 1683); *see also* Attix, *supra* note 38, at 359–60 (stating that Taiwan was under Chinese rule from 1683 to 1895); Chen, *supra* note 32, at 230 (stating that from 1683 to 1895 China ruled Taiwan).

263. *See* Attix, *supra* note 38, at 360 (noting that China ceded Taiwan to Japan after the Sino-Japanese War); Kwan Weng Kin, *Deserted Isles Aroused Interest Only After Report of Oil Reserves*, THE STRAITS TIMES, September 21, 1996, at 36 (stating "Taiwan [was] ceded to Japan as spoils of war through the Treaty of Shimonoseki after China's defeat in the 1894–95 Sino-Japanese War"); Yoshio Nakagawa & Yomiuri Shimbun, *Taiwan's Colonial Legacy Revisited*, DAILY YOMIURI, May 7, 1995, at 5 (stating that, with the signing of the treaty, Japan acquired Taiwan from China with the signing at the end of the Sino-Japanese War). *See generally* Xiao-huang Yin and Tsung Chi, *Is US Playing The Taiwan Card by Granting its President a Visa?*, L.A. TIMES, June 4, 1995, at M2 (stating that since the signing of the Shimonoseki Treaty, Taiwan has been "lost" from China).

264. *See* Charney & Prescott, *supra* note 49, at 456 (stating that Taiwan ceded to Japan in 1895); *see also* Chang & Lim, *supra* note 66, at 429 (asserting that while there may be civility between the two, there is no strong pull to consider Taiwan as a part of China). *See generally* Piero Tozzi, Note, *Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?*, 64 FORDHAM L. REV. 1193, 1251 n.245 (1995) (discussing the difficulty of forming a strong identity in the middle of their "hodgepodge" history).

265. *See* Charney & Prescott, *supra* note 49, at 456–57 (discussing the legal dispute between China and Japan regarding the massacre of fifty-four Ryukyu castaways); *see also* Chang & Lim *supra* note 66, at 418 (noting that in 1874 the Ch'ing Dynasty declared Taiwan outside its jurisdiction); Tozzi, *supra* note 264, at 1251 n.244 (noting the cession of Taiwan to Japan by the Ch'ing Dynasty).

266. *See* JOHN KING FAIRBACK, China: A New History, (Harvard Univ. Press, 1992) (stating how this is called the event of Mu-Tan-Se, which is a famous incident in Taiwanese history); *see also* Charney & Prescott, *supra* note 49, at 456–57 (noting that the two countries agreed to drop discussions regarding the massacre in the settlement); Chang & Lim, *supra* note 66, at 418 n.102 (stating that they had settled the legal dispute regarding the massacre).

267. *See* Miriam Kim, Notes and Comments, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 131 n.111 (2002) (noting that Mao Zedong was the leader of the Communist Party that formed the People's Republic of China); Cynthia Losure Baraban, Note, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 IND. L.J. 1247, 1256 (1998) (discussing the foreign policy changes of Mao Zedong). *See generally* Costa, *supra* note 19, at 861 n.234 (discussing the military foreign policy issues with regard to Taiwan).

268. *See* Edgar Snow, *Red Star Over China,* N.Y. TIMES, Feb. 9, 1968, at 106–13; *see also* Costa, *supra* note 19, at 861 n.234 (noting the military threats to Taiwan). *See generally* Baraban, *supra* note 267, at 1256 (stating that Mao Zedong made diplomatic changes upon taking power).

269. *See* Treaty of Shimonoseki, Apr. 17, 1895, Japan-China, art. II, *reprinted in* TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894–1919, at 18–19 (John V.A. MacMurray ed., 1973). Under the Shimonoseki Treaty, the residents of Taiwan were given the treaty right to relocate in China, however, the overwhelming majority chose to remain in Taiwan. *See* Carolan, *supra* note 60, at 432 (noting China had to surrender "in perpetuity" to Japan); *see also* Charney & Prescott, *supra* note 49, at 456–67 (discussing the settlement giving Taiwan to Japan).

the people of Taiwan to create their own political destiny led to the establishment of the Taiwan Democratic Republic, the first democratic country in Asia.[270] However, without any recognition from the international community, the Taiwan Democratic Republic collapsed soon after Japanese troops landed on Taiwan.[271]

During the Second World War, in anticipation of Japan's defeat in the war, the Allied Powers (including China, the United Kingdom and the United States)[272] expressed their intent to return Taiwan to China in the 1943 Cairo Declaration. [273] Later, in the 1945 Potsdam Proclamation "the term of the Cairo Declaration" was once again affirmed by Allied Powers.[274] Following Japan's defeat, Nationalist China was authorized by General Douglas MacArthur to take over Taiwan on behalf of Allied Powers in 1945.[275] Four years later, in the latter part of 1949, Nationalist China lost the Chinese mainland in its defeat in civil war by the communists, and subsequently fled to Taiwan.[276]

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270. *See* Jiunn-rong Yeh, *Institutional Capacity-Building Toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229, 237 (1996) (discussing the modern historical development of Taiwan); *see also* Carolan, *supra* note 60, at 429 (noting the long history of a separate political existence between China and Taiwan). *See generally* Tozzi, *supra* note 264, at 1243–44 (discussing the theory of two Chinas).

271. *See* Jennifer A. Meyer, Note, *Let the Buyer Beware: Economic Modernization, Insurance Reform, and Consumer Protection in China*, 62 FORDHAM L. REV. 2125, 2129 (1994) (noting Japan's aggression in 1937); *see also* Barry Hart Dubner, *The Spratly "Rocks" Dispute—A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L.J. 291, 310 (1995) (detailing the history of the Japanese invasion of Taiwan). *See generally* Shen, *supra* note 19, at 1103 (discussing the history of legal instruments regarding Taiwan).

272. *See* Charney & Prescott, *supra* note 49, at 460–61 (discussing the post-World War II allies involved in the settlement regarding Taiwan); *see also* John E. Parkerson, Jr. & Steven J. Lepper, Decision, *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged with Criminal Offenses Overseas—European Convention on Human Rights*, 85 AM. J. INT'L L. 698, 701 (1991) (citing the post-World War II Allies); Arthur L. Berney, *Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor,* 17 B.C. THIRD WORLD L.J. 275, 276 (noting the states constituting the Allies).

273. *See* Charney & Prescott, *supra* note 49, at 457 (discussing the Cairo Declaration and its intent to return Taiwan to China); *see also* Shen, *supra* note 19, at 1103 (noting the effects of the Cairo Declaration on Taiwan); Butterton, *supra* note 20, at 66 (stating that the intent of the Cairo Declaration was to return Taiwan to China).

274. *See* Butterton, *supra* note 20, at 66 (noting the confirmation of the Cairo Declaration in the Potsdam Conference in 1945); *see also* Charney & Prescott, *supra* note 49, at 457 (stating that the Potsdam Conference reiterated the terms of the Cairo Declaration); Shen, *supra* note 19, at 1103 (noting the effects of the Potsdam Conference on the relationship between China and Taiwan).

275. *See* Lung-Chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 677 (1998) (stating that MacArthur told Chiang Kai-shek that he was allowed military occupation of Taiwan on the authority of the Allied Powers); *see also* Carolan, *supra* note 60, at 434 (noting MacArthur gave word allowing China to take Taiwan); Chang & Lim, *supra* note 66, at 408 (stating MacArthur authorized the military occupation of Taiwan by China).

276. *See* Scott A. McKenzie, Comment, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 549 n.130 (1998) (noting that the Chinese Nationalists lost the mainland in 1949); *see also* Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 300 (1995) (noting that since 1949 mainland China has been under Communist rule); Alice Erh-Soon Tay, *Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law*, 26 HONG KONG L.J. 194, 203 (1996) (stating that the People's Republic of China has been in control since 1949).

Even though Nationalist China had taken control of Taiwan in 1945,[277] it was not until 1951 that Japan formally surrendered sovereignty over Taiwan in the San Francisco Treaty of Peace with Japan (hereinafter "the 1951 Peace Treaty").[278] The treaty clearly indicated the terms of surrender of Japan,[279] but neither the ROC nor the PRC was authorized to control Taiwan after Japan formally gave up its sovereignty.[280] The notable absence of representatives from either the ROC or the PRC at the San Francisco Peace Conference[281] gave rise to the controversy as to whether Taiwan's international status was still unresolved.[282] An example of this is the statement by John Foster Dulles, Secretary of State in the Eisenhower administration:

> [T]echnical sovereignty over Formosa and the Pescadores has never been settled. That is because the Japanese peace treaty merely involves a renunciation by Japan of its right and title to these islands. But the future title is not determined by the Japanese peace treaty; nor is it determined by the peace treaty which was concluded between the Republic of China and Japan. Therefore, the juridical status of these islands, Formosa and the Pescadores, is different from the juridical status of the offshore islands [Quemoy and Matsu] which have always been Chinese territory.[283]

Officially both Britain and France took the similar position that Nationalist China was authorized by General Douglas MacArthur to undertake temporary military occupation of Tai-

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277. *See* Chiang, *supra* note 41, at 974 (noting the Nationalist government was in control in 1945); *see also* Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 592 n.186 (1995) (noting that in 1945 Nationalist China had control of the mainland); *see generally* Lau, *supra* note 29, at 211 n.230 (noting the expulsion of the Nationalist Chinese government in 1949).

278. Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 46; *see* Chiang, *supra* note 41, at 998 (noting that in the 1951 treaty, Japan renounces title to Taiwan); *see also* Lee, *supra* note 218, at 371 n.37 (discussing the implications of the Treaty on the Republic of China).

279. Article 2(b) of the Treaty of Peace with Japan provides that "Japan renounces all right, title and claim to Formosa and Pescadore." (136 U.N.T.S. at 48); *see* Glen W. Price, *Legal Analysis of the Kurile Island Dispute*, 7 TEMP. INT'L & COMP. L.J. 395, 415 (1993) (noting the treaties that ended World War II and effected the Japanese surrender); *see also* Chiang, *supra* note 41, at 998 (discussing the terms of surrender within the 1951 Peace Treaty).

280. *See* Shen, *supra* note 19, at 1111–12 (noting that the Peace Treaty is not technically valid for the People's Republic of China). *See generally* Richard D. Beller, Note, *Analyzing the Relationship Between International Law and International Politics in China's and Vietnam's Territorial Dispute Over the Spratly Islands*, 29 TEX. INT'L L.J. 293, 307 (1994) (noting the conflicts that exist between the Republic of China and the People's Republic of China); Gardner Patterson, *The GATT: Categories, Problems and Procedures of Membership*, 1992 COLUM. BUS. L. REV. 7, 15 (1992) (noting the difficulties in dealing with two conflicting Chinese governments).

281. *See* L.S. Chu & Deborah Kuo, *San Francisco Treaty Is Cornerstone of Taiwan Status: Adviser*, CENTRAL NEWS AGENCY (Taiwan), Sept. 9, 2001 (stating that the ROC and PRC were not invited to join the San Francisco Peace Conference in 1951 and did not conclude "the Treaty of Peace with Japan," which was entered into on April 8, 1952); *see also* Beller, *supra* note 280, at 308 (discussing the ramifications of the absences of the ROC and PRC at the San Francisco Peace Conference); Dubner, *supra* note 271, at 310 (noting that in 1952, Japan and China signed a separate treaty, in which Japan renounced all rights to Taiwan).

282. *See* Chiang, *supra* note 41, at 974 (noting that the UK Representative at the Conference for the Treaty of Peace with Japan concluded that "the Treaty itself does not determine the future of these islands" (Taiwan and the Pescadore)); John Foster Dulles, Answer to Soviet Charges Against Japanese Treaty, Sept. 3, 1951, DEP'T ST. BULL., at 4392 (noting that in due course a solution must be found, in accord with the purposes and principles of the Charter of the United Nations.); Chang & Lim, *supra* note 66, at 404 (discussing Taiwan's transformation from an unresolved colonial territory to a democratic, de facto state).

283. John Foster Dulles, Purpose of Treaty with Republic of China, DEP'T ST. BULL., Dec. 13, 1954, at 896.

wan as a trustee on behalf of the Allied Powers.[284] In 1955, Anthony Eden, British Secretary of State for Foreign Affairs, stated in the House of Commons that:

> [i]n September, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers; but this was not a cession, nor did it in itself involve any change of sovereignty. The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements and did not of themselves constitute the territory Chinese. . . . [F]ormosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the de jure sovereignty over which is uncertain or undetermined.[285]

In 1964, Georges Pompidou, the French premier, reiterated that "French recognition of the PRC on January 27, 1964 in no way explicitly or implicitly recognized Beijing's territorial claim over Taiwan,[286] and the island's status must be decided one of these days, taking the wish of the Formosa population into consideration."[287]

For more than three decades, from 1949 to 1987, Taiwan was placed under martial law,[288] imposed by the Chinese Nationalist government,[289] a minority government in Taiwan.[290] During the period, politically and culturally, the way that Nationalist China treated the people of

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284. *See* Michael Reisman, *Who Owns Taiwan*, NEW REPUBLIC, Apr. 1, 1972, at 22 (noting that England and France took the position that China was a "temporary guardian" over Taiwan); *see also* Charney & Prescott, *supra* note 49, at 461 (indicating that after the ROC took control of Taiwan, England and France believed that Taiwan was not a sovereign nation); Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 324 (2000) (stating that England and France did not veto this American initiative).

285. *See* Chiang, *supra* note 41, at 410 n.65 (discussing England's position regarding the status of Taiwan).

286. *See* Chang & Lim, *supra* note 66, at 410 n. 65 (indicating that France viewed the ROC as a "temporary guardian" over Taiwan); *see also* Chiang, *supra* note 41, at 976 (stating that most countries did not recognize the PRC until after France did in 1964); Charney & Prescott, *supra* note 49, at 461 (noting that the French government believed that Taiwan sovereignty was still unsettled).

287. *Self-determination for Taiwan Is Suggested by French Premier*, N.Y. TIMES, Apr. 24, 1964, at A4, *cited in* Chang & Lim, *supra* note 66, at 410 n.65.

288. *See* Attix, *supra* note 38, at 361 (stating that martial law lasted for forty years); *see also* Chen, *supra* note 32, at 233 (noting that Taiwan remained under martial law until 1987); Richard J. Ferris, Note, *Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore: An Introduction to the Environmental Regulatory Systems of Asia's Four New Dragons*, 4 DUKE J. COMP. & INT'L L. 125, 132 (1993) (describing Chiang Ching-kuo's decision to end martial law in 1987).

289. *See* Chen, *supra* note 32, at 233 (explaining how the Kuomintang, the Nationalist government, imposed martial law on Taiwan); *see also* Chen, *supra* note 275, at 675 (indicating that since 1945 Taiwan has experienced military occupation by the Chinese Nationalist government, which included four decades of martial law); Chen-Fu Lee, *China's Perception of the Taiwan Issue*, 32 NEW ENG. L. REV. 695, 697 (1998) (detailing what the Nationalist Party outlawed in Taiwan during its period of martial law).

290. *See* Chang & Lim, *supra* note 66, at 290 (asserting that the ROC is a minority government in Taiwan). *See generally* Charney & Prescott, *supra* note 49, at 453 (addressing whether the PRC or the ROC is the government of China); Tay-shen Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 532 (2002) (discussing the end of Chinese Nationalist rule in Taiwan).

Taiwan was more like colonial behavior.[291] An example was the incident of "2-28,"[292] where there was a widespread uprising on February 28, 1947, leading the Taiwanese public from expectation to disappointment and then to anger.[293]

Regardless of the fact that the effective area of Nationalist China has been confined to Taiwan since 1949, the constitution of Nationalist China, which was drafted and ratified in mainland China, established a state called the "Republic of China."[294] Its boundaries include mainland and Outer Mongolia.[295] This assumed that any territory that was once under China's rule after the founding of the ROC in 1912 should forever remain part of China.[296] This set the stage for extremely confrontational political relations that made both sides of the Taiwan

291. An official report of the U.S. State Department noted "[o]ur experience in Formosa is most enlightening. Many were forced to feel that conditions under autocratic rule [Japanese rule] were preferable [to KMT rule]. . . . The Taiwanese people anticipated sincerely and enthusiastically deliverance from the Japanese yoke. . . . However, [the KMT] ruthlessly, corruptly and avariciously imposed their regime upon a happy and amenable population. . . . There were indications that Formosans would be receptive toward the United States guardianship and the United Nations trusteeship." U.S. Relations with China, DEP'T ST. BULL., 1949, at 309, *cited in* Chang & Lim, *supra* note 66, at 411 (demonstrating how the Chinese Nationalist government acted like "conquerors and colonial masters" in Taiwan). *See also* Cooney, *supra* note 20, at 517 (declaring that although Taiwan was a part of the ROC, it was treated as a colony during the martial law period); Yeh, *supra* note 270, at 238 (stating that the Chinese Nationalist government treated Taiwan as a province of China).

292. *See* Attix, *supra* note 38, at 361 n.27 (stating that 20,000 Taiwanese people died during "2-28"); *see also* Chang & Lim, *supra* note 66, at 412–13 (noting that on Feb. 28, 1947, KMT soldiers killed 28,000 Taiwanese citizens); Yeh, *supra* note 270, at 238 (explaining that Chinese police arrested, tortured and murdered Taiwanese citizens during the "2-28 Incident").

293. *See* JOHN F. COPPER, TAIWAN: NATION-STATE OR PROVINCE?, 35 (1999) (discussing the culmination of the "2-28 Incident" through the developing feelings of rebellion and resistance to KMT rule). In the 2-28 Incident, the Nationalists were not only unable to reflect on it or practice democracy in accordance with the wishes of the people of Taiwan, but instead, sent troops to cruelly suppress them and make widespread arrests, leaving a deep scar in the history of Taiwan. For reflections of the 2-28 Incident, *see* Chen, *supra* note 275, at 677 (indicating that the KMT murdered Taiwanese to "suppress Taiwanese protests against the Chinese atrocities"); Ma Ying-Jeou, *A Reflection Upon the 2-28 Incident*, TAIPEI TIMES, Feb. 28, 2002 (describing the 2-28 Incident and its effects on the Taiwanese people over the last fifty-five years).

294. *See* Costa, *supra* note 19, at 861 (stating that after Mao Zedong's Communist forces defeated Chiang Kai-shek's Nationalist forces, Chiang formed the ROC in Taiwan). *See generally* Daphne Huang, Comment, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 171, 189 (1998) (describing the struggle that led to Mao Zedong establishing the PRC); Shen, *supra* note 19, at 1117 (noting that after the ROC was overthrown, the PRC was formed).

295. The ROC Constitution was written in 1946 and implemented in 1947, two years before the Nationalist Chinese fled to Taiwan following a defeat in the Chinese civil war. The Constitution demonstrates that Nationalist China viewed Mongolia as an integral part of its territory, despite the fact that the People's Republic of Mongolia declared its independence through a referendum in 1945 and was officially recognized as the Mongolian People's Republic in 1949. *See generally* Attix, *supra* note 38, at 367–68 (describing various provisions of the ROC Constitution); Cooney, *supra* note 20, at 514 (explaining that although the ROC's boundaries include mainland China and Outer Mongolia, its "effective area has been confined to Taiwan" since 1949); Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 145–46 (1998) (discussing what influenced the drafters of the ROC Constitution).

296. *See* Cooney, *supra* note 20, at 514, n.93 (noting that under the ROC Constitution, the boundaries of the ROC cannot be changed except by a resolution of the National Assembly); *see also Mongolian Status Issue Needs Legislative Decision: Legislature Head*, CENTRAL NEWS AGENCY (Taiwan), Feb. 27, 2002 (explaining that in order to alter Mongolia's status Taiwan would have to amend the ROC Constitution). *See generally* Chang & Lim, *supra* note 66, at 417 (stating that after the PRC defeated the ROC, it claimed the territory of the ROC).

Strait refuse to recognize the other as a legitimate government.[297] Both firmly asserted that there was only one China and that Taiwan was at the same time part of China.[298]

The PRC has continuously claimed its sovereignty over Taiwan, and the ROC has never denied that Taiwan is part of China.[299] This has not only made Taiwan's status more ambiguous,[300] but also confusing to the international community and the people of Taiwan as to whether Taiwan is an independent state.[301] However, it was the very thing on which the two governments of the Taiwan Strait could agree with each other politically, regardless of the fundamental difference between the two on the concept of "one China" and who should govern the state of China.[302]

After the PRC took China's seat and expelled the ROC's representative from the United Nations in 1971,[303] the government of Taiwan consequently failed to retain its seats in numer-

297. *See* Chen, *supra* note 18, at 606 (noting the increasing use of peaceful resolutions in disputes between China and Taiwan); *see also* Lee, *supra* note 289, at 695 (stating that the ROC and PRC both claim to be the "legitimate holder of China's sovereignty"); Wei, *supra* note 37, at 1177 (arguing that peaceful reunification is vital to both China and Taiwan).

298. *See* Huang, *supra* note 241, at 205 (stating that it was assumed that Taiwan would be an anti-communist base for recovering the Chinese mainland; therefore, the people of Taiwan were impelled to "China-iation," with a greater emphasis on cultural homogeneity, linguistic unity, common historical tradition and ethnic identity); *see also* Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527, 577 (2000) (arguing that the PRC and ROC will unite during the 21st century because both believe that there is one China). As a matter of fact, this is more like a fanatical "Great China" nationalism; under this circumstance, any idea of the territory not being part of China would be deemed blasphemy. That is also the case with Tibet. *See* Rebecca R. French, *The Status of Tibet: History, Rights, and Prospects in International Law*, 84 AM. J. INT'L L. 996, 996 (1990) (listing China's justifications for its claims to Tibet).

299. *See* Charney & Prescott, *supra* note 49, at 453 (asserting a possible solution to the conflict between the PRC and ROC over which government has sovereignty over Taiwan); Chiang, *supra* note 41, at 1003 (noting that since 1949, the PRC has claimed sovereignty over Taiwan).

300. *See* Chiang, *supra* note 41, at 959 (suggesting that other states do not regard the ROC or Taiwan as a state because the ROC government has never declared the establishment of a new state, which is separate from China); *see also* Butterton, *supra* note 20, at 66 (noting that Taiwan's ambiguous status is partly due to the Allied Powers' plans during and after World War II); Lee, *supra* note 289, at 701 (arguing that the ambiguous status of Taiwan makes Taiwanese people "uncomfortable").

301. *See* Charney & Prescott, *supra* note 49, at 65 (describing what caused the confusion over whether Taiwan is an independent state); *see also* Chen, *supra* note 32, at 225–26 (discussing the difficulties that the international community faces in deciding whether to acknowledge Taiwan as an independent state); Shen, *supra* note 19, at 1119 (explaining how this confusion does not prevent the PRC and Taiwan from "engaging in political, trade and other dialogues and negotiations based on equality and mutual benefits").

302. *See* Lee, *supra* note 289, at 695 (noting that Taiwan and the PRC only agree that "there is but one China"); *see also* Tzu-wen Lee, *supra* note 18, at 374 (stating that the ROC and PRC agree that only one China exists, but disagree over what "One China" means); Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 VAND. J. TRANSNAT'L L. 481, 507–13 (2001) (comparing the "One China" principles of the PRC and Taiwan).

303. *See* Chen, *supra* note 32, at 234 (explaining how the ROC's expulsion from the U.N. demonstrated that the international community recognized the PRC as the legitimate government of China); *see also* Chiang, *supra* note 41, at 976 (noting that there was no change in membership when the PRC took the ROC's seat because the member state was still China); Tzu-wen Lee, *supra* note 18, at 353–54 (stating that the ROC held the China seat at the U.N. from 1949 until October 25, 1971).

ous other international organizations[304] because the PRC successfully blocked Taiwan's entrance into many of these organizations.[305] In spite of that, Taiwan has still remained in several intergovernmental organizations, such as the Asian Development Bank (ADB)[306] and the World Trade Organization (WTO).[307] More significantly, the switch of the United States' official recognition from the ROC to the PRC in 1979[308] provided a precedent for other hesitant countries to follow.[309] Suffering from this consequence, Taiwan now maintains official relations with only twenty-nine states as of 2000.[310] Currently, Taiwan retains substantive relations with

304. *See* Chen, *supra* note 32, at 240 (indicating that Taiwan was unsuccessful in seeking membership in numerous intergovernmental agencies); *see also* Michael P. Scharf, *Bridging the Taiwan Strait—Problems and Prospects for China's Reunification or Taiwan's Independence: Foreword*, 32 NEW ENG. L. REV. 661, 661 (1998) (explaining that Taiwan has been unable to join international organizations); Zaid, *supra* note 193, at 812–13 (discussing how Taiwan has had difficulty participating in the international arena).

305. *See* Chen, *supra* note 32, at 240 (stating that the PRC blocked Taiwan from joining international organizations); *see also* Scharf, *supra* note 304, at 661 (noting that the PRC has blocked Taiwan from joining international organizations and from conducting diplomatic relations with the rest of the world); Zaid, *supra* note 193, at 812–13 (explaining how the PRC has interfered with Taiwan's dealings with other countries).

306. *See* Chen, *supra* note 32, at 240 (noting that Taiwan held onto its membership in ADB because the PRC was given a separate membership); *see also* Chiu, *supra* 189, at 255 (asserting that since Taiwan and the PRC are both members of the ADB and APEC, both countries should be members of the U.N.); Hsiu-An Hsiao, *supra* note 94, at 737 (explaining that Taiwan was able to keep its membership in the ADB because of its significant contributions to the organization).

307. *See* Raj Bhala, Conference, *Interfaces: From International Trade to International Economic Law: Enter the Dragon: An Essay on China's WTO Accession Plan*, 15 AM. U. INT'L L. REV. 1469, 1283–84 (2000) (explaining why Taiwan agreed not to become a WTO member before the PRC); *see also* Chen, *supra* note 32, at 240 (discussing how China cannot block Taiwan's membership into the WTO because China is not a member of the WTO); Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong Kong, and Taiwan*, 20 NW. J. INT'L L. & BUS. 1, 6 (1999) (noting that Taiwan and China are WTO observers while they wait to learn the status of their membership applications).

308. *See* Costa, *supra* note 19, at 863 (asserting that upon the United States' official recognition of the PRC, it abandoned Taiwan); *see also* Douglas Hollowell, *Practitioner's Survey: 1991–92 Survey of International Law in the Second Circuit*, 19 SYRACUSE J. INT'L L. & COM. 98, 122 (1993) (noting that President Carter terminated relations with the ROC on December 30, 1978); Stephen Lee, *American Policy Toward Taiwan: The Issue of the De Facto and De Jure Status of Taiwan and Sovereignty*, 2 BUFF. J. INT'L L. 323, 324 (discussing how the U.S. has shown it supports a "One China" policy).

309. *See* Chiang, *supra* note 41, at 977 (noting that after the U.S. recognized the PRC, other countries had to withdraw their recognition of the ROC because international law requires that countries have one government); *see also* Nelson C. Lu, Comment, *To Steal a Book Is No Longer Such an Elegant Offense: The Impact of Recent Changes in Taiwanese Copyright Law*, 5 ASIAN L.J. 289, 309 (1998) (listing reasons why many countries did not recognize Taiwan); Shen, *supra* note 19, at 1121 (stating that 110 countries recognized the PRC in 1979).

310. According to information from The Republic of China Yearbook 2000, Taiwan currently has official diplomatic ties with 29 countries: five countries in the South Pacific/Oceania region: Palau, Solomon Islands, Marshall Islands, Tuvalu, and Nauru; eight countries in Africa: Burkina Faso, Chad, Gambia, Liberia, Malawi, Sao Tome and Principe, Senegal, and Swaziland; two West European countries: the Holy See and the Republic of Macedonia; and fourteen countries in Latin America and the Caribbean area: Belize, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Saint Christopher and Nevis, and Saint Vincent and the Grenadines. *See also* Hsiao, *supra* note 94, at 734 (indicating that twenty-seven states recognized Taiwan in 1998); Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 73 n.8 (1998) (stating that thirty states maintained official ties with Taiwan in 1996).

most of the non-recognizing states.[311] This realistic trend is rather extraordinary, but also predictable for Taiwan.

As the PRC preconditions diplomatic relations on non-recognition of the government of Taiwan,[312] those among Taiwan's trading partners who recognize the PRC have been very careful to accompany any change in relations with an affirmation of the PRC's sovereignty over Taiwan.[313] The PRC is fully aware of that and uses every effort to oppose Taiwan's formal diplomatic relations with other states.[314] It also challenges Taiwan's participation in regional and international governmental organizations.[315] In view of these facts, it gives rise to a concern of whether non-recognition prevents governments from treating the ROC as the *de jure* government of Taiwan.[316]

The fact that Taiwan recently gave a dozen used fighter jets to Paraguay[317] was evidently an attempt to repay Paraguay for continuing to recognize Taiwan as the Republic of China.[318]

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311. *See* Carolan, *supra* note 60, at 455 (stating that although Taiwan maintains diplomatic relations with a small number of countries, it has unofficial ties with many more); *see also* Chen, *supra* note 32, at 254 (noting that the U.S. maintains unofficial ties with Taiwan through the American Institute in Taiwan); Chen-Fu Lee, *supra* note 289, at 387 (discussing how "Taiwan's substantive relations with . . . non-recognizing states have been developing and improving").

312. *See* Lu, *supra* note 309, at 308 (indicating that the PRC will not maintain diplomatic relations with any nation that recognizes Taiwan); *see also* Shen, *supra* note 19, at 1121 (explaining that China preconditions diplomatic relations on the recognition of three things: "(1) that there is only but one China in the world; (2) that the Government of the People's Republic of China is the sole legitimate government of China; and (3) that Taiwan is an inalienable territorial part of China"); Su Wei, *supra* note 37, at 1174 (stating that before the PRC will establish diplomatic ties with a country, it requires that it recognize the PRC as the only government of China).

313. *See* Cheri Attix, *supra* note 38 at 358 (discussing the unwillingness of nations to recognize Taiwan's sovereignty in order to avoid jeopardizing relations with China); Chen, *supra* note 275, at 683 (revealing that the U.S. refused to recognize Taiwan's status in order to maintain diplomatic relations with China); *see also* Shen, *supra* note 19, at 1121 (writing of the requirement of affirmation of Taiwan's status as a part of Chinese territory in order to maintain relations with China).

314. *See* Carolan, *supra* note 60, at 436 (discussing China's opposition to Taiwan's diplomatic relations with other states); Lung-chu Chen, *supra* note 275, at 676 (demonstrating China's opposition to Taiwan's forming diplomatic ties with other nations); *see also* Shen, *supra* note 19, at 1121 (revealing the tactics China uses to isolate Taiwan from diplomatic relations with other countries).

315. *See* Carolan, *supra* note 60, at 436 (discussing attempts by China to isolate Taiwan from participation in IGOs); Lung-chu Chen, *supra* note 275, at 676 (showing how China challenges Taiwan's participation in IGOs); *see also* Shen, *supra* note 19, at 1124 (discussing the international community's non-acceptance of Taiwan's sovereignty at China's behest).

316. *See* Attix, *supra* note 38, at 382 (referring to the affirmations by China's trading partners that it has complete dominion over Taiwan); Shen, *supra* note 19, at 1125 (stating that non-recognition makes a state not a state, a government not a government, etc.); *see also* Nii Lante Wallace-Bruce, *Taiwan and Somalia: International Legal Curiosities,* 22 QUEEN'S L.J. 453, 466 (1997) (stating that Taiwan cannot expect recognition from other governments until it asserts its own independence).

317. *See* Grant, *supra* note 1 at 216 (noting that "Taiwan recently gave a dozen fighter jets (albeit old ones) to Paraguay . . ."); *Paraguay will be Given F-5s*, JANE'S DEF. WKLY, Oct. 1, 1997, at 8 (stating that Taiwan gave Paraguay fighter jets).

318. *See Paraguay will be Given F-5s, supra* note 317, at 8 (stating that Taiwan gave Paraguay fighter jets); Grant, *supra* note 1, at 216 (noting that "[Taiwan's gift of the fighter jets was] evidently in return for Paraguay continuing to recognize Taiwan as the Republic of China); *see also* Chang Yu-jung, *Paraguay Issues Stamps in Honor of Taiwan,* THE TAIPEI TIMES ONLINE, Oct. 11, 2002 (demonstrating the continued goodwill and recognition by Paraguay toward Taiwan), *available at* http://www.taipeitimes.com/news/2002/10/11/story/0000175238.

As a small, poor, geographically disadvantaged Latin American state,[319] Paraguay, through its recognition policy, successfully extracted a material concession by taking those planes from Taiwan,[320] one of the premier trading powers of the world.[321] This observation is particularly relevant in showing that many states that still recognize Taiwan as the Republic of China have extracted similar concessions.[322] Given this factual background, it is not difficult to understand why Taiwan is in an anomalous position in the world.

B. China's Stance on Taiwan's Position

Regardless of the ROC's strong claim as a sovereign state,[323] on the assumption that it was the legitimate successor government of China,[324] the PRC government has regarded Taiwan as an inalienable part of its territory.[325] It argues that the PRC inherits all territorial boundaries of

319. *See* Grant, *supra* note 1, at 216 (stating that "[Paraguay is] a small, poor, geographically disadvantaged Latin American state"); Erika Gottfried, *MERCOSUR: A Tool to Further Women's Rights in the Member Nations,* 25 FORDHAM URB. L.J. 923, 938 (1998) (describing Paraguay as an economically disadvantaged state); *see also* Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U.J. INT'L L. & POL'Y 769, 801 (1997) (implying that Paraguay is economically disadvantaged).

320. *See* Grant, *supra* note 1, at 216 (stating that "[t]hrough its recognition policy, [Paraguay] has extracted a material concession [from Taiwan]"); Thomas D. Grant, *Hallstein Revisted: Unilateral Enforcement of Regimes of Nonrecognition Since the Two Germanies,* 36 STAN. J. INT'L L. 221, 232 (2000) (describing Taiwan's policy of "purchasing" recognition from developing countries); *see also* Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 229 (1999) (stating that Taiwan has shown that it can exchange financial support for recognition from developing countries).

321. *See* Grant, *supra* note 1 at 216 (noting how "[Taiwan is] one of the premier trading powers of the world"); Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics,* 1992 COLUM. BUS. L. REV. 19, 26 (1992) (stating that Taiwan is a major trading power); *see also* Tim Kennedy, *Taiwan Hopeful Time is Finally Right for UN Membership*, ARAB NEWS 15, Oct. 2002 (stating that Taiwan is the eighth largest source of foreign aid and direct investment; by implication Taiwan is a premier trading power), *available at* http://www.arabnews.com/Article.asp?ID=18926.

322. *See* Tim Healy & Laurence Eyton, *Perils of Money Diplomacy: It's Expensive, and Sometimes it Backfires*, ASIA WEEKLY, Dec. 20, 1996, at 20 (noting that "[i]ncreasingly, the smaller nations of Africa, the Caribbean and South America feel they have the upper hand. By threatening to switch to Beijing, they can pry more cash out of Taipei"); Grant, *supra* note 1 at 216 (stating how "[o]ther states still recognizing Taiwan as the Republic of China have extracted similar concessions"); Kennedy, *supra* note 321 (stating that Taiwan uses its economic power to gain support of poor nations).

323. *See* Carolan, *supra* note 60, at 458 (demonstrating that Taiwan meets the criteria for statehood, thereby giving it a strong claim of sovereignty); Lung-chu Chen, *supra* note 275, at 676 (reasoning that the ROC has a strong claim to sovereignty); *see also* Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan,* 15 AM. U. INT'L L. REV. 1101, 1126 (2000) (discussing Taiwan's claim to statehood).

324. *See* Attix, *supra* note 38, at 357 (stating that the PRC has been considered by many to be the legitimate government of China); *see* Markus G. Puder, *supra* note 260, at 511 (discussing the position of the PRC that the ROC has terminated its political status); *see also* Shen, *supra* note 323, at 1116 (arguing that the PRC is the legal successor of the ROC).

325. *See* Attix, *supra* note 38, at 369 (stating that the PRC views Taiwan as an inalienable part of its territory); Carolan, *supra* note 60, at 436 (stating that China considers Taiwan an inalienable part of its territory); *see also* Puder, *supra* note 324, at 507 (stating the PRC's position that Taiwan is part of its territory).

the previous government.[326] Thus, Taiwan's issue is within its "domestic affairs" and not subject to international law.[327] On August 31, 1993, the PRC issued a White Paper, entitled "The Question and Reunification of China" (hereinafter "1993 White Paper"),[328] through which the PRC reiterates its stance on Taiwan's position.[329] In summary, the primary assertions for the PRC's claim of sovereignty over Taiwan were: (1) the 1895 Shimonoseki Treaty, ceding Taiwan and the Pescadores to Japan, was rendered null and void by China's declaration of war against Japan in 1941;[330] (2) the 1943 Cairo Declaration stated that territories stolen from China, including Taiwan and the Pescadores, should be restored to China;[331] (3) the 1945 Potsdam Proclamation affirmed the terms of the 1943 Cairo Declaration;[332] (4) in its instrument of surrender of August 15, 1945, Japan undertook to carry out the terms of the Potsdam Proclamation;[333] (5) on October 25, 1945, the Japanese surrendered Taiwan to the Chinese government in Taiwan, and under Chinese law Taiwan was restored to China on that day;[334] (7) the civil

326. It is a well-established rule of international law that a shift of government in a sState neither changes that state's legal personality, nor does it affect the sovereignty and territorial integrity of that state. When the PRC government replaced the ROC government in 1949, a matter of succession took place. This succession was not a succession of state, but a succession of government. *See* Shen, *supra* note 323, at 1108; Kennedy, *supra* note 321 (recounting China's argument that it is the legitimate representative of China and therefore entitled to Taiwan); *see also* Wallace-Bruce, *supra* note 316, at 464 (summarizing the PRC's assertions that it is the legitimate government of China and that Taiwan is a part of its territory).

327. *See* Attix, *supra* note 38, at 370 (stating that China views its issues with Taiwan as internal and resents outside interference); Cooney, *supra* note 20 at 503 (stating that China considers Taiwan a domestic affair and refuses foreign involvement); Shen, *supra* note 19, at 1160 (discussing China's position that its relations with Taiwan are an internal matter).

328. *See* Chen, *supra* note 32, at 248 (summarizing China's position on Taiwan as revealed by the White Paper); Cooney, *supra* note 20, at 503 (discussing the issuance of the White Paper); Taiwan Affairs Office and Information Office of the State Council of China, *White Paper on the Taiwan Question and the Reunification of China*, Aug. 31, 1993 (outlining China's claim of sovereignty over Taiwan), *available at* http://www.china-embassy.org/eng/7127.html.

329. *See* Chen, *supra* note 32, at 248 (reiterating China's position on Taiwan); Cooney, *supra* note 20, at 503 (stating that the current Chinese position on Taiwan is outlined in its White Paper); Su Wei, *supra* note 37, at 1176 (stating that the White Paper reveals China's stance on Taiwan).

330. *See* Chen, *supra* note 32, at 248 (listing the reasons behind China's claim to Taiwan); *White Paper*, *supra* note 328 (detailing the issue of sovereignty as relating to Taiwan); *see also* The People's Republic of China, *White Paper—The One China Principle and the Taiwan Issue* (tracing the historical development of China's legitimate claim to Taiwan), *available at* http://www.taiwandocuments.org/white.html (last visited Feb. 21, 2000).

331. *See* Chen, *supra* note 32, at 248 (summarizing the effect of the Cairo Declaration on the territories "stolen" from China); *White Paper, supra* note 328 (outlining China's claim of sovereignty over Taiwan).

332. *See* Chen, *supra* note 32, at 248 (quoting the White Paper's statement of the effect of the Potsdam Proclamation on China's relations with Taiwan); *White Paper, supra* note 328 (outlining China's claim of sovereignty over Taiwan); The People's Republic of China, *White Paper*, *supra* note 330 (following the path of China's claim over Taiwan).

333. *See* Chen, *supra* note 32, at 248 (stating that the Japanese undertook to carry out the Potsdam Proclamation as a condition of its surrender); *see also Taiwan—An Inalienable Part of China* (tracing the route of Chinese claims over Taiwan), *available at* http://www.china.org.cn-white/taiwan/10-2.htm (last visited Oct. 15, 2002).

334. As a result of the Japanese surrender to the Chinese government on Oct. 25, 1945, there was an announcement by the representative of the Chinese government that, as of that day, Taiwan and the Pescadores had been restored to China, and all the people, land and state affairs of Taiwan and the Pescadores came under Chinese sovereignty. In terms of Chinese law, Taiwan was returned to China on the same day. *See* The People's Republic of China, *White Paper—The One-China Principle and the Taiwan Issue,* Feb. 21, 2000, *available at* http://www.taiwandocuments.org/white.html; *see also* Chen, *supra* note 32, at 249 (detailing the surrender of Taiwan to China by Japan as outlined in the White Paper); *White Paper, supra* note 328 (discussing China and the claims they have over Taiwan).

war between the Nationalists and Communists ended in an establishment of the PRC as the sole legitimate government of China on October 1, 1949, and also established the Nationalist government on Taiwan.[335]

In this sense, Taiwan is neither under colonial rule nor subject to alien domination.[336] Rather, it originated from the Chinese civil war half a century ago and is left over from that war.[337] As the reunification of Taiwan with mainland China has been a strategic goal since 1949,[338] the PRC would react strongly to any possible application for the people of Taiwan to exercise the right of self-determination,[339] under international norms and principles, to achieve de jure independence.[340] As enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[341] there is no basis whatsoever for the people of Taiwan to exercise the right of self-determination upon an issue that concerns the sovereignty and territorial integrity of China as a whole.[342]

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335. *See* Chen, *supra* note 32, at 249 (stating that the PRC was established as a result of the civil war in China); *see also Taiwan—an Inalienable Part of China, supra* note 333 (tracing the route of Chinese claims over Taiwan).

336. *See* Carolan, *supra* note 60, at 457 (stating that Taiwan is a de facto state and therefore under neither colonial rule nor alien domination); Chang & Lim, *supra* note 66 at 406–407 (1997) (postulating that without Japanese rule, Taiwan is no longer under alien domination, and that without Chinese rule, Taiwan is not under colonial rule, either); *see also* Wallace-Bruce, *supra* note 316, at 458 (disputing the PRC's control of Taiwan, thereby implying that Taiwan is neither under colonial rule nor subject to alien domination).

337. *See* Attix, *supra* note 38, at 362 (tracing the fate of Taiwan through theChinese civil war); *see* Carolan, *supra* note 60, at 435 (discussing the role of Taiwan in China's civil war); *see also* Su Wei, *supra* note 37, at 1171 (postulating that the Taiwan question originated from the Chinese civil war that occurred half a century ago).

338. *See* Attix, *supra* note 38, at 362 (implying that China'a opposition to Taiwan's independence in the aftermath of the civil war in 1949 should have been viewed as a statement that China considered Taiwan a part of the mainland); Carolan, *supra* note 60, at 436 (stating that in 1949 the PRC considered Taiwan a part of its territory and planned to invade it); *see also* Shen, *supra* note 19, at 1109 (arguing that the separation of China from Taiwan does not diminish China's territorial hold over Taiwan).

339. *See* Cooney, *supra* note 20, at 500 (revealing China's strong opposition to Taiwan's separation from the mainland); Shen, *supra* note 19, at 1159 (stating that China will do everything in its power to keep Taiwan from realizing self-determination); *see also* Wallace-Bruce, *supra* note 316, at 464 (showing the forcefulness of China's opposition to Taiwan's independence).

340. *See* Cooney, *supra* note 20, at 500 (recognizing the difficulty of Taiwan achieving independence without the support of other nations); Shen, *supra* note 19, at 1137 (discussing the international norms of achieving independence); *see also* Wallace-Bruce, *supra* note 316, at 455 (stating the principles of *de jure* independence under international law).

341. *See* T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 14–15 (2002) (stating that the Declaration proclaims a duty on individual states not to intervene in matters within the domestic jurisdiction of other states); *see also* Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT'L L. 179, 188 (2002) (stating that the Declaration has been generally accepted as rules of international law); Patrick R. Hugg, *Cyprus in Europe: Seizing the Moment of Nice*, 34 VAND. J. TRANSNAT'L L. 1293, 1344 (2001) (stating that the Declaration proclaims a duty to respect the right of self-determination of other states).

342. *See* Declaration on Principle of International law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, Doc. A/8028(1970) (noting that the Declaration provides that "immediately after affirming a people's right to self-determination, such a right is not to be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent State."); *see also* Paul J. Magnarella, *The Evolving Right of Self-Determination of Indigenous Peoples*, 14 ST. THOMAS L. REV. 425, 434–435 (2000) (stating that the Declaration recognizes that implementation of the right to self-determination need not conflict with territorial sovereignty or the political unity of a state); Su Wei, *supra* note 37, at 1171 (interpreting the Declaration not to imply that a part of a sovereign and independent state has the right to secede from the state in question).

Another notable position in the 1993 White Paper with which the PRC upholds its title to Taiwan is the legal implication of U.N. General Assembly Resolution 2758.[343] It is on this very basis that the United Nations has recognized the government of the PRC as the sole legal government representing the whole of China.[344] Since the adoption of this resolution, all specialized agencies within the U.N. have restored China's seat to the PRC and expelled Taiwan's representative.[345] As the PRC has maintained diplomatic relations with more than 160 states in the world,[346] the international community generally recognizes the PRC as the sole legal government of China,[347] and Taiwan as part of China.[348] It is believed that the international community must adhere to the "one China" policy under international law by recognizing the principle that a state cannot have two equally representative governments.[349] It must respect the sovereignty and territorial integrity of China and refrain from any act that might contribute to Taiwan's secession from China.[350] Indeed, this is where the concept of the PRC's "one China" originated.[351]

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343. *See* UN G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8439 (1971); s*ee also* Zaid, *supra* note 193, at 810 (stating that for the fifth straight year Taiwan failed to persuade the General Assembly to consider re-admitting Taiwan to the UN).

344. *See* Chiang, *supra* note 41 at 980 (stating that the United Nations and over one hundred nations formally recognized the PRC as the sole government of China); *see* Lung-chu Chen, *supra* note 275, at 683 (stating that the PRC was seated in the United Nations in place of Taiwan, and the United States treated the PRC as the only lawful government of China); *see also* Hsiu-An Hsiao, *supra* note 94, at 738 (stating that the United States recognized the PRC as the sole legitimate government of China but never recognized the claim that Taiwan is part of China).

345. *See* Lung-chu Chen, *supra* note 275, at 683 (stating that the PRC was seated in the United Nations in place of Taiwan); *see also* Charney & Prescott, *supra* note 49, at 463 (stating that the PRC ousted the ROC from China's seat in the United Nations and made its claim to Taiwan); Lori Fisler Damrosch, *Taiwan Relations Act After Ten Years*, 3 J. CHINESE L. 157, 179 (1989) (stating that Taiwan lost its United Nations seat to the PRC but retained membership in several financial institutions).

346. *See* Shen, *supra* note 323, at 1121–22 (stating that by 1999, the PRC had diplomatic relations with 161 countries); *see also* Chen, *supra* note 32, at 247–46 (stating that the PRC, in extending diplomatic relations with other countries, demands that those countries recognize the PRC as the sole legitimate government of China); Tzu-Wen Lee, *supra* note 18, at 355 (stating that since the founding of the PRC, 157 countries have established diplomatic relations with China).

347. *See* Hsiu-An Hsiao, *supra* note 94, at 738 (stating that the United States recognized the PRC as the sole legitimate government of China), *see also* Lung-chu Chen, *supra* note 275, at 683 (stating that the United States treated the PRC as the only lawful government of China); Chiang, *supra* note 41, at 980 (stating that the United Nations and over one hundred nations formally recognized the PRC as the sole government of China).

348. *See* Shen, *supra* note 323, at 1114 (stating that most states recognized Taiwan as part of China); *see also* Lung-chu Chen, *supra* note 275, at 678 (stating that only 33 of the 123 countries have recognized Taiwan as part of China in their joint diplomatic communications with China). *But see* Hsiu-An Hsiao, *supra* note 94, at 738 (stating that the United States has not recognized the claim that Taiwan is part of China).

349. *See* Chiang, *supra* note 41, at 982 (stating that the United Nations refused to honor the ROC's request to allow the state of China to be represented by two governments, because under international law only one government can represent a state); *see also* Puder, *supra* note 324, at 507–508 (stating that the international community accepted the replacement of Taiwanese representatives with the PRC delegation and supports the proposition of one China).

350. *See* Su Wei, *supra* note 37, at 1175 (stating that the international community should respect China's sovereignty and refrain from interfering in the Taiwan issue); *see also* Joseph W. Dellapenna, *Foreword: Symposium on East Asian Approaches to Human Rights*, 2 BUFF. J. INT'L L. 193, 198 (1995–96) (stating that China lobbied for respect of its sovereignty as a value of overriding international concern for human rights); Puder, *supra* note 324, at 507 (stating that the One-China principle assumes China's sovereignty and territorial integrity).

351. *See* Tzu-Wen Lee, *supra* note 18, at 379 (stating that the One-China policy was initially used to ensure international recognition of the ROC government as the legal government of China); *see also* Chiang, *supra* note 41, at 981 (stating that under the One-China policy, there is only one Chinese state and Taiwan is part of that state); Shen, *supra* note 323, at 1121 (stating that most countries who have diplomatic relations with China have reaffirmed the One-China policy).

Primarily there are three conceptual dimensions underlying the principle of "one China."[352] First is the sovereignty and territory concept.[353] The sovereignty of China includes the mainland, Hong Kong, Macao, and the Taiwan region, which is an undivided sovereignty belonging to all the Chinese people including those residing in the Taiwan region.[354] It is not acceptable to split the sovereignty of China into "two Chinas" or "one China, one Taiwan."[355] The second concept is the concept of international space.[356] Only one Chinese government can legitimately represent the sovereignty of China in the international arena.[357] Special regions of China, like Hong Kong and Macao, can be governed internally by an administration highly autonomous from China's central government, but not to the extent that dual representation of China's sovereignty is allowed.[358] Lastly is the concept of national security.[359] Any threat to the

352. *See* Chen-Fu Lee, *supra* note 289, at 700 (stating that there are at least four interrelated conceptual dimensions underlying the principle of "One China"); *see also* Tzu-Wen Lee, *supra* note 18, at 378 (stating that in the absence of intent to be bound, China's numerous declarations upholding the One-China policy has created international problems). *See generally* Puder, *supra* note 324, at 481 (recognizing that China advocates the One-China principle for achieving a peaceful reunification between the mainland and Taiwan).

353. *See* Puder, *supra* note 324, at 482 (stating that China believes that the One-China principle is the only way of peacefully reunifying mainland China and Taiwan); *see also* Chen-Fu Lee, *supra* note 289, at 700 (explaining the conceptual dimensions underlying the One-China principle); Shen, *supra* note 323, at 1161 (stating that China's sovereignty over Taiwan is firmly established both in fact and in law).

354. *See* Chen-Fu Lee, *supra* note 289, at 700 (explaining the sovereignty concept); *see also* Jacques deLisle & Kevin P. Lane, *Political Alchemy, the Long Transition, and Law's Promised Empire: How July 1, 1997 Matters—and How It Doesn't Matter—in Hong Kong's Return to China*, 18 U. PA. J. INT'L ECON. L. 69, 126 (1997) (stating that China claimed that Hong Kong was, and always had been, subject to China's sovereignty); Urs Martin Lauchli, *Cross-Cultural Negotiations, with a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1056 (2000) (stating that the concept of sovereignty used by China is an outmoded political one that stems from the British monarchy).

355. *See* Chen-Fu Lee, *supra* note 289, at 700 (stating that according to the sovereignty concept it is not acceptable to split the sovereignty of China); *see also* Su Wei, *supra* note 37, at 1171 (stating that the question of Taiwan involves China's sovereignty and its territorial integrity). *See generally* Carolan, *supra* note 60, at 429 (arguing that an international law-based solution should be applied to determine whether Taiwan has a legitimate aspiration to declare independence);

356. *See* Chen-Fu Lee, *supra* note 289, at 700 (explaining the concept of international space in relation to the One-China principle); *see also* Paul R. Williams, *Creating International Space for Taiwan: The Law and Politics of Recognition*, 32 NEW ENG. L. REV. 801, 801 (1998) (stating that the Taiwanese government is comfortable with the One-China policy since it allows it to exercise a certain degree of international space). *See generally* Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267, 273 (2000) (stating that China's undertakings to accept international legal order had the purpose of securing international space for China's internal pursuit of economic development).

357. *See* Chen-Fu Lee, *supra* note 289, at 700 (stating that under the international space concept, only one Chinese government can represent its sovereignty in the international arena); *see also* Shen, *supra* note 323, at 1121 (stating that the U.S. and other countries with diplomatic relations with China have officially recognized China's sovereignty over Taiwan); Tzu-Wen Lee, *supra* note 18, at 374 (stating that the People's Republic of China claims that the One-China policy obliges the nations of the world to recognize that Taiwan is part of China).

358. *See* Chen-Fu Lee, *supra* note 289, at 700 (stating that special regions of China can be governed internally but not to the extent that it results in dual representation of China's sovereignty); *see also* Tzu-Wen Lee, *supra* note 18, at 374 (stating that according to China, after unification, Taiwan will become a "Special Administrative Region"); Bureau of East Asian and Pacific Affairs, *Taiwan* (stating that Taiwan's diplomatic position eroded when China replaced Taiwan at the United Nations in 1971), *available at* http://www.state.gov/r/pa/ei/bgn/2813.htm#foreign.

359. *See* Chen-Fu Lee, *supra* note 289, at 700 (explaining the concept of national security); *see also* Zhengyuan Fu, *China's Perception of the Taiwan Issue*, 1 UCLA J. INT'L L. & FOREIGN AFF. 321, 325 (1996–97) (stating that China believes that the Taiwan issue involves nationalism, national security, and territorial integrity); Kara Zivin, *Are International Institutions Doing Their Job? Isolationism and Internationalism in International Politics*, 90 AM. SOC'Y INT'L L. PROC. 123, 133–134 (1996) (stating that the issue between China and Taiwan is one of the most important security issues in East Asia).

integrity of China's sovereignty and territory is an issue of China's national interest and security.[360] Thus, deployment of force against Taiwanese independence and against the schemes of foreign forces to interfere with China's reunification is part of China's national defense.[361]

Under the principle of "one China," the PRC has adjusted its strategy from "forceful liberation" of Taiwan to "peaceful reunification" with Taiwan.[362] Since the 1960s, the PRC has shown its tolerance for the status quo of Taiwan's de facto independence provided Taiwan continues to acknowledge the "one China" policy[363] and does not move toward de jure independence.[364] The "peaceful reunification" policy marks a critical turning point of the PRC's orientation on domestic policy and its attitude toward Taiwan.[365] A brief summary of the main points of the peaceful reunification policy follows:[366]

> (1) To make every effort to achieve a peaceful reunification while not to commit to forgoing the use of force as a last resort.
>
> (2) To promote actively personal, economic, cultural, and other cross-strait exchanges and work for the early realization of the "three links" between the two sides of the Taiwan Strait.

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360. *See* Chen-Fu Lee, *supra* note 289, at 700 (explaining the concept of national security and the One-China principle); s*ee also* Puder, *supra* note 324, at 513 (stating that China considers Taiwan an inalienable part of its sovereign domain and seeks to insulate the reunification process from internalization); Su Wei, *supra* note 37, at 1177–1178 (stating that the question of Taiwan is as an internal matter of China and the use of force to accomplish China's national unification should not be ruled out).

361. *See* Chen-Fu Lee, *supra* note 289, at 700 (explaining the concept of national security and the One-China principle); *see also* Jianming Shen, *Cross-Strait Trade and Investment and the Role of Hong Kong*, 16 WIS. INT'L L.J. 661, 663 (1998) (stating that it is the official policy of both Beijing and Taipei that Taiwan is part of China); Su Wei, *supra* note 37, at 1178 (stating that the use of force to accomplish China's national unification should not be ruled out).

362. *See* Puder, *supra* note 324, at 482 (recognizing that the PRC advocated the One-China principle for peaceful reunification); *see also* Chen-Fu Lee, *supra* note 352, at 696 (stating that mainland China has adjusted its strategy from forceful to peaceful reunification); Zaid, *supra* note 193, at 814–15 (stating that the U.S. view is that the Taiwan issue is to be resolved peacefully).

363. *See* Zhengyuan Fu, *supra* note 359, at 326–327 (stating that the Chinese decision makers have shown tolerance toward Taiwan's de facto independence as long as Taiwan acknowledges the One-China policy); *see also* Ryan M. Roberts, *Economic Independence Versus Military Balance: A Look at the Relationship Between Israel and China and How the United States is Involved*, 9 TULSA J. COMP. & INT'L L. 643, 662 (2002) (stating that China would use the force necessary to ensure that Taiwan does not gain independence). *See generally* Charney & Prescott, *supra* note 49, at 463 (stating that China's use of violence to prevent Taiwan from gaining independence would not be justified under international law).

364. *See* Zhengyuan Fu, *supra* note 359, at 326–327 (stating that Deng Xiaoping noted that "reunification of Taiwan should be left to the future generation"); *see also* Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 212 (2001) (stating that China has threatened to use force against any movement that attempts to accomplish independence of Taiwan).

365. *See generally* Puder, *supra* note 324, at 481 (stating that China advocates the orderly and peaceful reunification between the mainland and Taiwan); *see also* Su Wei, *supra* note 37, at 1177–78 (stating that only with peaceful reunification can there be a win-win situation for both China and Taiwan); Liuting Wang, *Macao's Return: Issues and Concerns*, 22 LOY. L.A. INT'L & COMP. L. REV. 175, 175–76 (1999) (stating that the Chinese government's commitment to "one country, two systems" would open the possibility for a peaceful reunification of Taiwan).

366. *See* Su Wei, *supra* note 37, at 1176 (listing key elements of the PRC's policy toward Taiwan); *see also* Puder, *supra* note 324, at 482 (recognizing that the PRC advocates peaceful reunification between Taiwan and China); Guiguo Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory in Practice*, 7 PAC. RIM L. & POL'Y J. 279, 282 (1998) (stating that according to the chairman of the People's Congress, after peaceful reunification Taiwan would become a special administrative region with a high degree of autonomy).

> (3) To conduct peaceful negotiations for reunification, where, within the overall framework of the one-China principle, any issue can be addressed.
>
> (4) To adopt "one country, two systems" after reunification, by which the main body of China (the mainland of China) will stick to its socialist system while Taiwan will maintain its existing capitalist system for a long time to come.
>
> (5) To give Taiwan a high degree of autonomy after reunification while the central government will not station any troops or administrative personnel in Taiwan.
>
> (6) To solve the question of Taiwan is an internal matter of China and it is up to the Chinese people themselves to find the solution without any foreign involvement.

Regarding the Taiwan issue, the latest policy directive of peaceful reunification began with a proclamation by the 1979 Standing Committee of the People's Congress of the PRC.[367] The concept of "one country, two systems," which was deemed as a major change in China's policy toward Taiwan,[368] first appeared in detail in the State Council's White Paper in 1993.[369] Part III of the 1993 White Paper reiterates the PRC's basic position of "peaceful unification, one country, two systems."[370] The 1993 White Paper sets out four key principles, which may be stated as follows:

> (1) There is only one China, of which Taiwan is a part. The central government of China is in Beijing and the "authorities in Taipei" are therefore not

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367. *See* Standing Committee of the National People's Congress, Gao Taiwan Tongbao Shu (Message to Compatriots in Taiwan), RENMIN RIBAO, Jan. 1, 1979, at 1; *see also* Michael E. Mangelson, *Taiwan Re-recognized: A Model for Taiwan's Future Global Status*, 1992 B.Y.U. L. REV. 231, 242 (1992) (stating that China's peaceful reunification policy began in 1979); Cooney, *supra* note 20, at 501–502 (stating that in 1979, the Standing Committee of the National People's Congress urged unification of China and Taiwan).

368. *See* William I. Friedman, *China's One Country Two Systems Paradigm Extends Itself Beyond the Mainland's Borders to the Southern Provincial Government of Hong Kong*, 11 J. TRANSNAT'L L. & POL'Y 65, 71 (2001) (stating that China needs to demonstrate to the world that its "one country, two systems" policy is successful, if it is to reunite with Taiwan); Wang, *supra* note 365, at 175 (stating that the Chinese government's commitment to the "one country, two systems" theory would open the possibility for a peaceful reunification of Taiwan); Yung Wei, *Recognition of Divided States: Implication and Application of Concepts of "Multi-System Nations," "Political Entities," and "Intra-National Commonwealth,"* 34 INT'L LAW. 997, 1001 (1999) (stating that the notion of "one country, two systems" was put forth by the PRC around 1983).

369. *See The Taiwan Question and Reunification of China* (citing the White Paper which details the views of the People's Republic of China on the issue of "one China"), *available at* http://www.china.org.cn/e-white/white/Taiwan (last visited Oct. 21, 2002); *White Paper—The One-China Principle, supra* note 330 (explaining the purpose of the White Paper in terms of unifying the two countries while maintaining levels of independence for Taiwan simultaneously). *But see* David M. Lampton, *Reality Check: China's White Paper is Counterproductive* (Feb. 28, 2000) (criticizing the 1993 White Paper by saying that Taiwan will never be given its independence if the arrangement goes forth), *at* http://www.nixoncenter.org/publications.

370. *See The Taiwan Question and Reunification of China, supra* note 369 (furthering the point that China should control Taiwan); *China Releases White Paper on Taiwan Issue* (summarizing China's objective to keep Taiwan from ever obtaining even a minimal amount of self-control), *available at* http://english.peopledaily.com.cn/200002210102.html (last visited Feb. 22, 2000); *see also White Paper—The One-China Principle and the Taiwan Issue: The Taiwan Affairs Office and the Information Office of the State Council* (Feb. 21, 2000) (explaining the concept of "one country two systems" as viewing the countries as one but still allowing Taiwan to retain a minimal amount of control), *available at* http://www.china-embassy.org/eng/7128.html (last visited Nov. 10, 2002).

> a legitimate government of China. The PRC opposes the following models: the "two Chinas" model (the mainland as one China and Taiwan as a separate China); the "one country, two governments" model (one China but one government in Beijing and a separate government in Taipei); and the "one China, one Taiwan" model (the existence of an independent Taiwan—that is, Taiwan as a separate country). The White Paper states that "Self-determination for Taiwan is out of the question."
>
> (2) Although there is only one China, it is possible for socialist and capitalist societies to co-exist within it, so that, after reunification, Taiwan's "current socio-economic system, its way of life as well as economic and cultural ties with foreign countries can remain unchanged."
>
> (3) After reunification, Taiwan will enjoy a high degree of autonomy as a special administrative region. It will have its own administrative and legislative powers, and independent judiciary and right of adjudication, and "will run its own party, political, military, economic and financial affairs." It will, to some extent, be able to conclude agreements with foreign countries (but not, of course, as a sovereign nation). Government representatives in the Taiwan special administrative region will be eligible for appointment to senior posts in the central government.
>
> (4) Economic and other links between mainland China should be rapidly expanded and negotiations towards reunification commenced as soon as possible. Port III of the White Paper also states that the "Taiwan issue" is a domestic affair, involving no foreign government—that it is not analogous to the Korean and German "divided country" situations, and that the PRC reserves the right to use military force to uphold its sovereignty and territorial integrity over Taiwan. [371]

Under the basic content of China's stance on Taiwan's position, Taiwan is a special local government that has separately administered itself under a different political system from that of Beijing[372] and does not affect the sovereignty of the state of China.[373] As a sole legitimate

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371. Cooney, *supra* note 20, at 503–504; *see also The Taiwan Question and Reunification of China, supra* note 369 (stating the four principles from Part III of the White Paper which discusses the People's Republic of China's intentions regarding Taiwan); *China Releases White Paper on Taiwan Issue*, *supra* note 370 (summarizing the third section of the White Paper and explaining that the People's Republic of China would have control over Taiwan, yet Taiwan would still maintain autonomy in certain areas).

372. *See* Cooney, *supra* note 20, at 503–504 (citing the People's Republic's of China's view of what their relationship with Taiwan should be); *see also White Paper—The One-China, supra* note 370 (explaining the different objectives of the White Paper regarding control over Taiwan). *But see* Lampton, *supra* note 369 (criticizing the White Paper and saying that the things mentioned by the paper in terms of allowing Taiwan to have autonomy are not a reality).

373. *See* Cooney, *supra* note 20, at 503–504 (stating that China's intention with respect to Taiwan is that the two countries be viewed as one but to also grant Taiwan a certain amount of its own governmental powers); *see also White Paper—The One-China, supra* note 370 (citing that Taiwan would still maintain certain freedoms under the proposed arrangement). *But see* Lampton, *supra* note 369 (mentioning how China would try to rule Taiwan just as it currently controls Bejing if the White Paper succeeds).

government representing China as a whole, the PRC promises that the legitimate right and interest of the Taiwanese people would be guaranteed,[374] regardless of whatever political differences between the two sides remain.[375]

C. Legal Analysis of Taiwan Status

Given the fact that such instruments as the Cairo Declaration and the Potsdam Proclamation are only the form of joint declarations to express the Allied Powers' common foreign policy,[376] neither document has a binding effect under international law.[377] Thus, we may say that the two declarations have no legal authority to dispose of territory of a sovereign country,[378] like Japan, nor did the Allied Powers have the right to enforce such a transfer.[379]

The 1943 Cairo Declaration and 1945 Potsdam Proclamation served as a basis for Nationalist China to take over Taiwan after Japan's surrender in the Second World War.[380] As aforementioned by John Foster Dulles, the former U.S. Secretary of State, Anthony Eden, the former British Foreign Secretary, and Mr. Georges Pompidou, the former French Premier, the occupation of Taiwan by China was only on behalf of the Allied Powers, not for the exercise of

374. *See The Taiwan Question and Reunification of China*, *supra* note 369 (noting that Taiwan's interests will still be maintained if the White Paper is approved); *see also White Paper—The One-China, supra* note 370 (explaining how, under the proposed arrangement, Taiwan would still maintain certain governmental freedoms). *But see* Lampton, *supra* note 369 (accusing the government of China for having false intentions with respect to Taiwan).

375. *See The Taiwan Question and Reunification of China*, *supra* note 369 (citing the White Paper and showing that the People's Republic of China wants unification with Taiwan regardless of political differences); *White Paper—The One-China, supra* note 370 (discussing prevailing intentions towards Taiwan). *But see* Lampton, *supra* note 369 (criticizing the White Paper and arguing that, in fact, the existing serious political differences will keep unification from becoming a reality).

376. *See Cairo Conference* (Dec. 1, 1943) (detailing the Cairo Declaration and listing the Allies that combined to form the policies of the Conference), *at* http://www.taiwandocuments.org/cairo.htm (last visited Nov, 10, 2002); *The Potsdam Proclamation* (providing "[a] statement of terms for the Unconditional Surrender of Japan, July 26, 1945," and explaining that the Proclamation encompassed common foreign policies that were shared by the allies), *available at* http://www.ibiblio.org/pha/policy/1945/450726a.html (last visited Nov. 10, 2002); *see also* Charney & Prescott, *supra* note 49, at 457 (explaining that the Allied Powers were the driving force behind the authorship and passage of the Cairo Declaration).

377. *See Cairo Conference*, *supra* note 376 (referring to the fact that the Cairo Declaration was not binding under international law); *see also* Charney & Prescott, *supra* note 49, at 441 (noting that neither the Cairo Declaration nor the Potsdam Proclamation are binding).

378. *See Cairo Conference*, *supra* note 376 (noting that the Conference itself has no authority to dispose of territory of a sovereign country); *The Postdam Proclamation, supra* note 376 (providing the text of the Proclamation); *see also* Charney & Prescott, *supra* note 49, at 457 (discussing the lack of authority to act with respect to a sovereign country that exists both under the Cairo Declaration and the Potsdam Proclamation).

379. *See Cairo Conference*, *supra* note 376 (enumerating that under the Declaration the Allied Powers are not given the right to enforce an attempted transfer of territory of a sovereign country to another country); *The Postdam Proclamation, supra* note 376 (providing that neither Japan nor the Allied Powers have the right to transfer control of Taiwan to another country); *see also* Charney & Prescott, *supra* note 49, at 457 (explaining the practical functions of the Cairo Declaration and the Potsdam Proclamation).

380. *See* Charney & Prescott, *supra* note 49, at 460 (asserting that the Cairo Declaration and the Potsdam Proclamation played major roles in leading to China's takeover of Taiwan); *see also The Postdam Proclamation, supra* note 376 (providing the substance of the Proclamation); *Cairo Conference*, *supra* note 376 (discussing the foundation laid within the Conference that served as apparent authority for China's takeover of Taiwan).

China's sovereignty.[381] This is due to the fact that Japan had not formally and legally renounced its authority over Taiwan until 1951[382] while concluding the San Francisco Peace Treaty with the Allied Powers.[383] Also, the 1952 Peace Treaty did not determine the future of Taiwan;[384] rather, it only indicated that Japan formally gave up its sovereignty over Taiwan.[385]

At this point, during the period between 1945 and 1951, Nationalist China was only an occupying power in Taiwan, pending a postwar settlement.[386] This meant that it had to abide by "the 1907 Hague Regulations on Land Warfare" and "the 1949 Geneva Conventions on Protection of Civilians" to maintain the public order and safety of Taiwan without any change in the status of Taiwan. [387] After Japan formally renounced all its right, title and claim to Taiwan under the 1952 Treaty of Peace with Japan,[388] the future of Taiwan was to be decided at an opportune time in accordance with the principles of the UN Charter.[389] Factors to be decided

381. *See* Charney & Prescott, *supra* note 49, at 461 (explaining the purpose of the agreements supervised by the Allied Powers was not to give China sovereignty over Taiwan, but citing Dulles as having recognized that the international documents did not give China control over Taiwan); *Cairo Conference*, *supra* note 376 (providing the substance of the Conference). *See generally* Chen, *supra* note 32, at 228 (giving a brief history of Taiwan itself as a country, and then discussing its years as an occupied territory and speculating about its political future).

382. *See* Charney & Prescott, *supra* note 49, at 461 (stating that Japan did not renounce its claim on Taiwan until 1951); Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PAC RIM. L & POL'Y J. 63, 66 (2000) (discussing Japan's formal relinquishment of Taiwan); *see also* Su Wei, *supra* note 37, at 1172 (identifying when Japan officially relinquished its control over Taiwan).

383. *See* Seokwoo Lee, *supra* note 382, at 66 (outlining the exact terms of the San Francisco Peace Treaty and identifying their ramifications); Carolan, *supra* note 60, at 441 (discussing the supervisory powers of the Allies under the San Francisco Peace Treaty).

384. *See* Charney & Prescott, *supra* note 49, at 461 (detailing the accomplishments of the 1952 Peace Treaty); Chiang, *supra* note 41, at 998 (explaining that the San Francisco Peace Treaty did not give control to China); *see also Agreement for the Settlement of Disputes Arising Under Article 15(a) of the Treaty of Peace with Japan* (June 12, 1952) (citing the 1952 Peace Treaty with Japan and explaining that it did not ensure either country's control over Taiwan), *available at* http://www.taiwandocuments.org/sanfrancisco07.htm.

385. *See* Chiang, *supra* note 41, at 98 (explaining that Japan was merely giving up its own control over Taiwan; it was not transferring control to another country); s*ee also Agreement for the Settlement of Disputes, supra* note 384 (delineating the boundaries of the agreement between Japan and China as it related to Taiwan); *Treaty of Peace with Japan* (Sept. 8, 1951) (referring to the original settlement entered into by Japan regarding Taiwan), *at* http://www.taiwandocuments.org/sanfrancisco01.

386. *See* Chiang, *supra* note 41, at 998 (explaining China's relationship with Taiwan between 1945 and 1950); Seokwoo Lee, *supra* note 382, at 66 (noting that China took control over Taiwan in 1945); Tzu-Wen Lee, *supra* note 18, at 353 (discussing the actual rule of China over Taiwan).

387. *See* LILIAN C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (Manchester Univ. Press 1998) (discussing the rights and duties of the occupying power); *see also 1949 Geneva Conventions: Index* (citing the "1949 Geneva Conventions on Protection of Civilians" and using this as a guideline to ensire safety in Taiwan), *available at* http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/APP.htm (last visited Nov. 10, 2002); *The Proceedings of the Hague Peace Conferences* (citing the "1907 Hague Relations on Land Warfare" and giving restrictions on how an occupied territory may be treated), *available at* http://legalminds.lp.findlaw.com/list/newlawbooks-1/msg01336.html.

388. *See Agreement for* the *Settlement of Disputes, supra* note 384 (explaining the intended consequences of the 1952 Treaty as they were to affect Taiwan); *see also* Charney & Prescott, *supra* note 49, at 461 (noting that the 1952 Treaty was not meant to address every issue related to China, Japan, and Taiwan, and stating that there were boundaries to the Treaty); Chiang, *supra* note 41, at 998 (discussing the time in 1951 when Japan relinquished control over Taiwan).

389. *See Charter of the United Nations Signed at San Francisco* (June 26, 1945) (citing the U.N. Charter and enumerating its principles), *available at* http://www.unhchr.ch/html/menu3/b/ch-cont.htm; *see also* Carolan, *supra* note 60, at 441 (explaining that the U. N. Charter is determinative when discussing the sovereignty of a nation); Seokwoo Lee, *supra* note 382, at 66 (noting that the countries taking part in the Treaty are bound by the rules of the U. N. Charter).

included the principles of self-determination of people and the non-use of force in setting territorial or other disputes.[390] This is a situation involving the international legal principle of self-determination that cannot be excluded from the jurisdiction of the United Nations by a claim of domestic jurisdiction.[391] As such, international customary law is binding on all states regardless of consent.[392] In any event, states have bound themselves under the Charter to respect this principle.[393]

Such an opportunity arose in 1971 when the United States proposed a compromise to resolve the Chinese representation question in the UN.[394] Under this proposed formula, the PRC would have taken over China's seat in the Security Council,[395] and the two Chinas would have been represented in the General Assembly as separate states in the UN.[396] However, it was unsuccessful because both Nationalist China and Communist China asserted that there was only one China, and that it included Taiwan as well as the mainland.[397]

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390. *See Charter of the United Nations Signed at San Francisco*, *supra* note 389 (providing the substance of the U.N. Charter); *see also* Carolan, *supra* note 60, at 441 (explaining that all nations must negotiate and then agree to the terms included in U.N. charters); Seokwoo Lee, *supra* note 382, at 66 (describing the U.N. Charter as a framework for proceeding in territorial disputes).

391. *See Charter of the United Nations Signed at San Francisco*, *supra* note 389 (noting that states are bound to respect the charters); *see also The Avalon Project at Yale Law School: Charter of the United Nations* (June 26, 1945) (expressing the intentions of the U.N. Charter to outline principles of self-determination that member states would be bound by), *available at* http://www.yale.edu/lawweb/avalon/un/uncharter.htm; Seokwoo Lee, *supra* note 382, at 66 (explaining that the U.N. Charter should be referred to when any discussion regarding domestic matters arises).

392. *See Charter of the United Nations Signed at San Francisco*, *supra* note 389 (providing the text of the Charter); *See also* Carolan, *supra* note 60, at 459 (explaining the effect of the U.N. Charters and laws on non-member countries); Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 19 (2000) (noting that the rules of the U.N. Charter apply to all states regardless of consent).

393. *See* Huang, *supra* note 241, at 201 (explaining that as enshrined in the concept of Article 1(4) of Additional Protocol I to the 1949 Geneva Conventions, such conflicts with respect to peoples engaged in resisting the suppressing of their right of self-determination are regarded as international conflicts); *The Avalon Project at Yale Law School, supra* note 391 (stating that the under the U.N. Charter the claim of self-determination cannot be excluded from domestic claims); *Charter of the United Nations Signed at San Francisco*, *supra* note 389 (noting that one of the requirements of the Charter is that states are bound to respect the principle of self-determination).

394. *See* Tzu-Wen Lee, *supra* note 18, at 373 (discussing the proposal that the United States gave to China in 1971); *see also* Su Wei, *supra* note 37, at 1172 (stating that the U.N. General Assembly replaced the seat with the Paople's Republic of China); Chen, *supra* note 275, at 678 (discussing the U.N. vote in 1971 to give the People's Republic of China a seat, and its subsequent passage by Resolution 2758).

395. *See* Su Wei, *supra* note 37, at 1172 (discussing the proposal to have the People's Republic of China take over China's seat in the U.N. Security Council); Carolan, *supra* note 60, at 459 (detailing the takeover of China's seat by the People's Republic of China); *see also* Chen, *supra* note 275, at 678 (referring to the vote whereby the People's Republic of China was granted a seat in the U.N.).

396. *See* Tzu-Wen Lee, *supra* note 18, at 373 (explaining the intent behind having two Chinas separately represented); *see also* Carolan, *supra* note 60, at 459 (discussing how, as a result of the U.N.'s proposition, "two Chinas" have been formed). *But see The Taiwan Question and Reunification of China, supra* note 369 (criticizing the idea of "two Chinas" in the White Paper).

397. *See* FREDERIC L. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING: SELECTED DOCUMENTS, 180–81 (West Pub. Co., 2nd ed. 1993) (discussing the history of the Taiwanese-Chinese conflict); *see also* Carolan, *supra* note 60, at 438 (describing the U.S. acknowledgment of the Chinese position that Taiwan was a part of China in an effort to normalize relations with China in the 1970s). *See generally* Lung-chu Chen, *supra* note 313, at 676 (summarizing Taiwan's historical legal status and describing the Taiwanese interest in becoming an independent member state to the United Nations and other international organizations, thus divesting itself from its current Chinese representation).

Regardless of the issue of Taiwan's undetermined status, Cold War politics, especially the outbreak of the Korean War in 1950, made it difficult for the non-communist bloc of western states to abandon Nationalist China in Taiwan.[398] Rather, they upheld the government of Taiwan effectively and supported its claim as China's sole legitimate government in the world.[399] The Treaty of Peace between the ROC and Japan, which referred to the terms in the 1951 Peace Treaty, was signed in 1952 (hereinafter "the 1952 Peace Treaty").[400] Although there was no specific provision for the transfer of Taiwan to the ROC government, it is beyond any doubt that the 1952 Peace Treaty, by recognizing that Japan had abandoned Formosa,[401] allowed the ROC to acquire title to Taiwan and establish permanent sovereignty over it.[402] This is because the ROC exceeds all the requirements of international law for the acquisition and maintenance of territorial title, either by way of occupation or prescription.[403]

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398. *See* Chang & Lim, *supra* note 66, at 409 (discussing the position of non-communist western countries with regard to China's control over Taiwan); *see also* Carolan, *supra* note 60, at 436 (describing how the U.S. changed its stance due to the Korean War and the Cold War to support the ROC instead of the PRC as the legitimate government of China, and thus withheld any sort of recognition for the PRC as China's legitimate ruling party); Angeline G. Chen, *supra* note 32 at 234 (describing how Western powers, because of the Cold War, recognized and supported the KMT's rule as opposed to that of the PRC).

399. *See* Lung-chu Chen, *supra* note 275, at 683 (stating that, "[the] United States and its allies then found it expedient, as part of their global Cold War strategy, to treat Chiang Kai-shek's Kuomintang regime, the ROC, as the only lawful government of China in the United Nations and in other international arenas, while refusing to recognize the existence of the PRC"); *see also* Carolan, *supra* note 60, at 436–37 (stating that, "the United States, the United Nations, and most of the non-communist world recognized the rump Republic of China (R.O.C.) as the official government of all China and withheld any sort of recognition from the P.R.C."). Chen, *supra* note 32, at 234 (stating that, "[w]estern powers, in particular the United States, supported the KMT's position as the legitimate government of China").

400. *See* Treaty of Peace between the Republic of China and Japan, Apr. 28, 1952, (providing the text of the Treaty of Peace between the Republic of China and Japan signed in Taipei), *available at* http://www.taiwandocuments.org/taipei01.htm (last visited on Oct. 24, 2002); *see also* Chiang, *supra* note 41, at 997–98 (describing the Treaty of Peace between the ROC and Japan signed in 1952 which confirmed the terms of the San Francisco Peace Treaty of 1951 with regard to the disposition of Taiwan); Shen, *supra* note 323, at 1111–12 (discussing Japan's unilateral renunciation of Taiwan in the 1952 Peace Treaty resulting from its acknowledgment that all previous treaties and agreements it had entered into with China before December 1941 were invalid).

401. *See* Treaty of Peace, *supra* note 400 (stating that Article 2 of the 1952 Peace Treaty states, "Japan has renounced all right, title, and claim to Taiwan (Formosa)…"); *see also* Chiang, *supra* note 41, at 998 (describing the territorial effect of the 1952 Peace Treaty between the Republic of China and Japan and acknowledging that under the Treaty Japan had renounced its right and title to Taiwan); Shen, *supra* note 323, at 1116–17 (analyzing the validity and effect of the 1952 Peace Treaty between the Republic of China and Japan).

402. *See* Treaty of Peace, *supra* note 400 (stating that Article 10 of the 1952 Peace Treaty states, "nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan . . . and their descendents who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the [ROC] in Taiwan "); *see also* Lung-chu Chen, *supra* note 275, at 677–78 (describing the effect of Japan's renunciation of its interest in Taiwan in the 1952 Peace Treaty on Taiwan's international legal status); Charney & Prescott, *supra* note 49, at 460 (stating that, "one can argue that the ROC governed Taiwan on behalf of China as a whole or that the government on Taiwan then or subsequently established sovereignty over the island as a separate entity").

403. *See* Shen, *supra* note 323, at 1109–17 (discussing China's legal claim over Taiwan, in the context of international law, supported by various treaties, as well as China's historical occupation of Taiwan); *see also* Charney & Prescott, *supra* note 49, at 460 (discussing the ROC's territorial occupation of Taiwan and stating that, "[it is arguable that] the peace treaties should be interpreted consistently with their intention and that intention may be found in the Cairo Declaration, which identifies the ROC as the intended recipient of the Japanese territorial surrender of Taiwan, and the Potsdam Proclamation, which appears to endorse that intention"). *See generally* Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 1 (1997) (discussing the international law aspects of the acquisition and maintenance of territorial title from a legal and historical perspective).

After Japan renounced its sovereignty over Taiwan,[404] it took a non-committal position on the issue of Taiwan's sovereignty.[405] Instead, Japan stated that it "understands and respects" the PRC position.[406] This view has been firmly upheld by Japanese judicial opinions, as was the case of Lai-Chin-Jung-Yi. In 1956, the Supreme Court of Japan decided that:

> [t]he determination as to whether the parties have lost the Japanese nationality they had once held should be made on the basis of the Formosan Register of Personal Status Established for the Formosans as a special category, separately from the Family Register of Japan, ever since the establishment of Japanese Sovereignty over Formosa. It is therefore proper to understand that those who held such personal status in the Register referred to above have lost Japanese nationality and acquired the nationality of the Republic of China with the establishment of permanent sovereignty of the Republic of China, i.e., with the entry into force of the Peace Treaty in 1952 when the de jure change of sovereignty over that territory.[407]

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404. *See* Treaty of Peace, *supra* note 400 (noting that Article 2 of the treaty states, "Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands"); *see also* Seokwoo Lee, *supra* note 382, at 125 (discussing the territorial disputes that occurred from the manner in which the 1951 Peace Treaty between China and Japan was drafted and acknowledging that Japan "cede[d] to China in full sovereignty the island of Taiwan (Formosa) and adjacent minor islands"); Shen, *supra* note 323, at, 1114 (stating that, "[u]nder the San Francesco multilateral Treaty of Peace with Japan of 1951, Japan once again formally affirmed its renunciation of all its claims to Taiwan and other territories it took from China and other countries.").

405. *See* Chang & Lim, *supra* note 66, at 353 (stating that, "[i]t is important to note, however, that Japan never stated to whom it relinquished its claim, not even in the separate peace treaty made between Japan and the Republic of China the next year"); *see also* Chen, *supra* note 32, at 249 (stating that, "[w]hile Japan expressly relinquished its claim to Taiwan and to the Pescadores, it did not state to whom it relinquished its claim."); Chiang, *supra* note 41, at 992–98 (discussing the objective and subjective approaches to the interpretation of the 1952 Peace Treaty and stating that, "Japan renounced its claim . . . without qualification and without any attempt to transfer their title, but [left] it unresolved").

406. *See* Tzu-Wen Lee, *supra* note 18, at 361 n.13 (noting that Dr. Takakazu Kuriyama stated that even though "[J]apan is unable to pronounce independently on the question as to whether or not Taiwan is part of China, it is perfectly consistent with the past history as well within the Peace Treaty for Japan to take the position that Taiwan should be returned to China as intended by Cairo and Potsdam Declarations.") *see also* Joint Communique of the Government of Japan and the Government of the People's Republic of China, Sept. 29, 1972 (noting how communique resulted from a meeting to normalize relations between the China and Japan between Chairman Mao Tse-tung and Prime Minister Kakuei Tanaka on September 27, 1972, in Peking), *available at* http://www.taiwandocuments.org/japan01.htm.

407. *See Material on Success of States*, UN Doc. ST/LEG/SER.B/14(N.Y./U.N., 1967), *cited in* Hungdah Chiu, *The One China Policy and Taiwan's International Status*, Vol. 52, No. 2, THE LAW MONTHLY (Taipei, 2000) (discussing the different perspectives of the PRC and ROC and their relation to Taiwan's international status); *see also* Taimie L. Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109, 128, n.54 (1991) (discussing the loss of Japanese nationality as a result of the 1951 Peace Treaty between the ROC and Japan); Treaty of Peace, *supra* note 400 (stating that Article 10 of the treaty states that, "nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores)," thereby affirming a change in nationality from Japanese to that of the Republic of China.).

Since the PRC was established in 1949, it has never exercised control over Taiwan.[408] Without actual possession or control over Taiwan, the PRC cannot assert jurisdiction over Taiwan.[409] The 1996 Maersk Dubai case is a good case on this point.[410] As Dr. Angeline G. Chen noted:

> [t]he Maersk Dubai case illustrates the ambiguity created by Taiwan's indeterminate status within the international community. Nevertheless, the statements issued by the Chinese officials are accurate: under international law, one sovereign state cannot extradite an individual to anything other than another sovereign state. If Taiwan did not hold the attributes of a nation-state independent and apart from China, the officers could not have been released from the Canada courts to stand trial in Taiwan.[411]

Dr. Chen was suggesting that developments in customary international law bear directly on territorial sovereignty.[412] Thus, even though there is international recognition of the PRC

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408. *See* Lung-chu Chen, *supra* note 313, at 275 (stating that, "[d]espite all of its rhetoric of Taiwan being part of China, the PRC has never, since its founding in 1949, extended actual jurisdiction and effective control over Taiwan"); *see also* Chang & Lim, *supra* note 66, at 419 (arguing that, "[t]he Beijing government has not exercised control over Taiwan for a single day since the PRC's founding in 1949"); Hsiu-An Hsiao, *supra* note 94, at 735 (stating that the PRC has never exercised jurisdiction in Taiwan since Japan relinquished its sovereignty over Taiwan at the end of the Second World War).

409. *See* Chang & Lim, *supra* note 66, at 419 (arguing that because the PRC has never exercised control over Taiwan, it cannot assert its jurisdiction over Taiwan); *see also* Chen, *supra* note 32, at 239 (discussing how the government on Taiwan operates independently of the PRC is evidence that the PRC does not exercise sovereignty over Taiwan); Chiang, *supra* note 41, at 998 (stating that, "[d]ue to the fact that China . . . has not acquired the title to the island of Taiwan either under a treaty or by occupation, China has no sovereignty over the island of Taiwan").

410. *See* State of Romania v. Cheng, [1997] 119 C.C.C. 3d 561; *see also* Elissa Steglich, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways through Expanded Criminal Jurisdiction*, 78 TEX. L. REV. 1323, 1323 (2000) (analyzing the legal constraints surrounding domestic prosecution of high seas crimes). In early 1996, six Taiwanese sailors from the merchant container ship Maersk Dubai were arrested in Nova Scotia, Canada. The six men, all officers, were accused of murdering three Romanian stowaways on the high seas. This incident became the focal point of a diplomatic tussle among Canada, Romania, China, and Taiwan over who had jurisdiction over the matter. Canada initially sought to extradite those suspects to Romania, with which it has an extradition treaty. Taiwan, however, opposed the extradition attempts and offered instead to prosecute them in Taipei. Meanwhile, the PRC attempted to intervene, claiming sovereignty over the suspects and the case because Taiwan is part of China and is an integral part of China's territory, and thus emphasized that Taiwan had no part to play without jurisdiction. The PRC insisted that extradition could take place only between two sovereign states, not "between a province of a country and another country." Despite China's position, the Nova Scotia Supreme Court decided to return those officers to Taiwan to stand trial there. Taiwan welcomed the decision by saying that "the decision not only complies with international law and practice, but also shows Canada's respect for our judicial system." Chen, *supra* note 32, at 237.

411. *See* Chen, *supra* note 32, at 237 (analyzing Taiwan's indeterminate status and its corresponding responsibility with regard to international affairs); *see also* Moira McConnell, *"Forward this Cargo to Taiwan": Canadian Extradition Law and Relating to Crime on the High Seas*, 8 CRIM. L.F. 341–45 (1997) (discussing the extradition of Taiwanese officers in the Maersk Dubai case and the general principles of jurisdiction asserted over crime on the high seas); *see also* Steglich, *supra* note 410, at 1324 (discussing the United Nations Convention on the Law of the Sea and stating that under the Convention "a ship is subject to the exclusive jurisdiction of the nation's flag under which it sails").

412. *See* McConnell, *supra* note 411, at 341–45 (stating that, "[t]here are five traditional bases of jurisdiction on which states purport to exercise their sovereignty: territoriality, nationality, protective, passive personality, and universality"); *see also* Tzu-Wen Lee, *supra* note 18, at 370 (discussing the effect of the International Law of Recognition on the ROC's claim to Taiwan). *See generally* Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 383 (1996) (analyzing the concept of territorial sovereignty as a basis for exertion of a court's authority under the rules of international law).

and many countries have "acknowledged," "understood," or "noticed" China's position that Taiwan is an integral part of China,[413] it cannot be concluded that legal recognition of Chinese sovereignty or that the PRC's jurisdiction over Taiwan has been conferred.[414] At this point, it is notable that conflicts of territory are inevitably matters of international concern and not just a domestic issue.[415]

Although the international status of Taiwan would be derived from a choice between the ROC and the PRC, recognition itself is considered to be more of a matter of political decision on the part of recognizing states than of the government or state in question.[416] However, it is the common consent of civilized states that a state is, and becomes, an international personality through recognition.[417] In this regard, self-recognition is critical to Taiwan.

As enshrined in the ROC constitution, the boundaries of the ROC's territory are defined as "the country's existing territory."[418] The vagueness and absurdity of this definition is self-evi-

413. *See* Shen, *supra* note 323, at 1118–19 (stating that, "[t]he international community generally recognizes the PRC Government as the sole legitimate Government of China and Taiwan as part of China"); *see also* Tzu-Wen Lee, *supra* note 18, at 357–60 (discussing the joint communiques between the PRC and foreign states which acknowledge and ratify China's claim over Taiwan); *see also* Puder, *supra* note 324, at 520–22 (discussing international recognition of Taiwan and the PRC).

414. *See* Lung-chu Chen, *supra* note 275, at 678 (discussing the United Nations decision to seat the PRC in place of the ROC and the effect on the PRC's territorial claim to Taiwan); *see also* Chiang, *supra* note 41, at 998–99 (discussing China's sovereignty over Taiwan and stating that, "[t]he claim . . . that Taiwan is part of China has no legal basis); *see also* Wallace-Bruce, *supra* note 316, at 458 (stating that, "the People's Republic of China has never ruled or controlled Taiwan.").

415. *See* Chang & Lim, *supra n*ote 66, at 419 (stating that, "[i]t is crucial to note that conflicts of territory are inevitably matters of international concern"); *see also* Charney & Prescott, *supra* note 49, at 463–65 (describing the application of international law to territorial disputes, and specifically to the conflict between Taiwan and China); Soong, *supra* note 46 at 365–66 (discussing the possible international ramifications of aggression between China and Taiwan in an attempt to exert territorial sovereignty over Taiwan).

416. *See* Su Wei, *supra* note 37, at 1174 (stating that, "[i]n international law practice, recognition is considered more to be a matter of political decision on the part of the recognizing State than to be constitutive of the government or State in question"); *see also* Walter J. Kendall III, *A Peace Perspective on the Taiwan United Nations Membership Question*, 28 J. MARSHALL L. REV. 259, 259 (stating that "recognition decisions rest with individual governments [and] are political, rather than legal, in nature"); *see also* Williams, *supra* note 356, at 801–04 (discussing the politics of international recognition and applying those principles to the current status of Taiwan).

417. *See* L. OPPENHEIM, 1 OPPENHEIM'S INTERNATIONAL LAW 125 (Sir Robert Jennings & Sir Arthur Watts eds., 1992) (discussing the concept of recognition in international law); *see also* Attix, *supra* note 38, at 379–82 (discussing the implied recognition of Taiwanese statehood through dealings with other countries); Chen, *supra* note 32, at 239–40 (discussing Taiwan's membership in various ILO's and NGO's as a an indicator with regard to recognition as a sovereign entity in the international arena).

418. *See* CONSTITUTION OF THE REPUBLIC OF CHINA, art. 4 (providing the text of the Constitution of the Republic of China which was adopted by the National Assembly on December 25, 1946, promulgated by the National Government on January 1, 1947, and effective from December 25, 1947) *available at* http://www.gio.gov.tw/info/news/constitution.htm (last visited on Oct. 24, 2002); *see also* Mutual Defense Treaty, December 2, 1954, U.S.-China, art. VI, 6 U.S.T. 433 (acknowledging the ROC's territories as Taiwan and the Pescadores); Chang & Lim, *supra* note 66, at 420–21 (describing the boundaries of the ROC's territory as "an area of roughly 14,000 square miles, defined by Taiwan and its outlying islands of the Pescadores, Kinmen and Matsu").

dent.[419] In order to bring the legal concept into line with the current reality that mainland China is an area under control by Communist China, rather than the government of Taiwan,[420] the ROC has redefined the original boundaries of the ROC's territorial claims.[421] It includes only the total area of Taiwan's Penghu Islands (including Kinmen and Matsu) and recognizes in 1991 that the PRC is the legitimate government of mainland China.[422] In 1994, Taiwan officially announced that it would no longer compete with the PRC for the right to represent China in international society.[423] Moreover, in response to a question during an interview by German journalists in 1999, Mr. Lee Teng-hui, the president of Taiwan, made an unprecedented remark that the relations across Taiwan Strait should be "state-to-state relations"

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419. *See* Cooney, *supra* note 20, at 514 (stating that the ROC "constitution establishes a state called the 'Republic of China' (ROC) whose boundaries include mainland China and Outer Mongolia, even though since 1949 its effective area has been confined to Taiwan"); *see also* Chen, *supra* note 18 at 608 (discussing the ROC's claim to territorial title over mainland China even after the creation of the PRC and establishment of a new legal system on mainland China). *See generally* CONSTITUTION OF THE REPUBLIC OF CHINA, art. 4, (Article 4 defines the territory controlled by the ROC as its "existing national boundaries" which at the time of ratification could be deemed to include mainland China) *available at* http://www.gio.gov.tw/info/news/constitution.htm (last visited on Oct. 24, 2002).

420. *See* Chen, *supra* note 32, at 224 n.8 (stating that, "[i]n May of 1991, Taiwan's President Lee Teng-Hui officially recognized that the political body in Beijing [the PRC] controlled the mainland); *see also The Mainland Question*, (noting that "[i]n the early 1990's, the ROC unofficially dropped its claim that there was one China ruled by one government, namely the ROC. The ROC admitted that both the ROC and the PRC are sovereign only on the territories that they effectively rule"), *available at* http://www.geocities.com/CapitolHill/7288/paper.htm (last visited Oct. 24, 2002); Jeremy Mark, *Taiwan, in Historic Gesture, Says it Recognizes Leadership of* China, WALL ST. J., May 1, 1991, at A12 (describing Taiwan President Lee Teng-Hui's statement that "[t]he mainland is now under the control of the Chinese Communists, and this is a fact we must face").

421. *See* Cooney, *supra* note 20, at 519–20 (discussing the Taiwanese National Assembly's 1991 amendment to the ROC Constitution limiting it to the "Taiwan area"); *see also* Philip Yang, *Taiwan's Legal Status: Going Beyond the Unification-Independence Dichotomy* (stating that, "Taiwan's strategy is to admit the existence of two Chinese states: both are de facto and *de jure* states controlling their own territories, but neither one of them is the legal government representing both mainland China and Taiwan), *at* http://www.taiwansecurity.org/TS/Yang-9910-Taiwan%27s-Lage-Status.htm; *see also* Interview of Taiwan President Lee Teng-Hui with Deutsche Welle Radio (July 9, 1999) (stating that, "Article 10 of the Additional Articles (now Article 11) limits the area covered by the Constitution to that of the Taiwan area, and recognizes the legitimacy of the rule of the People's Republic of China on the Chinese mainland"), *at* http://www.taiwandc.org/nws-9926.htm (last visited Oct. 24, 2002).

422. *See* Charney & Prescott, *supra* note 49, at at 460 (reporting Taiwan's concession that "Taiwan may be a separate state that does not include all of China but, rather, only the islands it occupies"); *see also* Attix, *supra* note 38, at 367 (listing the territories under ROC control as Formosa, the Penghu Islands, Quemoy Island and Mazu Island and acknowledging that these include the only territory Taiwan claims); Mainland Affairs Council, *How We View Beijing's White Paper: "One China Principle and the Taiwan Issue,"* Feb. 22, 2000 (discussing the Taiwanese Mainland Affairs Council's interpretation of China's White Paper and stating that, "[t]he People's Republic of China (PRC) regime has never ruled Taiwan, Pescadores, Kinmen, and Matsu") *at* http://www.mac.gov.tw/english/MacPolicy/890222e.htm (last visited Oct. 24, 2002).

423. *See* Tzu-Wen Lee, *supra* note 18, at 353 (stating that, "[Taiwan] officially announced in 1994 that it would no longer compete with the PRC for the right to represent China in the international community"); *see also* Charney & Prescott, *supra* note 49, at 460 (discussing that Taiwan declared it would not compete for the right to represent all of China in the international arena, recognizing that China comprises 'two essentially equal political entities'"); Chen, *supra* note 32, at 240 (acknowledging Taiwan's pursuit of membership as a sovereign entity in various ILOs and NGOs since 1994).

or at least "special state-to-state relations."[424] Notably, these new claims of territorial sovereignty are good circumstantial evidence to prove that the government of Taiwan is fully aware of self-recognition.[425] In fact, such an official declaration can be deemed as a declaration of the establishment of a state.[426] Under the concept of recognition of governments, if the ROC continues to claim to represent the state of China, then it would be impossible for Taiwan to gain formal recognition from a majority of the international community.[427] The real issue is choosing the government to represent the state of China.[428] Thus the PRC, instead of the ROC, should be the one to survive.

The political reform effort has transformed Taiwan toward profound self-governance.[429] Since the 1970s, an increasing political consciousness of self-governance by the indigenous population of Taiwan has led to the commencement of democratic reform.[430] As a result, mar-

424. In response to a question during an interview with a German radio station, Deutche Welle, on July 9 of 1999, regarding whether "the Beijing government views Taiwan as a renegade province," President Lee remarked: "the cross-strait relationship is a special state-to-state relationship." *See* The Position Paper To Elaborate On The Controversial State-To-State Remarks Made By President Lee Teng-Hui To Define Relations Between Taiwan And Mainland China, issued by the Mainland Affairs Council, ROC, on Aug. 1 of 1999. After this unpredictable statement, Mr. Lee was regarded as a naked separatist, moving toward creating "two Chinas" or "one China, one Taiwan." *See* Interview of Taiwan President Lee Teng-hui with Deutsche Welle Radio (July 9, 1999) (stating that, "[t]he 1991 constitutional amendments have designated cross-strait relations as a state-to-state relationship or at least a special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group, or between a central government and a local government"), *at* http://www.taiwandc.org/nws-9926.htm (last visited Oct. 24, 2002); *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879, 896 (1999) (discussing the U.S. disapproval of the statement made by Taiwanese President Lee Teng-Hui implying a two-China policy or a one-China, one-Taiwan policy); Shen, *supra* note 323, at 1104 (discussing that Mr. Lee "exposed himself to the world as a naked separatist by moving closer towards creating 'two Chinas' or 'One China, one Taiwan'").

425. *See* Chiang, *supra* note 41, at 998–99 (stating that based on territorial claims, China has no sovereignty over Taiwan). *See also* Shen, *supra* note 323, at 1129–30 (arguing that Taiwan does not have territorial sovereignty unless Beijing abandons such sovereignty); *but see Strait Talk—Taiwan and China*, THE ECONOMIST, Aug. 10, 2002 (reporting additional comments made by President Chen Shui-bian in which he described the present situation as "one country on each side" of the Taiwan Strait).

426. *See Formosa And The Chinese Recognition Problem* 50 AM. J. INT'L L. 405, 415 (1956) (stating how Professor D.P. O'Connell noted that "a government is only recognized for what is claims to be"); Tzu-Wen Lee, *supra* note 18, at 380 (explaining that the best indication of statehood is a formal declaration); *see also* Chiang, *supra* note 41, at 971 (explaining that a state may qualify for statehood under the four criteria, but it does not become a state until it declares itself a state).

427. *See* Attix, *supra* note 38, at 357 (noting that many countries only recognize the PRC and not the ROC); *see also* Charney & Prescott, *supra* note 49, at 453 (2000) (noting that the ROC has claimed to represent Taiwan since 1912). *See generally* Tzu-Wen Lee, *supra* note 18, at 351 (discussing the differences between recognition of a state and recognition of a government).

428. *See* generally Tzu-Wen Lee, *supra* note 18, at 351 (discussing Taiwan's ability to be recognized as a state); Shen, *supra* note 323, at 1101 (examining whether Taiwan meets the criteria of statehood); Zaid, *supra* note 193, at 805 (stating that the issue is whether Taiwan should be recognized as a sovereign state).

429. *See generally* Chang & Lim, *supra* note 66, at 393 (examining democratic political reforms in Taiwan); Chen, *supra* note 32, at 235 (discussing the political events, particularly the Democratic Progressive Party's rise to power, that have established Taiwan's democratic government); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, l11 PAC. RIM L. & POL'Y J. 531, 533 (2002) (noting some political reforms in Taiwan since 1987).

430. *See* Carolan, *supra* note 60, at 439 (noting that Taiwan functions under a multiparty democracy); *see also* Charney & Prescott, *supra* note 49, at 477 (stating that Taiwan is currently a "young" democracy); Chen, *supra* note 32, at 235 (discussing various political events that have established Taiwan's democratic government).

tial law was abolished in 1978,[431] and the people of Taiwan were able to present a strong desire to push the government toward "Taiwanization" in a democratic manner.[432] The notable example is that Taiwan has peacefully held the direct election of its President since 1996.[433] Full-fledged democratic governance in Taiwan is regarded as a universal principle in the context of internal self-determination.[434] Moreover, Taiwan's political achievement has earned it more respect from the international community.[435] The people of Taiwan have successfully exercised their right of internal self-determination and transformed Taiwan from a dictatorial regime into a representative sovereign government.[436]

Taiwan has a stable population of roughly 23 million people.[437] The government of Taiwan has been in effective control over an area of roughly 36,000 square miles,[438] and the outlying islands of the Pescadores, Kinmen and Matsu since 1945,[439] when the territories were

431. *See* Carolan, *supra* note 60, at 439 (mentioning that martial law ceased to exist in 1987 in Taiwan); *see also* Chen, *supra* note 32, at 235 (noting that martial law ended in 1987); *Taiwan Ends 4 Decades of Martial Law*, N.Y. TIMES, July 15, 1987, at A2 (reporting that the Nationalist Government lifted martial law on July 14, 1987).

432. *See* Lung-chu Chen, *supra* note 275, at 679 (discussing the milestone events in the democratization and Taiwanization of Taiwan); *see also* Bernard Kishoiyian, *The United Nations: Meeting the Challenges of the Post-Cold War World*, 87 AM. SOC'Y INT'L L. PROCEEDINGS 268, 294 (1993) (noting the dramatic changes in Taiwan due to democratization and Taiwanization); Steve Lohr, *New Times on Taiwan as Old Guard Eases Grip*, N.Y. TIMES, May 30, 1984, at A2 (describing Taiwanization as the incorporation of native Taiwanese into the current government).

433. *See* Glenn R. Butterton, *supra* note 20 at 51 (noting Taiwan's first democratic election in 1996); *see also Taiwan's Democratic Elections*, N.Y. TIMES, March 24, 1996, at 14 (discussing the democratic election in which Lee Teng-hui was elected); *A Chinese First*, THE ECONOMIST, March 30, 1996 (reporting on Taiwan's first democratic election).

434. *See* Carolan, *supra* note 60, at 464 (discussing the application of self-determination to Taiwan); *see also* Huang, *supra* note 364, at 211–12 (2001) (stating that Taiwan's evolution into a democratic state demonstrates that the Taiwanese have exercised their right of internal self-determination). *See generally* Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT'L L. 129, 129 (1999) (defining self-determination as the "right of all peoples to freely choose their social, economic, political and cultural future without external interference").

435. *See* Attix, *supra* note 38, at 379 (discussing the international community's recognition of Taiwan through trading and noting that such recognition spills into the political arena); *see also* Lee, *supra* note 218, at 360 (calculating the number of states that recognize Taiwan's sovereignty). *But see* Shen, *supra* note 323, at 1124 (arguing that the international community has not formally recognized Taiwan as a state independent of China).

436. *See* Lung-chu Chen, *supra* note 275, at 679 (attributing Taiwan's democratic political transformation to its self-determination); *see also* Huang, *supra* note 364, at 211–12 (concluding that Taiwan has converted from a dictatorial regime to a democratic sovereignty); Anthony Spaeth, *An Epic Moment—the Jubilant Voters of Taiwan Send Up a Resounding Answer to Beijing's Rockets. The Next Move: A Lee-Jiang Summit?*, TIME INT'L, Apr. 1, 1996 (noting that in the 1990s Taiwan was beginning to "shed its dictatorial ways").

437. *See* WORLD ALMANAC AND BOOK OF FACTS 2002, *Nations of the World, Taiwan* (Primedia Reference, Inc. 2002) (stating the population of Taiwan as 22,370,461); *see also Taiwan at a Glance 2002* (noting that as of July 2002, the population was approximately 22.5 million), *at* http://www.gio.gov.tw/taiwan-website/5-gp/glance/ch3.htm (last visited Oct. 14, 2002); *A Tale of Two Chinas*, N.Y. TIMES, Aug. 12, 2002, at A15 (remarking that Taiwan has a population of 23 million).

438. *See* WORLD ALMANAC, *supra* note 437 (citing the area of Taiwan as 12,400 square miles); *see also Taiwan at a Glance 2002, supra* note 437 (stating that Taiwan is approximately 36,000 square kilometers); Zaid, *supra* note 193, at 806 n.2 (noting that Taiwan is 36,000 square kilometers).

439. *See* Cooney, *supra* note 20, at 514 n.94 (noting that the ROC controls Taiwan, Pescadores, Kinmen and Matsu); Hsiu-An Hsiao, *supra* note 94, at 733 (commenting that the KMT has been in control of Taiwan, Pescadores, Kinmen, and Matsu since 1949); Lee, *supra* note 218, at 374 (stating that the ROC's jurisdiction covers Taiwan, Pescadores, Kinmen, and Matsu).

returned to China at the end of the Second World War.[440] In addition, Taiwan has its own independent and representative government, the ROC, which was established in 1912.[441] Despite the fact that many states do not recognize Taiwan,[442] the government of Taiwan enters into treaties in bilateral and multilateral settings with these states.[443]

There is no doubt that Taiwan meets the objective criteria for statehood.[444] This includes a permanent population, a defined territory, a functioning government that is in effective control of that territory, and the capacity to engage in international relations with other states.[445] Although a state can withhold recognition of the entity's government,[446] interaction with it creates rights and obligations for that unrecognized entity.[447] For this practical reason, countries treat Taiwan as a de facto state for purposes of enforcing Taiwan's rights and duties under international law.[448] Therefore, numerous states have entered into commercial treaties with Taiwan despite the absence of diplomatic relations.[449]

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440. *See* Attix, *supra* note 38, at 367 (noting that Pescadores, Kinmen, and Matsu were returned to Taiwan at the end of the Second World War); *see also* Hsiu-An Hsiao, *supra* note 94, at 733 (mentioning that the KMT has been in control of Taiwan, Pescadores, Kinmen, and Matsu since the late 1940s); Lee, *supra* note 218, at 374 (stating that the ROC's has had jurisdiction over Pescadores, Kinmen, and Matsu since the 1940s).

441. *See* Charney & Prescott, *supra* note 49, at 465 (stating that Taiwan has been an independent state since 1912 when the ROC was founded); *see also* Rong-Chwan Chen, *supra* note 18, at 599 n.3 (noting that the ROC was formed by Dr. Sun Yat-sen in 1912); *The Republic of China Yearbook—Taiwan 2002 (ROC Chronology: Jan 1911–Dec 2001)* (citing the foundation of the Republic of China as Jan. 1, 1912), *at* http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/appendix1.htm (last visited Oct. 14, 2002).

442. *See* Attix, *supra* note 38, at 363 (stating that when Taiwan lost its U.N. recognition, over 60 countries continued unofficial recognition of Taiwan through trade); *see also* Chen, *supra* note 32, at 226–27 (explaining that many states do not officially recognize Taiwan as a state but still trade with Taiwan as though it were a sovereign state); Lee, *supra* note 218, at 360 (listing the states that do and do not recognize Taiwan's sovereignty).

443. *See* Attix, *supra* note 38, at 367 (noting that the ROC enters into multilateral agreements with other countries); *see also* Carolan, *supra* note 60, at 455 (stating that Taiwan has entered into multilateral agreements with numerous states); Chang, *supra* note 66, at 421 (explaining that Taiwan's government represents Taiwan in bilateral and multilateral treaties although Taiwan is not formally recognized as a state).

444. *See* Chen, *supra* note 32, at 227–28 (discussing Taiwan's qualifications for statehood); *see also* Zaid, *supra* note 193, at 806 (arguing that Taiwan possesses all the qualifications of statehood). *But see* Shen, *supra* note 323, at 1140 (concluding that Taiwan does not meet the standard for statehood).

445. *See* Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097 (1933) (listing the qualifications for statehood); *see also* Chen, *supra* note 32, at 228 (listing the four factors used in determining statehood). *But see* Shen, *supra* note 323, at 1140 (examining the four factors, applying them to Taiwan, and concluding that Taiwan does not meet the requirement for a state).

446. *See* Chen, *supra* note 32, at 226–27 (stating many states do not recognize Taiwan as a state); *see also* Lee, *supra* note 218, at 360 (listing the states that do not recognize Taiwan's sovereignty). *See generally* Attix, *supra* note 38, at 366 (noting that no countries have yet to recognize Taiwan as a state).

447. *See* Attix, *supra* note 38, at 379 (noting that recognition implies duties and obligations); *see* also Lee, *supra* note 18, at 382–83 (indicating that non-recognition makes it difficult for enforcement of rights and duties, but not impossible); Zaid, *supra* note 193, at 814 (explaining that Taiwan, even as an unrecognized state, accepts its share of international responsibilities).

448. *See* Attix, *supra* note 38, at 366 (explaining that "de facto states are those which meet the criteria for statehood despite lack of legal recognition by other states [and] [i]nternational law calls upon other nations to respect the rights of de facto states and, in return, expects de facto states to abide by the norms of international law"); *see also* Chang & Lim, *supra* note 66, at 421 (stating that some countries treat Taiwan as a de facto state so that Taiwan's rights and duties under international law are enforceable); Chen, *supra* note 32, at 228 (discussing Taiwan's status as a de facto state).

449. *See* Attix, *supra* note 38, at 382 (describing two particular types of agreements that Taiwan has established: airspace agreements and arms sales agreements); *see also* Chang & Lim, *supra* note 66, at 421 (stating that over ten countries have entered into commercial agreements with Taiwan); Chen, *supra* note 32, at 226–27 (noting that although many states do not recognize Taiwan officially as a state, they continue to trade with Taiwan).

These agreements, such as the airspace agreements,[450] illustrate the legal effect of sovereignty that implies the recognition of Taiwan's international status.[451] Under the Convention on International Civil Aviation, "every state has complete and exclusive sovereignty over that airspace above its territory."[452] States conclude agreements with Taiwan for the purpose of direct flights, instead of seeking the permission of the PRC.[453] This accurately indicates that states recognize the complete and exclusive sovereignty of the ROC over Taiwan's airspace.[454] It is strong evidence of the intent to recognize Taiwan as a state.[455] An example disregarding the legal consequence of non-recognition is the Taiwan Relations Act of 1979 (TRA),[456] ratified by the United States.[457] The United States switched its formal recognition from the ROC to the

450. *See* Attix, *supra* note 38, at 382–83 (indicating that Lebanon, the United Arab Emirates, Indonesia, Thailand, and the Philippines have entered into airspace agreements with Taiwan); *see also* Chang & Lim, *supra* note 66, at 421 (noting that Taiwan entered into airspace agreements with countries in the absence of diplomatic relations). *See generally* Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 61 Stat. 1180 (declaring that "every State has complete and exclusive sovereignty over that airspace above its territory").

451. *See* Attix, *supra* note 38, at 382–83 (commenting that directly making agreements with Taiwan and bypassing China shows that Taiwan is a sovereign state). *See generally* Chen, *supra* note 32, at 238–39 (discussing Taiwan's trade relations with the international community). *But see* Shen, *supra* note 323, at 1140 (arguing that Taiwan's international trade relations do not grant sovereignty).

452. *See* CONVENTION ON INTERNATIONAL CIVIL AVIATION, Dec. 7, 1944, art. 1, 61 Stat. 1180 (reciting the general principles and application of the convention); s*ee also* Attix, *supra* note 38, at 382 (noting that Taiwan can demonstrate that it is a sovereign state by directly making agreements with other countries and not having to go through China).

453. *See* Chang & Lim, *supra* note 66, at 420–21 (stating that over ten sovereign states have contracted with Taiwan for airspace and landing rights); *see also* Attix, *supra* note 38, at 382–83 (noting that some airlines offered direct flights); CONVENTION ON INTERNATIONAL CIVIL AVIATION, *supra* note 452 (establishing that "every State has complete and exclusive sovereignty over that airspace above its territory").

454. *See* Attix, *supra* note 38, at 382–83 (stating that an implication of the airspace agreements allowing for direct flights between Taiwan and other sovereign nations is an intention to recognize Taiwan as a sovereign state)*; see also* Charney & Prescott, *supra* note 49, at 463–66 (indicating that political and economic interaction with Taiwan indicates that other sovereign nations recognize the ROC's authority over Taiwan). *See generally* Lee, *supra* note 18, at 392 (examining the history of the Republic of China in Taiwan).

455. *See* Attix, *supra* note 38, at 382–83 (discussing that one result of the airspace agreements allowing for direct flights between Taiwan and other nations is recognition of Taiwan as a sovereign state). *See generally* Lung-chu Chen, *supra* note 275, at 680 (describing the United States policy objectives toward Taiwan and China). *But See* Shen, *supra* note 19, at 1117–25 (indicating the worldwide recognition of China and Taiwan as one sovereign entity under the PRC in addition to acknowledging the ROC's administrative role in Taiwan).

456. *See* Taiwan Relations Act of 1979, 22 U.S.C. §§ 3301–3316 (1979 & Supp. 1990); *see also* Exec. Order No. 13014, 61 Fed Reg. 42,963 (Aug. 15, 1996) (discussing the changes to the executive branch as a result of the Taiwan Relations Act); Murphy, *supra* note 424 at 629–30 (describing the Taiwan Relations Act and examining the motivations of the United States with regard to the act).

457. *See* Taiwan Relations Act of 1979, *supra* note 456; *see also* Glenn R. Butterton, *supra* note 20 at 60–61 (stating that the Taiwan Relations Act was adopted in 1979); James Lilley, *The United States, China, and Taiwan: A Future With Hope*, 32 NEW ENG. L. REV. 743, 743 (1998) (stating that the Taiwan Relations Act was adopted in 1979).

PRC on January 1, 1979,[458] and began official relations with Taiwan.[459] As Dr. Hungdah Chiu observed, "the effect of this legislation is to treat Taiwan as a state and its governing authorities there as a government,[460] despite the lack of formal recognition for the ROC on Taiwan."[461]

With the lack of effective control, the PRC's current claim to be the legitimate government of Taiwan is much more suspect in both international law and states' practices than the ROC's past claim to be the legitimate government of mainland China.[462] Although the majority of the people of Taiwan still appear to favor eventual reunification with mainland China,[463] they also desire a continuation of the status quo under the principle of sovereignty equality.[464] This principle of sovereignty equality cannot be changed with time or with the continued progress in cross-strait interactions between Taiwan and China.[465]

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458. *See* Chiang, *supra* note 41, at 976–79 (describing the Taiwan Relations Act in relation to the United States recognition of the PRC and ROC); *see also* Murphy, *supra* note 424 at 893–94 (discussing the United States' continuing relations with the ROC after formally recognizing the PRC as Taiwan's official government under the "one China" plan); Omar Saleem, *The Sparty Islands Dispute: China Defines the New Millennium*, 5 AM. U. INT'L L. REV. 527, 534–36 (2000) (examining United States recognition of China and Taiwan in relation to the Taiwan Relations Act of 1979).

459. *See* Chiang, *supra* note 41, at 976–79 (describing the United States relations with Taiwan); *see also* Attix, *supra* note 38, at 364–66 (stating that via the Taiwan Relations Act, the United States recognizes the PRC as the sovereign government but also pursues relations with Taiwan). *But see* Glenn R. Butterton, *supra* note 20 (examining United States treatment of Taiwan).

460. *See* Attix, *supra* note 38, at 364–66 (examining the implications of Taiwan's unofficial state status in relation to its trade partners); *see also* Stephen Lee, *American Policy Toward Taiwan: The Issue of the De Facto and De Jure Status of Taiwan and Sovereignty*, 2 BUFF. J. INT'L L. 323, 323–24 (1995) (discussing the dual nature of United States treatment of Taiwan in relation to state sovereignty); Murphy, *supra* note 424 at 629–30 (stating that as a result of the Taiwan Relations Act the United States treats Taiwan as a state, although not formally recognizing Taiwan as a sovereign state).

461. *See* Stephen Lee, *supra* note 460 at 323–24 (discussing United States treatment of Taiwan in relation to state sovereignty); *see also* Attix, *supra* note 38, at 381–82 (examining that the effect of the Taiwan Relations Act and the motivations of Taiwan's trade partners for not formally recognizing Taiwan's statehood).

462. *See* Chen, *supra* note 32, at 248–52 (stating that China's claim over Taiwan is not legitimate and favoring an independent Taiwan); *see also* Carolan, *supra* note 60, at 446–50 (discussing China's claim over Taiwan); Chiang, *supra* note 41, at 1002 (providing an overview of the history between Taiwan and China).

463. *See* Seth Faison, *New Goal in Taiwan: To Be Left Alone*, N.Y. TIMES, Aug. 9, 1999, at A6 (stating that public opinion is split as to the issues of reunification with China); *see also* Attix, *supra* note 38, at 370–79 (examining major political parties in Taiwan, their stance on reunification and the outcome of elections with relation to the issue of reunfication with China or independence for Taiwan). *See generally* Piero Tozzi, *Constitutional Reform on Taiwan: Fulfilling A Chinese Notion of Democratic Sovereignty?*, 64 FORDHAM L. REV. 1193, 1196 (1995) (reflecting on the Chinese political tradition in relation to Western traditions).

464. *See* Seth Faison, *supra* note 463, at A6 (stating that a majority of the Taiwanese public favors the status quo regarding relations with China); s*ee also* Geoffrey Barker, *Tension in Taiwan*, AUSTL. FIN. REV., Dec. 28, 2000, at 25 (stating that most of the Taiwanese public favors the status quo in terms of government); Clyde Haberman, *Independent Taiwan: Risky Idea May Be Gaining*, N.Y. TIMES, Jan. 18, 1988, at A3 (stating that most Taiwanese people would publicly embrace reunification although most desire a status quo approach to the governing of Taiwan).

465. *See* Charles R. Irish, *The International Status of Taiwan in the New World Order: Legal and Political Considerations*, 92 AM. J. INT'L L. 167, 169 (1998) (discussing the competition that may be encountered with the implementation of the "one country, two systems" model); *see also* Charney & Prescott, *supra* note 49, at 471 (2000) (discussing potential difficulties that Taiwan may experience by having two sovereign governments). *See generally* Michael C. Davis, *supra* note 295 (discussing the differences and potential conflicts that arose between the two systems after Hong Kong was transferred to China).

V. Commentary on "One Country, Two Systems" Model for Reunification Policy

Since 1997, Hong Kong has become a Special Administrative Region (SAR) of the People's Republic of China.[466] After assuming full sovereignty over Hong Kong[467] and Macau,[468] Beijing faced one remaining obstacle to its goal of national reunification.[469] This is known as the "Taiwan issue."[470] Since Beijing links the resolution of Hong Kong and the Taiwan issue,[471] the policy for Beijing to achieve peaceful reunification of mainland China and Taiwan

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466. *See 1984 Sino-British Joint Declaration on the Question of Hong Kong*, Sept. 26, 1984, Gr. Brit.-PRC, 23 INT'L LEGAL MAT. 1366; *see also* David Pannick, QC, *Hong Kong Silences the Echoes of a Long-Dead Empire*, TIMES (London), July 23, 2002, at Features/Law 4 (stating that Hong Kong became a Special Administrative Region of China in 1997); Daniel C. Turack, *The Projected Hong Kong Special Administrative Region Human Rights Record in the Post-British Era*, 31 AKRON L. REV. 77, 77–78 (1997) (stating that the People's Republic of China in 1997 resumed control over Hong Kong, which became a Special Administrative Region of China).

467. In the 1800s, the United Kingdom defeated China in the Opium War, and China consequently relinquished Hong Kong to the British. Hong Kong remained under the control of the United Kingdom until July 1, 1997. The 1984 joint declaration outlines the parties' plans for Hong Kong, plus, there are three annexes. Annex 1 contains 14 paragraphs specifying China's basic policy with respect to Hong Kong; annex 2 establishes a Sino-British liaison group to supervise transfer of sovereignty; annex 3 describes treatment of land leases in Hong Kong after 1997. *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, Gr. Brit.-PRC, 23 INT'L LEGAL MAT. 1366; *see also* Jonathan A. DeMella, *In Re Extradition of Lui Kin-Hong: Examining the Effect of Hong Kong's Reversion to the People's Republic of China on United States-United Kingdom Treaty Obligations*, 47 AM. U. L. REV. 187, 188 (1997) (stating that China became the sovereign over Hong Kong in 1997); Daniel C. Turack, *supra* note 466 at 77–78 (stating that the People's Republic of China in 1997 resumed control over Hong Kong, which became a Special Administrative Region of China, thus becoming the sovereign).

468. *See* Joint Declaration of the Government of the People's Republic of China and The Government of the Republic of Portugal on the Question of Macau, Apr. 13, 1987, PRC-Port., (agreeing to the transfer of control over Macau from Portugal to China), *available at*, http://www.imprensa.macau.gov.mo/dc/declconj e.htm (last visited Oct. 2002). *See generally* Frances M. Luke, *supra* note 36 (indicating that Macau was transferred to China in 1999); Ren Min, *Mocao in History of Chinese Territory*, 42 BEIJING REV. 51 (1999) (discussing the transfer of Macau from Portugal's control to China's control); Rui M. Ramos, *Conflicts of Law, Comparative Law and Civil Law: The Private International Rules of the New Special Administrative Region of Macau of the People's Republic of China*, 60 LA. L. REV. 1281, 1281 (2000) (stating that Macau was transferred to China's control in 1999).

469. *See* Michael R. Gordon, *Collision with China: The Issues; Dispute Grows Over Providing Arms to Taiwan*, N.Y. TIMES, Apr. 15, 2001, at 1 (noting that Taiwan was China's next target for reunification); *see also* Erik Eckholm, *The World: China's Own Witch Hunt*, N.Y. TIMES, Feb.27, 2000, at 4 (discussing China's goal of reunification with Taiwan after having gained control over Hong Kong and Macau). *See generally* Taiwan Affairs Office & Information Office of the State Council, *The One-China Principle and the Taiwan Issue*, Feb. 21, 2000 (discussing China's policy with regard to the reunification of China and Taiwan), *available at* www.nytimes.com/library/world/asia/022100china0taiwan-text.html (last visited Oct. 2002).

470. *See China's Statement: 'The Right to Resort to Any Necessary Means,'* N.Y. TIMES, Feb. 22, 2000, at A10 (identifying and discussing the "Taiwan issue"); *see also The One-China Principle and the Taiwan Issue*, *supra* note 469. *See generally* Edwards, *supra* note 33, at 756 (discussing the reunification of Hong Kong with China, indicating that China expects the Hong Kong reunification experience to be a model for the reunification of Taiwan and examining the likelihood of the reunification of Taiwan with China).

471. *See* Clyde A. Haulman, *The Future of Hong Kong: Hong Kong and the World: Asia-Pacific Economic Links and the Future of Hong Kong*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 155–56 (1996) (describing the interrelation between Hong Kong and Taiwan in terms of reunification with China); *see also* Vincent W. Lau, *supra* note 29, at 211–12 (noting the interrelation between the outcome of the reunification between Hong Kong and China and the potential for reunification between Taiwan and China). *See generally* Francis M. Luke, *supra* note 36, at 725–27 (indicating that China intended the "One-China" plan to be utilized for Taiwan but was implemented with Hong Kong and Macau also).

would be similar to the logic applied in Hong Kong, which is well known as "one country, two systems"(Hong Kong Model).[472] Thus, the success or failure of "one country, two systems" is critical to Beijing's reputation and its hope of creating a model to settle the Taiwan issue.[473] In this respect, Taiwan would, like Hong Kong, become a "special administrative region" under the authority of the PRC central government.[474] The PRC does not provide clear details of how this Hong Kong Model will work practically in the case of Taiwan.[475] It is understood that the result of negotiation between the PRC and the United Kingdom regarding the future of Hong Kong led the PRC to adopt the "one country, two systems" principle as the basis for regulating relations between Hong Kong and the PRC central government, following its resumption of sovereignty.[476] Accordingly, the PRC adopted the Basic Law of Hong Kong (hereinafter

472. *See* Frances M. Luke, *supra* note 36, at 725–27 (discussing the use of the "one country, two systems" policy in the reunification Macau and Hong Kong, and indicating China's intention to use the same plan for the reunification of Taiwan); *see also* Cooney, *supra* note 20, at 98–99 (examining the "one country, two systems" model as applied to Hong Kong and discussing the use of the plan in the reunification of Taiwan and China).

473. *See* Edwards, *supra* note 33, at 751–57 (describing the implementation of the "one country, two systems" model in Hong Kong, discussing the similarities and differences between the two locations and examining the likelihood of success of the model in Taiwan); *see also* Cooney, *supra* note 20, at 98–99 (examining the "one country, two systems" model as applied to Hong Kong and discussing the possible use of such a plan in Taiwan). *See generally*, Ming K. Chan, *The Future of Hong Kong: Colonial Legacy, Transformation, and Challenge,* ANNALS AM. ACAD. POL. & SOC. SCI. 11, 15–16 (1996) (discussing the "one country, two systems" model with regard to Hong Kong and indicating that Hong Kong was a testing ground for the model).

474. The "one country, two systems" model, as a proposed framework for the unification of Taiwan was recently reaffirmed by PRC President Jiang Zemin at the 15th Party Congress, at which he highlighted: "The concept of 'one country, two systems' is an important component of Deng Xiaoping theory. The basic idea is that on the premise of national reunification, the main part of China will stick to the socialist system while Taiwan, Hong Kong and Macau will retain the current capitalist system and way of life for a long time to come. This concept is the basic policy for promoting the great cause of the peaceful reunification of the Motherland, because it not only embodies the principled position of achieving national reunification and safeguarding state sovereignty, but also embodies a high degree of flexibility. The adoption of the policy of 'one country, two systems' is in the interest of the reunification of the Motherland and the reunification of the Chinese nation and conducive to world peace and development." For *Full Text of Jiang Zemin's Report at 15th Party Congress*, *see* XINHUA NEWS AGENCY, Sept. 21, 1997. *See also* Wang & Leung, *supra* note 366, at 281 (indicating that Taiwan would become a "special administrative region" like Hong Kong when China and Taiwan unify and explaining the nature of such a region); Judith R. Krebs, *One Country, Three Systems? Judicial Review In Macau After Ng Ka Ling*, 10 PAC. RIM L. & POL'Y 111, 111–12 (2000) (describing the People's Republic of China's "special administrative region" utilizing the examples of Macau and Hong Kong);

475. *See* Cooney, *supra* note 20, at 498–99 (stating that the PRC government has not yet released details as to the "one country, two systems" model planned for Taiwan). *See generally* Wang & Leung, *supra* note 366 (discussing the implementation of the one country/two systems model).

476. *See* Brian Tamanaha, *Post-1997 Hong Kong: A Comparative Study of the Meaning of High Degree of Autonomy*, 20 CAL. W. INT'L L.J. 41, 45 (1989) (stating that the people of Hong Kong were promised a high degree of autonomy in executive, legislative and judicial matters by the Chinese and British governments for 50 years); *see also* Ming K. Chan, *supra* note 473, at 15 (stating that as part of the Sino-British Declaration of 1984, China was required to allow Hong Kong's social and economic system to remain unchanged); Edwards, *supra* note 33, at 760 (indicating that the Sino-British Declaration of 1984 required China to adopt the "one country, two systems" model for Hong Kong in order to maintain certain freedoms for fifty years).

"Basic Law")[477] to apply in Hong Kong when Hong Kong returned to China.[478] The purpose of the Basic Law is to further guarantee autonomy and capitalism in Hong Kong after 1997.[479]

Under the Basic Law, Hong Kong would be permitted to enjoy a "high degree of autonomy"[480] in executive, legislative, and judicial matters,[481] and its capitalist way of life would be preserved for an indefinite period.[482] In the view of the 1993 White Paper, the central feature of the "one country, two systems" model for Taiwan suggested that the Taiwanese would enjoy greater autonomy than the people of Hong Kong in that Taiwan would retain its military, parties and political system after reunification.[483] Beijing has repeatedly stated that the basic principles of the Hong Kong Model are applicable to Taiwan since the fundamental concepts will

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477. *See* Daniel C. Turack, *supra* note 466, at 77–81 (discussing the implementation of the Basic Law in Hong Kong); *see also* Frances M. Luke, *supra* note 36, at 737–38 (examining the use of the Basic Law in Hong Kong).

478. *See* Peter H. Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 374–79 (2002) (describing the creation and development of the PRC's "basic law"); Luke, *supra* note 36, at 737–38 (examining the use of the Basic Law in Hong Kong). *See generally* Chan, *supra* note 473 (stating that the Basic Law was required to ensure "a high degree of autonomy" with regard to Hong Kong's local government).

479. *See* Patricia H. Palumbo, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997*, 6 CONN. J. INT'L L. 667, 669 (1991) (stating that the Sino-British Joint Declaration of 1984 guaranteed the people of Hong Kong no change in government for fifty years, thus making the locality autonomous); *see also* Yongping Xiao, *Comments on the Judgment on the Right of Abode by Hong Kong CFA*, 48 AM. J. COMP. L. 471, 474–76 (2000) (commenting on the Basic Law and indicating that the Basic Law ensures the autonomy of Hong Kong when it was reunited with China). *See generally* Chan, *supra* note 473 (stating that the Basic Law was required to ensure "a high degree of autonomy" with regard to Hong Kong's local government).

480. *See* Daniel D. Bradlow, *Hong Kong: Preserving Human Rights and the Rule of Law,* 12 AM. U.J. INT'L L. & POL'Y 361, 369 (1997) (indicating that due to the Sino-British Joint Declaration of 1984, Hong Kong was to be granted a "high degree of autonomy"); Ming K. Chan, *supra* note 473, at 16 (stating that the Basic Law was required to ensure "a high degree of autonomy" with regard to Hong Kong's local government). *See generally* Brian Tamanaha, *supra* note 476 (stating that the people of Hong Kong were promised a high degree of autonomy in executive, legislative and judicial matters by the Chinese and British governments for 50 years).

481. *See* Jonathan A. DeMella, *In Re Extradition of Lui Kin-Hong: Examining the Effects of Hong Kong's Reversion to the People's Republic of China on United States-United Kingdom Treaty Obligations*, 47 AM. U.L. REV. 187, 189 (1997) (noting the Chinese government granted Hong Kong with a high degree of executive, legislative, and judicial autonomy, including a court of final adjudication); Richard W. Mueller, *The Future of Hong Kong and the World: America's Long-Term Interest in Hong Kong*, 547 ANNALS 144 (1996) (stating that the social and economic systems and freedoms currently enjoyed by the Hong Kong people will remain unchanged); Kathleen Marie Whitney, *There is no Future for Refugees in Chinese Hong Kong*, 18 B.C. THIRD WORLD L.J. 1, 3 (1998) (noting that Hong Kong is vested with executive, legislative and independent judicial power).

482. *See* Di Jiang-Schuerger, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 J. MARSHALL L. REV. 1321, 1326 (1998) (noting that according to the 1987 Sino-British Joint Declaration, the people of Hong Kong have been promised both autonomy and capitalism for fifty years by Chinese and British governments); Donna Deese Skeen, *Can Capitalism Survive under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L LAW. 175, 179 (1995) (analyzing the legal duty the Joint Declaration created for China).

483. *See* George E. Edwards, *Applicability of the "One Country Two Systems" Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China*, 32 NEW ENG. L. REV. 751, n.13 (1998) (noting that "Taiwan would have a high degree of autonomy, and will operate 'its own party, political, military, economic and financial affairs'"); *see also* Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's "One Country, Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y J. 497, 502 (1997) (noting that Taiwan will run its own party, political, military, economic and financial affairs).

be the same as in the case of Hong Kong.[484] Therefore, the Hong Kong experience of the "one country, two systems" model is viewed as having great significance for Taiwan.[485] As the Hong Kong model is based on the premise that Hong Kong is part of the PRC,[486] an analysis of the Hong Kong Model would indicate some important differences between the application of this model to Taiwan and Hong Kong.[487]

Generally speaking, the original logic applying the Hong Kong Model to the case of Taiwan comes from the 1993 White Paper.[488] Beijing claims that there is only one China,[489] of which Taiwan is part,[490] and the central government is in Beijing.[491] The authorities in Taipei, therefore, are not a legitimate government of China;[492] rather, the authorities in Beijing are the sole legitimate government of China.[493] The argument is that the imposition of this "one country two systems" model on Taiwan would radically reduce the degree of autonomy and accountability which currently exists in the Taiwanese political system.[494] This is because the authorities in Taipei, who describe themselves as the government of the Republic of China,[495] have continuously been a sovereign state since 1912.[496] The Hong Kong model would pull Tai-

484. *See* Cooney, *supra* note 483, at 504 (describing all the basic principles that are applicable); *see also* Xiaobing Xu & George D. Wilson, *The Hong Kong Special Administrative Region As A Model of Regional External Autonomy*, 32 CASE W. RES. J. INT'L L. 1, 2 (2000).

485. *See* Cooney, *supra* note 483, at 504 (describing how the "One Country, Two Systems" model is important for Taiwan).

486. *See* Daniel C. Turack, *The Projected Hong Kong Special Administrative Region Human Rights Record In The Post-British Era*, 31 AKRON L. REV. 77, 77 (1997) (citing the Joint Declaration regarding basic Chinese policy). See generally *A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Peoples Republic of China on the Future of Hong Kong* 23 INT'L. LEGAL MAT. 1366 (1984) (outlining the process for the transfer of Taiwan).

487. *See* Edwards, *supra* note 483, at 751 (stating that Taiwan maintains that differences render the Hong Kong model inapplicable to Taiwan); Cooney, *supra* note 483, at 499 (noting that the People's Republic of China has indicated some important differences between the application of the One Country, Two Systems (OCTS) in Taiwan and Hong Kong); *see also* Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, n.266 (indicating the differences between leaders in China and Taiwan over their unification plans).

488. *See* Carolan, *supra* note 60, at 435 (noting that the Chinese White Paper on cross-strait relations, *The Taiwan Question and Reunification of China* (Aug. 1993), is the "White Paper"); s*ee also* Taiwan Affairs Office & Information Office of the State Council, THE WHITE PAPER (Feb. 22, 2000) (providing the entire White Paper for review), *available at* http://www.chinadaily.com.cn/highlights/taiwan/whitepaper.html.

489. *See* Cooney, *supra* note 483, at 503 (describing how there is only one China, of which Taiwan is a part); *see also* Wang & Leung, *supra* note 366 (stating the philosophy of OCTS).

490. *See* Taiwan Affairs Office & Information Office of the State Council, *supra* note 488 (noting that Taiwan is independent of China, having achieved economic and governmental autonomy despite Beijing's efforts to the contrary).

491. *See* Taiwan Affairs Office & Information Office of the State Council, *supra* note 488 (discussing the government structure of Beijing).

492. *See* Cooney, *supra* note 483, at 505 (describing how "the central government of China is in Beijing and the 'authorities in Taipei' are therefore not a legitimate government of China").

493. *Id*.

494. *See generally id*.

495. *See* Chang & Lim, *supra* note 66, at 393 n.1 (noting that the terms "Kuomintang," "Nationalist government," and "Republic of China" are used interchangeably in this article to describe the Kuomintang government in Taipei); Chen-Fu Lee, *supra* note 289, at 695 (noting that the Kuomintang (KMT) government of the Republic of China (ROC) fled the mainland to Taipei and re-established its government seat). *See generally* Cooney, *supra* note 483, at 505 (generally discussing the government structure).

496. *See* Zaid, *supra* note 193, n.12 (noting that Taipei considers "one China" to mean the Republic of China (ROC), founded in 1912 with sovereignty over all of China).

wan back from the cusp of independence and then take a significant amount of time to re-establish the status quo if Taiwan found this arrangement unacceptable.[497] This is especially true since China is presently divided into two areas under two political entities: the ROC and the PRC, each having exclusive rights in the territory under its control.[498]

In spite of the fact that the government system of Hong Kong was reformed during the 1980s and early 1990s,[499] the changes in Hong Kong have not been as fundamental as those in Taiwan.[500] In the wake of political liberation, the reform of the constitutional system in Taiwan has transformed Taiwan into a full-fledged democratic government.[501] Since the elections of 1996, the President of the ROC has been directly elected by universal suffrage.[502] The Premier, although not directly elected, is appointed by the President with the consent of the Legislative Yuan,[503] which is also directly elected by the people.[504] In contrast, the people of Hong Kong enjoyed limited autonomy under British rule as a creation of the British authorities, not the people of British colonial Hong Kong.[505] The people of Hong Kong were largely denied the

497. *See* Paul R. Williams, *supra* note 356, at 802 (discussing how Taiwan may continue to expand its international space and request independence from other states).

498. *See* Chiang, *supra* note 41, at 974 (stating that "[t]he two governments, the PRC government and the ROC government, have coexisted since 1949. While the former controls the Mainland Chinese territory, the latter controls the island of Taiwan"); Charles Irish, *The International Status of Taiwan in the New World Order: Legal and Political Considerations*, 92 AM. J. INT'L L. 167, 168 (1998) (noting that the ROC government's claim to be the legitimate government of mainland China and the People's Republic of China (PRC) government's claim to be the legitimate government of Taiwan seem much more suspect in both international law and international politics).

499. *See* Cooney, *supra* note 483, at 509 (noting that the governmental systems of both regions were reformed during the 1980s and early 1990s); *see also* Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 314 n.37 (1996) (noting that in 1991 the legislative body in Hong Kong was reformed so that more members were directly elected by the population of Hong Kong).

500. *See* Cooney, *supra* note 483, at 510 (noting that "[t]he governmental systems of both regions were reformed during the 1980s and early 1990s; in Hong Kong, the change has been significant, but not fundamental"); Anna M. Han, *China's Company Law: Practicing Capitalism in a Transitional Economy*, 5 PAC. RIM L. & POL'Y 457, n.12 (1996) (noting that some scholars have suggested that any social reform to accommodate a change to a market system requires a more fundamental change).

501. *See* Cooney, *supra* note 483, at 518 (noting that the system of government in Taiwan changed from an authoritarian regime to a liberal democratic state); Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 113 (1998) (stating that Taiwan has openly adopted a multiparty democratic political system with substantial constitutional commitments); Puder, *supra* note 324, at 507 (observing that the Democratic Progressive Party in Taiwan "has placed Taiwanese independence at the top of its agenda").

502. *See* Cooney, *supra* note 483, at 518 (describing how "[a]ll members of the National Assembly are now elected for four year terms in competitive elections . . . representing Chinese abroad, National Assembly members are Taiwanese people elected in Taiwan under universal suffrage").

503. *See* Cooney, *supra* note 483, at 522 (noting that the Premier, or the "President of the Executive Yuan" is appointed by the President).

504. *See* Cooney, *supra* note 483, at 520–21 (noting that National Assembly members are Taiwanese people elected in Taiwan under universal suffrage).

505. *See* Cooney, *supra* note 483, at 497 (noting that the fundamental purpose of the Hong Kong formal constitution was to announce and preserve control over the British colony by metropolitan power); *see also* Xu & Wilson, *supra* note 484, at 2 (noting that the people were entitled to British-type institutions like, a legislature, executive government, and a court system).

right to enjoy the power to determine the constitutional structure of Hong Kong.[506] This denial culminated in the agreement of the United Kingdom to return Hong Kong to China without first obtaining the consent of the people of Hong Kong[507] and without their agreement to the terms upon which the return would occur.[508] It is believed that Hong Kong has never experienced a system of self-governance.[509] What is so clear in this connection is that the formal constitution of Taiwan had little in common with that of Hong Kong.[510]

Notably, the authorities of both Taipei and Beijing officially consider Taiwan to be part of a united China.[511] The two sides only disagree as to who should control this unified China and on what political principle it should be unified.[512] This concept of a united China is essentially a modern notion.[513] However, the "one country, two systems" has been predicated on the sub-

506. *See* Cooney, *supra* note 483, at 532 (describing how "the transfer of ultimate authority over constitutional matters to the NPC denies the Taiwanese the right they currently enjoy to conclusively determine their governmental framework"); DeMella, *supra* note 481, at 187 (noting that Hong Kong's citizens live in a framework of law and justice without economic, social, or political repression).

507. *See generally* Shawn B. Jensen, *International Agreements Between the United States and Hong Kong Under the United States-Hong Kong Policy Act*, 7 TEMP. INT'L & COMP. L.J. 167, 167–71 (1993) (discussing the background relating to the nature of these negotiations and Hong Kong's peculiar history leading to its reversion to the People's Republic of China).

508. *See* NIHAL JAYAWICKRAMA, THE RIGHT OF SELF-DETERMINATION IN HONG KONG'S BASIC LAW: PROBLEMS AND PROSPECTS (Peter Wesley-Smith ed., 1990) (discussing how the treaties under which the United Kingdom ruled Hong Kong were certainly as valid as every treaty under which the United Kingdom ruled states in Africa or Asia).

509. *See* Charney & Prescott, *supra* note 49, at 475 (noting that Taiwan's history of self-governance is a factor that distinguishes it from Hong Kong); *see also* Guo-cang Huan, *The Future of Taiwan: A View From Beijing*, FOREIGN AFFAIRS, Summer 1985, 475 (explaining that Hong Kong differs from Taiwan because it has not experienced self-governance); Edwards, *supra* note 33, at 753–54 (noting that even under Hong Kong's new form of government there is no accountability and the people were not free to choose or elect their leaders).

510. *See* Cooney, *supra* note 20, at 510 (asserting that the constitution of Taiwan has always had little in common with the constitution of Hong Kong); *see also* Attix, *supra* note 38, at 367–68 (noting that the constitution of Taiwan provides for a democratic government, dissimilar to Hong Kong's lack of self-governance). *See generally* George E. Edwards, *supra* note 33, at 753–54 (recognizing the historical difference in the political systems of Taiwan and Hong Kong).

511. *See* Glenn R. Butterton, *supra* note 20, at 70 (noting that Beijing considers Taiwan to be a part of China and feels that it can exercise governmental power over Taiwan); *see also* Cooney, *supra* note 20, at 503 (stating that the PRC considers Taiwan as a part of mainland China and has never recognized the Republic of China); Christopher C. Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan*, 32 NEW ENG. L. REV. 819, 823 (1998) (asserting that Taiwan recognizes the government in Beijing and formally adopts the position that there is one China in which Taiwan is included).

512. *See* Michael C. Davis, *The Concept of Statehood and the Status of Taiwan*, 4 J. CHINESE L. 135, 135 (1990) (asserting that the governments' of Taiwan and the People's Republic of China do not agree on who should control a united China); *see also* Lee, *supra* note 218, at 353–54 (noting that both the PRC and the ROC each claim to control the state of China); Puder, *supra* note 324, at 507 (asserting that the People's Republic of China believes that Taiwan is part of the state of China and that the PRC has control over that state).

513. *See* Michael C. Davis, *supra* note 512, at 135 (noting that a united China is a contemporary idea); *see also* Attix, *supra* note 38, at 371–72 (asserting that the current position of Taiwan is that it desires to be part of a united China); Gary Klintworth, *China and Taiwan—From Flashpoint to Redefining One China* (Nov. 7, 2000) (explaining that Beijing's recent position is that it desires a unified state and it feels that Taiwan has no future separate from a unified China), *available at* http://www.aph.gov.au/library/pubs/rp/2000-01/01RP15.htm#back.

ordination of the people of Taiwan, like Hong Kong, to the central government of the PRC.[514] The relationship between the people of Taiwan and their government can no longer be characterized as subordination.[515] The continuity in the nature of government achieved in Hong Kong is not possible in Taiwan.[516]

As mentioned above, in contrast to the rest of China, the Hong Kong model practices a capitalist, rather than a socialist, economic system.[517] Under the Basic Law, the people of Hong Kong can exercise a high degree of autonomy that includes executive, legislative and independent judicial power.[518] This means the region of Hong Kong has its own currency,[519] is a sepa-

514. *See* Cooney, *supra* note 20, at 523–24 (asserting that, under the same plan developed for reunification of Taiwan, the people of Hong Kong have had no autonomy and have been subject to the control of the PRC); *see also* Davis, *supra* note 512, at 137 (stating that the plan the PRC has for Taiwan's reunification is similar to the plan that was established for Hong Kong, and is based upon the subordination of the people of Taiwan to the PRC). *See generally* Wing Tat Lee, *Mixing River Water and Well Water: The Harmonization of Hong Kong and PRC Law*, 30 LOY. U. CHI. L. J. 627 (1999) (explaining how the Basic Law of Hong Kong subordinates the people to the central government of the PRC).

515. *See* Cooney, *supra* note 20, at 518 (noting that Taiwan's government has been transformed into a democracy); *see also* Charney & Prescott, *supra* note 49, at 477 (asserting that the government of Taiwan is now a democracy). *See generally* Mangelson, *supra* note 367, at 231 (stating that Hong Kong differs from Taiwan because it has never experienced a form of self-government).

516. *See generally* Rong-Chwan Chen, *supra* note 18, at 599–600 (asserting that the government of the people of Hong Kong did not experience a change when control was passed from Great Britain to the People's Republic of China; they have not yet experienced a form of self-government, since control has just been passed form one hand to another); Cooney, *supra* note 20, at 500 (noting that the governmental system in Taiwan is no longer similar to that of Hong Kong while under British rule, and that the one country, two systems plan is no longer relevant for Taiwan because of this change in political power); Harris, *supra* note 32, at 355 (stating that the model of reunification for Hong Kong is inapplicable to Taiwan because Taiwan has changed its government by developing a constitution and national laws).

517. *See* Peter Wesley-Smith, *The Future of Hong Kong: Hong Kong Institutions: Law in Hong Kong and China: The Meshing of Systems*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 107 (1996) (asserting that China and Hong Kong have different economic systems, socialist and capitalist, respectively); *see also* John H. Henderson, Note, *The Reintegration of Hong Kong into the People's Republic of China: What it Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 525 (1995) (explaining that Hong Kong retains its economic system, practicing capitalism rather than Chinese socialism); Luke, *supra* note 36, at 736 (noting that, under the Joint Declaration, Hong Kong retains a capitalist economy).

518. *See* Edwards, *supra* note 33, at 763 (asserting that Hong Kong has a special administrative region through which it will exercise independent executive, legislative and judicial power); *see also* Joseph R. Crowley, *One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1, 10 (1999) (noting that Hong Kong is authorized to have executive, legislative and independent judicial power through the Basic Law); Donna Deese Skeen, Comment, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L LAW. 175, 180 (1995) (explaining that Hong Kong has executive, legislative and independent judicial powers under the Joint Resolution with China).

519. *See* Benjamin L. Liebman, *Autonomy Through Separation? Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L.J. 231, 235 (1998) (asserting that Hong Kong is financially independent and maintains its own currency); *see also* Henderson, *supra* note 518, at 526 (noting that Hong Kong maintains its own currency under the Joint Declaration); Peter K. Yu, *Succession By Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 73 (1999) (explaining that one of Hong Kong's fundamental governmental functions is to maintain its own freely convertible currency).

rate customs territory,[520] issues its own passports,[521] and maintains its own educational system.[522] Still, it can retain its economic and cultural relations with foreign countries under the name "Hong Kong, China."[523] If these provisions were applied to Taiwan, its people could clearly, on one level, continue to enjoy control over many aspects of their social, economic, legal and political life.[524] Reunification on these terms might, in fact, lead to relatively little surface change. Yet, other provisions in the Basic Law indicate that, in constitutional terms, reunification on the PRC's terms would significantly reduce Taiwan's autonomy.[525] For example, Taiwan cannot represent itself on an equal footing with the PRC in international affairs.[526]

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520. *See* Joseph T. Kennedy, Note, *The New Chinese Revolution: Hong Kong's Insurance Against Chinese Non-Compliance with the 1984 Joint Declaration*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 83, 88 (1994) (noting that under the Joint Declaration, Hong Kong is a separate customs territory, as part of the plan to maintain Hong Kong's economy); *see also* Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong Kong and Taiwan*, 20 NW. J. INT'L L. & BUS. 1, 38 (1999) (asserting that Hong Kong remains a separate customs territory under the "one country, two systems" plan); J.F. Matthews, *The Legal System of the Hong Kong Special Administrative Region*, 18 U. PA. J. INT'L ECON. L. 3, 5 (1997) (explaining that part of Hong Kong's autonomy is maintaining the status of a separate customs territory).

521. *See* Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105, 108 (1992) (noting that Hong Kong's Special Administrative Region has the power to issue its own passports); *see also* Liebman, *supra* note 519, at 236 (asserting that under the Basic Law, Hong Kong has the right to issue its own passports); Erik Alexander Rapoport, Comment, *Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997?*, 4 ASIAN L. J. 135, 148–49 (1997) (stating that one of the powers of the Hong Kong Special Administrative Region is to issue its own passports).

522. *See* Roda Mushkat, *supra* note 521, at 132–33 (noting that the education system that was previously in place in Hong Kong shall remain in place under the Hong Kong Special Administrative Region); *see also* Vincent W. Lau, *supra* note 29, at 188 (stating that under the Basic Law, Hong Kong has control over the education system); Legislation & Regulations, *People's Republic of China: The Basic Law of The Hong Kong Special Administrative Region of the People's Republic*, 29 INT'L LEGAL MAT. 1519, 1541 (1990) (asserting that the government of Hong Kong will have control over the educational system and policies).

523. *See* Michael Dardzinski, *Hong Kong in Transition: Convergence or Divergence in the Implementation of the Joint Declaration*, 91 AM. SOC. INT'L PROC. 176, 194 (1997) (noting that under the Basic Law, Hong Kong can use the name "Hong Kong, China" to conduct and maintain foreign relations); *see also* Shawn B. Jensen, *International Agreements Between the United States and Hong Kong Under the United States-Hong Kong Policy Act*, 7 TEMP. INT'L & COMP. L.J. 167, 173 (1993) (stating that the Joint Declaration gives Hong Kong the power to form international agreements under the name "Hong Kong, China"); Vincent W. Lau, *supra* note 29, at 193 n.49 (asserting that the Basic Law allows Hong Kong to maintain commercial and economic relations under the name "Hong Kong, China").

524. *See* Cooney, *supra* note 20, at 527 (asserting that if the plan for Hong Kong were applied to Taiwan, the people there may be able to enjoy freedoms they have been enjoying thus far); *see also* Zhengyuan Fu, *supra* note 359, at 349–50 (stating that if the provision to maintain Hong Kong's autonomy under the one country, two systems plan allows democracy to remain, Taiwan may also be able to experience the same autonomy); Xiao Weiyun, *A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law*, 2 J. CHINESE L. 95, 97 (1988) (noting that Taiwan may be able to enjoy autonomy as a Special Administrative Region, like Hong Kong).

525. *See* Vincent W. Lau, *supra* note 29, at 221 (noting that despite promises of autonomy from the PRC, when independence has been exercised by Taiwan, the PRC has reacted with their military, threatening the same autonomy they had promised); *see also* Mangelson, *supra* note 367, at 242 (stating that since Taiwan is now a self-governing entity, reunification with mainland China could promise nothing but a threat to Taiwan's sovereignty). *See generally* Kevin M. Harris, *supra* note 32, at 358 (asserting that agreements with the mainland government could only compromise the stability and independence the people of Taiwan have achieved).

526. *See* Zaid, *supra* note 193, at 807 (noting that mainland China has such a great deal of influence that Taiwan's international status is not secure despite its good economic position); *see also* Lung-chu Chen, *supra* note 313, at 676 (stating that despite Taiwan's achievement of sovereignty and independence it has not secured a place in the international legal arena due to the vehement objections of mainland China). *See generally* Cooney, *supra* note 20, (asserting that the PRC wants to make Taiwan a Special Administrative Unit so they will not have any inherent power to exercise, thus removing them from the international arena).

Article 68 of the Basic Law provides guidelines for elections to the Hong Kong Special Administrative Region (HKSAR) Legislative Council, as follows:

> The Legislative Council of the HKSAR shall be constituted by election.
>
> The method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II, which provides 'an electorate formula for the first Legislative Council of the HKSAR. This formula, which is not dissimilar to that used in the 1995 Legislative Council elections, provides that the Legislative Council shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies.' [527]

Thus, it is understood that the legislative powers, even the executive powers, in Hong Kong are not fully and directly accountable to the people of Hong Kong,[528] nor is the Chief Executive directly elected by the people of Hong Kong.[529] This is because, without directly and fully reflecting the will of the people of Hong Kong, the Basic Law does not promise immediate universal suffrage by using the proportional representation list system.[530] Instead, it decreases

527. *See generally* Albert H. Y. Chen, *The Basic Law Legal Preparation for the Establishment of the HKSAR: Chronology and Selected Documents*, 27 HONG KONG L.J. 405, 414–15 (1997) (stating that the legislative electoral process cannot contravene the Basic Law and special provisions will guide elections in the HKSAR); Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667, 669 (1991) (asserting that the people of Hong Kong will only be able to directly elect a small portion of the legislature while the executive branch retains the rest of the electoral vote); Wang & Leung, *supra* note 366, at 320 (asserting that through the Basic Law's prescriptions for the electoral process, universal suffrage will be achieved as a method of electing the legislature).

528. *See* Edwards, *supra* note 33, at 767–68 (asserting that the legislative and executive powers in Hong Kong are not accountable to the people because they are not directly elected by the people, nor do they act autonomously); *see also* Palumbo, *supra* note 527, at 703 (stating that the people of Hong Kong have very little voting power in electing the legislature, and the executive branch is directly accountable to the PRC). *See generally* Mushkat, *supra* note 521, at 135 (noting that Hong Kong does not enjoy a high degree of autonomy because the people have little power over the legislative process).

529. *See* Xiao Weiyun, *A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law*, 2 J. CHINESE L. 95, 103 (1988) (noting that the first chief executive of the SAR was not directly elected by the people of Hong Kong despite provisions for such within the Joint Declaration). *See generally* Thomas M. H. Chan, *The Political Organization of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 115, 119 (1988) (stating that the government of Hong Kong SAR uses only a form of local election and would rather find a way to directly appoint its leaders to their positions without contravening the constitution); Edwards, *supra* note 33, at 767–68 (arguing that what the Hong Kong model provides is not a high degree of autonomy, because this system was not accountable to the people of Hong Kong, and that "accountability" should be defined as the extent to which Hong Kong government officials and the Legislative Council were selected by, responsible to, and answerable to the people of Hong Kong).

530. *See* Kathleen Marie Whitney, *There is No Future for Refugees in Chinese Hong Kong*, 18 B. C. THIRD WORLD L.J. 1, 36 (1998) (noting that under the election law's proportional representation system, legislative seats will only be voted for by corporations rather than following a universal suffrage procedure). *See generally* Lau, *supra* note 29, at 208–09 (asserting that the Basic Law allows for universal suffrage but actions by Hong Kong officials to achieve this status were thwarted by the PRC); Mushkat, *supra* note 521, at 280 (stating that the proportional representation system's process for elections only works to diminish any democracy that has been achieved).

Hong Kong's autonomy, as universal suffrage is only the "ultimate aim."[531] It is clear that the right of the people of Hong Kong to universal suffrage is in accord with both international covenants on human rights,[532] such as the Covenant on Civil and Political Rights,[533] and the Covenant on Economic, Social and Cultural Rights.[534] These covenants apply to Hong Kong by virtue of having been ratified by the United Kingdom[535] and were extended to protect Hong Kong people in 1976.[536] In this respect, the fundamental concept of the Basic Law is not a state

531. *See* Vachon, *supra* note 126, at 108–10 (asserting that the Basic Law states that universal suffrage is the ultimate goal but the Law also allows Hong Kong to be manipulated out of its autonomy since any laws effective in Hong Kong must comply with the Basic Law, and China has the power to decide what does and does not comply); *see also* Davis, *supra* note 295, at 279–80 (noting that although the Basic Law states universal suffrage as the ultimate aim, in order for it to occur there must be a two-thirds vote to approve it along with other provisions in the Basic Law that must be met first). *See generally* deLisle & Lane, *supra* note 354, at 125 (stating that the Basic Law makes universal suffrage the goal but steps to achieve this have been slowed by the Chinese government).

532. *See* Yu Ping, *Will Hong Kong Be Successfully Integrated Into China: A Human Rights Perspective* 30 VAND. J. TRANSNAT'L L. 675, 681–82 (1997) (asserting that Hong Kong citizens had not enjoyed the human rights they should have under British rule despite the ICCPR as a guideline for such rights); *see also* Cheryl K. Moralez, *Seizing the Opportunity: Participating in the Fifth Periodic Report of the Hong Kong Special Administrative Region Before the U.N. Human Rights Committee*, 4 DEPAUL INT'L L.J. 175, 176 (2000) (noting that Hong Kong should have been enjoying human rights under the ICCPR, and both the U.N. Committee on Human Rights and Hong Kong NGOs were concerned that they were not having their human rights protected); Peter K. Yu, *Succession By Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 62 n.40 (1999) (stating that the British failed to include Hong Kong in any international human rights agreements that would provide them with protection against abuses that other British territories had available).

533. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 993 U.N.T.S. 171, art. 40 (1966) (noting that participating countries shall have access to the U.N. Human Rights Committee as an international monitoring body for human rights abuses); *see also* Ali Kahn, *A Theory of Universal Democracy*, 16 WIS. INT'L L.J. 61, 74 n.41 (1997) (stating that Hong Kong is pre-committed to the ICCPR due to British ratification of the agreement while Hong Kong was under their rule); Vachon, *supra* note 126, at 108–10 (asserting that under the Basic Law the ICCPR shall remain effective in regard to Hong Kong following its transition into a Special Administrative Region).

534. *See* INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993. U.N.T.S. 3, art. 22 (1966) (asserting that human rights in participating countries will be subject to review by certain committees of the United Nations, such as the U.N. Treaty Bodies, to ensure protection of human rights in international agreements); *see also* Bradlow, *supra* note 480, at 412 (noting that the ICESCR was applicable to Hong Kong due to British ratification of the covenant during the time in which Hong Kong was one of its territories); Ping, *supra* note 532, at 690–91 (stating that Hong Kong is a party to the ICESCR due to British ratification of the covenant while Hong Kong was a British territory, and that the covenant is still applicable to Hong Kong under the Basic Law).

535. *See* Joseph R. Crowley, *supra* note 518, at 74 (noting that international covenants are still applicable to Hong Kong, as a result of British ratification during the time Hong Kong was a British territory; it is both through China's express agreement in the Basic Law and international law norms that these covenants survive sovereignty); *see also* Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 385 (1992) (asserting that human rights covenants were ratified by Britain, effectively applying them to all dependent territories of Britain); Turack, *supra* note 466, at 82 (stating that the United Kingdom's ratification of international human rights covenants made them applicable to their territories, including Hong Kong).

536. *See* Carole J. Petersen, *Values In Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L. REV. 337, 345–46 (1997) (asserting that international human rights covenants applied to Hong Kong as per British ratification in 1976); *see also* George E. Edwards, *supra* note 33, at 772–73 (stating that human rights covenants were extended to protect the people of Hong Kong following British ratification in 1976). *See generally* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination?*, 46 U. KAN. L. REV. 283, 287 (1998) (stating that British ratifications of human rights covenants were important to protect the people of Hong Kong as a territory).

in a federal system, but rather a "local government" directly under the authority of the PRC.[537] Hence, under the similar logic of the Basic Law system, Taiwan clearly has no sovereignty of its own[538] and thus, the people of Taiwan are subject to PRC rule whether or not they so choose.[539] As a result, neither the Basic Law nor any other PRC legislation gives the people of Taiwan the right to secede should they express such a desire,[540] for instance, through a referendum.[541] Simultaneously, it is difficult to see how the PRC government could allow a situation to occur in which the head of the Taiwanese administration is a person who was both popularly elected and actively denounced communism and the central government. [542]

Regardless of the fact that Hong Kong's constitutional changes required for Basic Law to become operational were made by the British and PRC governments,[543] rather than by the

537. *See* Emily Johnson Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT'L L.J. 361, 370 (2002) (stipulating that under the Basic Law, the PRC would take control of the region but Hong Kong would maintain a degree of autonomy); *see also* Tahirih V. Lee, *"Apres Moi Le Deluge"? Judicial Review in Hong Kong Since Britain Relinquished Sovereignty*, 11 IND. INT'L & COMP. L. REV. 319, 362 (2001) (referring to the courts of Hong Kong as "regional courts" within the Chinese system); Wang & Leung, *supra* note 366, at 296 (holding that the Basic Law will never be equal to the PRC government).

538. *See* Cooney, *supra* note 20 (discussing the differences between Hong Kong and Taiwan and how neither has sovereignty from China); *see also* Shauna Emmons, *Comment: Freedom of Speech in China: Possibility or a Prohibition*, 23 LOY. L.A. INT'L & COMP. L. REV. 249, 285 (2001) (calling the Basic Law of Hong Kong a quasi-constitution because it is really a part of the larger PRC Constitution); Liebman, *supra* note 519, at 232 (asserting that the Basic Law of Hong Kong does not provide for its sovereignty and hence does not provide for the sovereignty of Taiwan).

539. *See* Cooney, *supra* note 20 (asserting that the people of Taiwan must accept PRC rule under the existing governmental regime). *See generally* Emmons, *supra* note 538 (describing the rule by the PRC over the people of Hong Kong and by analogy the people of Taiwan); Randall Peerenboom, *Let One Hundered Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471 (2002) (analyzing Hong Kong's reversion to PRC control and the rule of law still enjoyed after its change of government).

540. *See* Shen, *supra* note 19, at 1104 (stating that nothing short of the mandate of the Chinese government can give Taiwan the right to secede); *see also* Carolan, *supra* note 60, at 463 (asserting that Taiwan cannot secede from the PRC because it is already a separate entity); Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, 36 STAN. J. INT'L L. 253, 261 (2000) (holding that China does not recognize Taiwan as a state in secession even though the countries have a separate currency and legal order).

541. *See* Wei, *supra* note 37, at 1172 (asserting that a referendum has no basis in the Tiawanese quest for independence); *see also* Thomas D. Grant, *supra* note 195, at 139 (analyzing the emergence of independent states in Russia and the role referenda played in their inceptions). *See generally* William J. Dodge, Comment, *Succeeding in Seceding? Internationalizing the Quebec Secession Referendums Under NAFTA It Is Proposed that Quebec Become A Sovereign Country Through the Democratic Process*, 34 TEX. INT'L L.J. 287, 290–91 (1999) (discussing Quebec's independence movement and the referendums that helped move the process forward).

542. *See generally* Emily Johnson Barton, *supra* note 537 (stating that many in Hong Kong felt that the change to PRC rule would bring strict limitations on the people and government of their country); Karmen Kam, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. the Sovereignty Interests of China*, 27 BROOK. J. INT'L L. 611 (2002) (analyzing the transfer of government in Hong Kong and the problems it has had on the leadership of the country).

543. *See* Emily Johnson Barton, *supra* note 537, at 370 (discussing the joint declaration that passed Hong Kong from Britain to the PRC and the inception of the "Basic Law" on the region); *see also* Marsha Wellknown Yee, *supra* note 28, at 1377 (stating that the governments of Britain and the PRC established the Basic Law in a joint declaration ratified in 1984). *See generally* Kam, *supra* note 542 (analyzing the PRC government and its inception of the Basic Law in Hong Kong).

consent of the people of Hong Kong,[544] the position of Hong Kong is based on the Sino-British Joint Declaration.[545] It is an international agreement similar to a treaty under international law and should be accorded the same treatment as a treaty.[546] It has binding effect on China under international law.[547] By contrast, in the case of Taiwan, there would be no international restraint on the PRC amending a Basic Law of Taiwan.[548] Accordingly, if a Basic Law of Taiwan is to be implemented in accordance with the above existing procedures in Hong Kong, then it is feasible that the ROC Constitution would be altered in order to maintain a unitary system under the concept of the "one country, two systems" model.[549] In this logic, to surrender all control over the political structure of Taiwan to the authorities of Beijing is definitively the only result that is without any consideration for the will of the people of Taiwan.[550] Obviously, Taiwan will never settle for anything less than full democracy.[551]

A fundamental reason why the "one country, two systems" model cannot be feasibly implemented in Taiwan has been identified, and there cannot be a feasible plan for the peaceful

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544. *See* Vachon, *supra* note 126 (discussing the Basic Law and the PRC government's role in its inception); *see also Report of the Joseph R. Crowley Program, One Country, Two Legal Systems?,* 23 FORDHAM INT'L L.J. 1, 2 (1999) (asserting that the Basic Law is Hong Kong's constitution within the PRC). *See generally* Kam, *supra* note 542, at 615 (discussing how the British and PRC governments governed Hong Kong and created the Basic Law).

545. *See* Kam, *supra* note 542, at 615 (analyzing the "one country, two systems" principle utilized in Hong Kong); *see also* Friedman, *supra* note 368, at 71 (asserting that the Sino-British declaration led to the inception of the Basic Law); J. Cameron Thurber, *Will Retrocession to a Communist Sovereign Have a Detrimental Effect on the Emphasis and Enforcement of Laws Protecting Hong Kong's Environment? The Czech Experience as Contraposition,* 11 J. Transnat'l L. & Pol'y 39, 57 (2001) (stating that the Basic Law of Hong Kong is derived from the 1984 Sino-British joint declaration).

546. *See* Cameron Thurber, *supra* note 545, at 57 (discussing the 1984 Sino-British Joint Declaration); *see also* Friedman, *supra* note 368, at 74 (analyzing the Sino-British declaration and its impact on the country of Hong Kong). *See generally* Heng Loong Cheung, Comment: *Hong Kong SAR: Autonomy Within Integration?,* 4 UCLA J. INT'L L. & FOREIGN AFF. 181 (2001) (asserting that the Basic Law of Hong Kong does not reach the goals set forth by the Sino-British declaration).

547. *See* Paul Vitrano, *Hong Kong 1997: Can the People's Republic of China be Compelled to Abide by the Joint Declaration,* 28 GEO. WASH. J. INT'L & ECON. 445 (1995) (describing how, in 1984, China and the United Kingdom signed the Joint Declaration on the Question of Hong Kong, a treaty ratified in 1985 by both parties and registered with the United Nations); Cheung, *supra* note 546, at 183 (stating that principles set forth in the basic law are also stated in the PRC Constitution, the governing law of China); *see also* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1479 (2000) (discussing the effect of the Sino-British agreement on Hong Kong and China within the WTO).

548. *See* Cooney, *supra* note 20, at 506 (discussing the differences between Hong Kong and Taiwan and the differences incumbent in PRC control). *See generally* Chiang, *supra* note 41, at 982 (assessing whether or not China still controls the country of Taiwan); Lee, *supra* note 218, at 352 (discussing the condition of Taiwan and whether it is or is not a part of the PRC).

549. *See* Cooney, *supra* note 20, at 506 (asserting that if Taiwan was to implement a Basic Law system it must be similar to the Basic Law already established in Hong Kong). *See generally* Chen, *supra* note 32, at 244 (arguing that Taiwan should enjoy autonomy from China and be treated as its own country); Edwards, *supra* note 33, at 751 (applying and analyzing the Hong Kong Basic Law model to Taiwan).

550. *See* J. Kate Burkhart, *Recent Development: Hksar V. Ma Wai Kwan David & Ors: A Step in the Right Direction*, 6 TUL. J. INT'L & COMP. L. 609, 611 (1998) (asserting that Chinese policy dictates the inclusion of Taiwan in a reunified China); *see also* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination?*, 46 U. KAN. L. REV. 283 (1998) (stating that the Chinese government sought to include the country of Taiwan within its political system). *See generally* Lee, *supra* note 218, at 352 (discussing that all the countries that recognize the PRC acknowledge Taiwan as a part of China).

551. *See* Chen, *supra* note 32, at 244 (asserting that Taiwan's democratic government gives it the right to sovereignty); *see also* Puder, *supra* note 324, at 513 (discussing the stance of Taiwan toward full democratization). *See generally* Shen, *supra* note 323, at 1101 (assessing the plight of Taiwan and its quest for sovereignty).

reunification of China.[552] This is a reasonable conclusion because not only was the model originally designed to deal with a colonial regime like Hong Kong,[553] but also transfers ultimate authority over constitutional matters to the PRC.[554] This may deny the people of Taiwan the right that has already been enjoyed by them to conclusively determine their own future.[555] In the discussion of the Sino-British Joint Declaration above, it must be kept in mind that the announced PRC policy to establish such a special administrative region is only used "when necessary,"[556] implying the PRC presumably will be abolished when the situation is no longer needed, as in the case of 1949 Shanghai. [557] Another notable example is Tibet, which in the early 1950s was promised autonomy in return for its "peaceful liberation."[558] By the mid-1950s, however, the PRC broke its promise of deploying Chinese troops at the border and used military force to occupy Tibet,[559] which led the Tibetan independent militia to be disbanded under the direction of the Communist Chinese Army.[560] There is no indication under the joint

552. *See* Chen, *supra* note 32, at 236 (asserting that the country of Taiwan feels it has satisfied the international requirements for statehood set forth in the Montevideo Convention); *see also* Chiang, *supra* note 41, at 982 (analyzing the Taiwanese government's attempts to rejoin the United Nations as a sovereign state). *See generally* Lee, *supra* note 18, at 352 (discussing the legal reasons in favor of Taiwan's sovereignty).

553. *See* Emily Johnson Barton, *supra* note 537, at 371 (stating that the "one country, two systems" policy was created for Hong Kong by the Sino-British declaration); *see also* Jack A. Hiller & Bernhard Grossfield, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?*, 50 AM. J. COMP. L. 175, 197 (2002) (asserting that the "one country, two systems" model was supposed to maintain the present common law rule in Hong Kong); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 534–35 (2002) (discussing the change in regime from Britain to China and the complexity of the "one country, two systems" model).

554. *See* Burkhart, *supra* note 550, at 611 (stating that when Hong Kong once again becomes a province of China the PRC Constitution outlines the principles the Hong Kong government is to follow). *See generally* Cooney, *supra* note 20, at 506 (discussing the establishment of PRC rule in Hong Kong and its ramifications on the control of the country); Lau, *supra* note 29, at 188 (analyzing Hong Kong's change to PRC rule and the level of autonomy purportedly left to the people of Hong Kong).

555. *See* Huang, *supra* note 364, at 201 (describing Taiwan as a territory attempting to develop through self-government and independence); *see also* Carolan, *supra* note 60, at 429 (asserting that Taiwan is and has been a political entity separate from China). *See generally* Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J. 13 (discussing the economic and political growth of Taiwan as a sovereign nation).

556. *See* Marsha Wellknown Yee, *supra* note 28, at 1377 (discussing the Sino-British declaration and its impact on Hong Kong); *see also* Friedman, *supra* note 368, at 71 (stating that the Sino-British declaration gave birth to the Basic Law); Karmen Kam, *supra* note 542, at 616 (analyzing the "one country, two systems" dynamic and its relation to the Sino-British declaration).

557. *See generally* Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 310 (1996) (discussing the emergence of the PRC in 1949).

558. *See* Kevin M. Harris, *supra* note 32, at 357 (discussing the promises made to Tibet by the Chinese government); *see also* Regina M. Clark, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement to Self-Determination*, 12 IND. INT'L & COMP. L. REV. 293, 297 (2002) (discussing the Chinese invasion of Tibet and the subsequent agreement struck between the two governments); Sloane, *supra* note 81, at 131 (stating that Tibet was recognized as a sovereign state before it was invaded by China in 1950).

559. *See* Kevin M. Harris, *supra* note 32, at 357 (discussing the occupation of Tibet by Chinese military forces); *see also* Sloane, *supra* note 81, at 109 (stating that Tibet is a sovereign nation under "illegal foreign occupation"). S*ee generally* Clark, *supra* note 558, at 294 (asserting that the Chinese occupation of Tibet has had severe human rights implications on the Tibetan people).

560. *See* Kevin M. Harris, *supra* note 32, at 357 (discussing the dispersal of the Tibetan independent militia); *see also* Clark, *supra* note 558, at 297 (asserting that after the Chinese invaded Tibet the Tibetan army was in turmoil); John S. Hall, Note, *Chinese Population Transfer in Tibet*, 9 CARDOZO J. INT'L & COMP. L. 173, 174 (2001) (giving an historical account of the 1950 Chinese invasion of Tibet).

declaration showing who, after 50 years, is to make the decision.[561] On this point, this begs the question of what is there to guarantee the continued enjoyment of the special privileges promised by the PRC.[562]

In comparison to the current position of Taiwan, where the people of Taiwan exercise final control over their one government exclusively,[563] the model of "one country, two systems" is not appropriate for Taiwan.[564] After all, the Hong Kong model is to promote not independence, but a "high degree of autonomy,"[565] which is to function "directly under the authority" of the central government of the PRC.[566] This shows that the Taiwan issue represents a situation where unification is not easy.

The basic principle of "one country, two systems" has allowed for the smooth return of Hong Kong and the maintenance of its long-term prosperity and stability.[567] This will undoubtedly create favorable conditions for the settlement of the Taiwan issue on both sides of the Taiwan Strait.[568] It is difficult to conclude whether the "one country, two systems" model

561. *See* Emily Johnson Barton, *supra* note 537, at 371 (asserting that under the joint declaration Hong Kong would remain free to control its affairs for at least fifty years); *see also* Karmen Kam, *supra* note 542, at 615 (discussing the fifty-year time frame set up for the people of Hong Kong by the Joint Declaration); Marsha Wellknown Yee, *supra* note 28, at 1379 (describing the agreement laid out under the "one country, two systems" principle).

562. *See* Emily Johnson Barton, *supra* note 537, at 370–71 (listing the stipulations promised by the Joint Declaration); *see also* Marsha Wellknown Yee, *supra* note 28, at 1377–78 (discussing the background of the Sino-British declaration and the autonomy promised Hong Kong under the agreement). *See generally* Karmen Kam, *supra* note 542, at 615 (analyzing the promised preservation of lifestyle and economic systems under the Sino-British declaration).

563. *See* Angeline G. Chen, *supra* note 32, at 244 (1998) (discussing the sovereignty of the government of Taiwan). *See generally* Chiang, *supra* note 41, at 959 (stating that China has no sovereignty over Taiwan and the current Taiwanese regime should remain in control); Lee, *supra* note 218, at 352 (asserting Taiwan's statehood and freedom from the control of the Chinese government).

564. *See* Karmen Kam, *supra* note 542, at 615 (assessing the 1984 Sino-British declaration and the inception of the "one country, two systems" model); *see also* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 369 (2002) (discussing the "one country, two systems" concept and Hong Kong's status as a member of the WTO). *See generally* Randall Peerenboom, *supra* note 553 (analyzing the "one country, two systems" model and its implementation in Taiwan).

565. *See* Edwards, *supra* note 33, at 751–52 (noting that the long-term objective of the Hong Kong model is to ensure a high degree of autonomy); *see also* Wang & Leung, *supra* note 366, at 282–83 (suggesting that Taiwan may flourish as highly autonomous under the Hong Kong model); Williams, *supra* note 356, at 802 (indicating that the adoption of the Hong Kong model would disserve Taiwan's objective of independence).

566. *See* Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 345, 373 (1997) (discussing the Hong Kong model and its basic provisions); *see also* Cooney, *supra* note 20, at 498–99 (observing that Taiwan, like Hong Kong, may enjoy autonomy while existing under China's central government); Davis, *supra* note 512, at 136–37 (noting that the Hong Kong model requires Taiwan to function subordinately to the central government of China).

567. *See* Davis, *supra* note 295, at 275 (mentioning that the reversion of Hong Kong went smoothly); *see also* Wang & Leung, *supra* note 366, at 289–90 (indicating that one goal of the "one country, two systems" model is to maintain stability and prosperity); *see also* Edwards, *supra* note 33, at 761 (noting that Hong Kong has experienced both economic prosperity and social stability).

568. *See* Edwards, *supra* note 33, at 761–62 (suggesting the seemingly successful reversion of Hong Kong will facilitate the resolution of the Taiwan issue); *see also* Kerry Dumbaugh, *The U.S. Role During and After Hong Kong's Transition*, 18 U. PA. J. INT'L ECON. L. 333, 337 (1997) (implying that the success of the Hong Kong model may prompt the reunification of Taiwan with China). *See generally* Yu Shuning, *For Hong Kong's Smooth Transition, Stability and Prosperity*, 18 U. PA. J. INT'L ECON. L. 25, 26–27 (1997) (acknowledging that the Hong Kong model is to lead to stability and prosperity).

has been a success in Hong Kong.[569] However, it is key for the people of Taiwan to take the Hong Kong reversion as a case to examine the commitments of the PRC.[570] Despite the fact that history gives us several other explanations, the experience of the Hong Kong model may make the Taiwanese very reluctant to trust the Communists on the mainland of China again.[571] If that is the case, this reflects something meaningful not only to the people of Hong Kong, but to the people of Taiwan in their future as well.

VI. Conclusion

The government of Taiwan, since its break from the mainland China in 1949,[572] has existed functionally as an independent sovereign state.[573] As enshrined in the principle of "people's sovereignty," sovereignty is a collective right that can only be entitled to and exercised by the entire population of the land constituting the territory of that state.[574] Successful self-governance in Taiwan represents the concept that the sovereignty of Taiwan belongs to the people of Taiwan.[575] This implies that the common will of the people of Taiwan is to establish a state.[576] With a population of 23 million (more people than over three-quarters of the 185

569. *See* Edwards, *supra* note 33, at 752 (providing two conflicting views regarding the success of the Hong Kong model); *see also* Cooney, *supra* note 20, at 509–10 (suggesting that regardless of the Hong Kong model's success, it would not work in Taiwan). *See generally* Shuning, *supra* note 568, at 25–26 (noting that people are still waiting to see whether Hong Kong's transition has been a success).

570. *See* Edwards, *supra* note 33, at 760–61 (emphasizing the importance of Taiwan continuing to monitor Hong Kong in an effort to gauge the commitments of mainland China); *see also* Michael C. Davis, *supra* note 295, at 275 (pointing out that the rest of the world viewed the Hong Kong reversion as indicative of China's international commitments). *See generally* Frances M. Luke, *supra* note 36, at 725–26 (revealing that the "one country, two systems" model was to be used first in Taiwan and then in Hong Kong and implying that Taiwan may learn and benefit from earlier application of the model to Hong Kong).

571. *See* Edwards, *supra* note 33, at 753–54 (implying that China's conduct regarding Hong Kong has not been entirely forthright); *see also* Cooney, *supra* note 20, at 509 (noting that the Hong Kong model cannot deliver what it promises). *See generally* Michael C. Davis, *supra* note 295, at 193 (referring to the notion that the mainland Communists have historically not been trusted).

572. *See* Edwards, *supra* note 33, at 758 (contrasting the historical sovereignty of Taiwan and Hong Kong); *see also* Chang & Lim, *supra* note 66, at 420–22 (evaluating Taiwan's international status as of 1949); Lung-chu Chen, *supra* note 275, at 676 (maintaining that Taiwan has been a sovereign nation for more than forty years).

573. *See* Edwards, *supra* note 33, at 758 (recognizing Taiwan as historically being independent and sovereign); *see also* Chang & Lim, *supra* note 66, at 420–22 (noting that Taiwan has had its own independent government since 1949); Chen, *supra* note 275, at 676 (discussing Taiwan's international status and relation to the People's Republic of China).

574. *See* Wei, *supra* note 37, at 1172 (explaining the concept of sovereignty as a collective right); *see also* Reisman, *supra* note 95, at 869–70 (emphasizing the role of a people's sovereignty in international law). *See generally* Araujo, *supra* note 62, at 1480–81 (discussing the concept of sovereignty in relation to human rights).

575. *See* Williams, *supra* note 356, at 804 (offering an analysis of the legal and political choices facing Taiwan and noting: "[I]n the case of Bosnia in particular, [the U.S. or the EU] required that Bosnia hold a referendum before it would consider granting Bosnia recognition as a state. Taiwan might be able to successfully rely upon this precedent to assert that any declaration of independence would not be an affront to the territorial integrity of China, so long as it was supported by a public referendum in Taiwan"); *see also* Carolan, *supra* note 60, at 439–40 (conceding that Taiwan is in a period of self-governance and popular sovereignty); Chen, *supra* note 275, at 679–80 (recognizing that the people of Taiwan have successfully engaged in nation-building and self-governance).

576. *See* Michael P. Scharf, *supra* note 304, at 661 (implying that the people of Taiwan prefer establishing an independent state rather than reuniting with China); *see also* Chen, *supra* note 275, at 678–80 (stating that the people of Taiwan do not want to be part of China); Edwards, *supra* note 33, at 757 (stating that the Taiwanese have the political will to sustain their sovereignty and should be recognized as a state).

members states of the UN),[577] Taiwan has not only the political will of its people to sustain its sovereignty,[578] but also, judged by the international legal concept of sovereignty and statehood, it possesses virtually all the elements of the definition of a state to qualify as a sovereign state.[579]

According to legal doctrine and states' practices, to qualify as a state, recognition by other states is not a requirement under customary international law.[580] More importantly, the denial of recognition is not meant to effect political change but rather is the result of either the observation that the putative government simply does not control the state[581] or a government comes to power by means of violating international law.[582] Once a political entity has met the criteria, namely, it possesses a territory[583] and a population that is subject to the control of the authority which is sovereign,[584] it is the duty of the international community to consider that the entity meets the threshold for recognition.[585] Therefore, an effective government, such as Taiwan, should be recognized and its status should be acknowledged.

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577. *See* Office of Information of the Government of the Republic of China, *The Population of Taiwan Reaches 22.4 Million* (July 2, 2002) (reporting that the population of Taiwan has increased in the past year to more than 22 million), *at* http://www.taiwaninfo.nat.gov.tw/societe/1025583664.html; *see also* Information Division, Taipei Economic and Cultural Office, *Population of Taiwan Tops 22.4 Million* (Mar. 3, 2002) (offering a new estimate of Taiwan's population), *at* http://www.taipei.org/teco/cicc/news/english/e-03-12-02/e-03-12-02-37.htm.

578. *See* Edwards, *supra* note 33, at 757 (contending that Taiwan should enjoy sovereign status); *see also* Chen, *supra* note 275, at 678–80 (discerning that the Taiwanese people have great resolve and that the sovereignty of Taiwan lies with them); Scharf, *supra* note 304, at 661 (mentioning a public opinion poll showing that more Taiwanese people prefer independence than reunification).

579. *See* Chen, *supra* note 275, at 678–79 (finding that Taiwan is a state, as measured by the international legal standard of statehood); *see also* Chang & Lim, *supra* note 66, at 420–22 (addressing Taiwan's international status and deeming it a potentially de facto state); Zaid, *supra* note 193, at 806 (acknowledging that Taiwan meets the criteria for statehood).

580. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (defining "state" for the purposes of international law); *see also* Wallace-Bruce, *supra* note 316, at 455–56 (listing the criteria for statehood traditionally recognized in international law). *See generally* Chang & Lim, *supra* note 66, at 420 (enumerating the legal requirements for statehood, which do not include recognition).

581. *See* Thomas D. Grant, *supra* note 1, at 218 (noting that nonrecognition may result from the observation that the putative government does not control the whole state). *But see* Hungdah Chiu, *supra* note 168, at 194–95 (explaining that the law of recognition is very much intertwined with politics); Grant, *supra* note 320, at 246–47 (referring to the mutual nonrecognition accord between Russia and China regarding the putative states of Chechnya and Taiwan, respectively).

582. *See* Thomas D. Grant, *supra* note 1, at 197 (alluding to the notion that recognition may be denied when a new government uses violence to succeed to power, a practice that violates international law); *see also* Lee, *supra* note 18, at 370 (noting that recognition is subject to the requirements and demands of international law). *See generally* Sloane, *supra* note 81, at 118 (implying that international law requires the denial of recognition of governments that come to power through illegal acts).

583. *See* Williams, *supra* note 356, at 802 (asserting that possession of a territory is a criterion for recognition as a state); *see also* Shen, *supra* note 323, at 1125–26 (listing possession of a territory as one of the requirements of statehood). *See generally* Chiang, *supra* note 41, at 963 (naming territoriality as a characteristic of the modern state).

584. *See* Williams, *supra* note 356, at 802 (establishing that one requirement for statehood is a population under the control of a sovereign nation); *see also* Shen, *supra* note 323, at 1125–26 (articulating that an entity must be sovereign in order to qualify as a state). *See generally* Chiang, *supra* note 41, at 963–64 (stating that sovereignty is a characteristic of the modern state).

585. *See* Williams, *supra* note 356, at 802 (suggesting that a country meeting the criterion for statehood should receive recognition and the rights that flow therefrom); *see also* Lee, *supra* note 18, at 370–71 (offering a brief discussion of the importance of recognition in the international community). *See generally* Chiang, *supra* note 41, at 969 (contending that when a new state is established, recognition should soon follow).

Perhaps it is too much to hope that the majority of the international community will move to consider Taiwan's entitlement to the rights and privileges of being a state, and recognize Taiwan as an independent sovereign state. Politically, rather than legally, most states of the world have found it difficult to consider the status of Taiwan without considering its relation with the PRC,[586] despite the fact that Taiwan should be given the status it deserves. Thus, if there were no objections from the PRC, the majority of the international community would recognize Taiwan as a state. Taiwan's status is much more influenced by its relations with China than its position in international society.[587] However, not surprisingly, the current diplomatic difficulties of Taiwan will not soon diminish, as it will take time for a settlement to be reached between the PRC and the ROC.[588]

To better understand the political and legal choices facing Taiwan, one must conceive of Taiwan as being perpetually poised on the cusp of independence.[589] If the PRC did not precondition diplomatic relations on non-recognition of the government of Taiwan, the majority of the international society would be unlikely to object to official recognition of Taiwan.[590] Taiwan is at once recognized by some and not by others, which makes the integration of recognition a choice between two competing governments, like Taiwan and China, critical to Taiwan.[591] Historically, through the mistaken assumption of being the sole legitimate government of all China, the ROC rejected any attempt at dual recognition or dual participation in the international community.[592]

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586. *See* Carolan, *supra* note 60, at 457–58 (mentioning that Taiwan's status is very much affected by China and various other nations); *see also* Zaid, *supra* note 193, at 806–811 (making note of China's omnipresent opposition to the recognition of Taiwan as a sovereign state). *See generally* Wei, *supra* note 37, at 1171 (proposing that China and Taiwan are inextricably intertwined by history and national interests).

587. *See* Zaid, *supra* note 193, at 806–811 (discussing the immense influence China has with respect to Taiwan's status in the international arena); *see also* Chang & Lim, *supra* note 66, at 430 (concluding that Taiwan was denied international recognition because of China's objections); Chen, *supra* note 32, at 227 (noting that recognition of Taiwan's status as an independent state is thwarted by China's threats).

588. *See* BBC Corp., *China Spokesman Warns Taiwan Against Seeking Progressive Independence*, BBC WORLDWIDE MONITORING (Jan. 15, 2002) (commenting on the tension that exists between the PRC and Taiwan), *available at* LEXIS; *see also* Carolan, *supra* note 60, at 429–30 (indicating that the settlement of the Taiwan issue has remained unresolved for fifty years and will likely remain unresolved); Lee, *supra* note 18, at 389 (suggesting a long-term view of the unification of China and Taiwan).

589. *See* Williams, *supra* note 356, at 801 (offering a perspective from which the situation in Taiwan may be better understood); *see also* Carolan, *supra* note 60, at 429 (suggesting that Taiwan is independent, but has not actually declared itself as such); Cooney, *supra* note 20, at 547–48 (stating that Taiwan is a de facto independent state).

590. *See* Shen, *supra* note 323, at 1121 (noting that the diplomatic relations of some nations with China prevent those same nations from recognizing Taiwan as an independent sovereign state); *see also* Carolan, *supra* note 60, at 457–58 (recognizing that China does not interact with any government that formally recognizes Taiwan); *see also* Su Wei, *supra* note 37, at 1174–75 (reflecting on the basic principle that countries recognizing China as the sole government of the whole of China consequently do not recognize Taiwan as an independent state).

591. *See* Lee, *supra* note 18, at 360–61 (giving a breakdown of the number of nations that recognized China's position regarding Taiwan's status); *see also* Grant, *supra* note 320, at 231–32 (showing the importance of recognition to diplomatic relations); Shen, *supra* note 323, at 1123–24 (indicating that the nonrecognition of Taiwan is at times a consequence of the recognition of the PRC).

592. *See* Davis, *supra* note 512, at 139–40 (1990) (discussing Taiwan's current role in the international forum); *see also White Paper, supra* note 328 (suggesting that China, like the ROC, rejects the notion of dual recognition). *But see* BBC Corp., *Foreign Ministry Comments on Taiwan, Cambodia, Prison Labour, Hong Kong*, BBC SUMMARY OF WORLD BROADCASTS, May 21, 1994, at Part 3 Asia (indicating that Taiwan has sought dual recognition).

Yet, through deciding no longer to compete with the PRC for the right to represent China, the ROC has shown a degree of flexibility to accept the principle of "dual participation" in its efforts to join international organizations.[593] It uses titles other than its official designation, "ROC," such as "Chinese Taipei" at the APEC (Asian Pacific Economic Cooperation),[594] "the Customs Territory of Taiwan, Penghu, Kinmen, and Matsu" at the GATT (General Agreement on Tariff and Trade) and WTO (World Trade Organization),[595] and "Taipei, China" at the Asian Development Bank (ADB).[596] The ROC also adopts the similar logic of "dual recognition" in its relations with other countries.[597] In spite of the enormous cost of the flexible diplomacy,[598] Taiwan has been effective in maintaining its relations with numerous countries by establishing private organs,[599] which perform the equivalent of official functions and enjoy a certain degree of diplomatic privilege and immunity.[600]

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593. *See* James V. Feinerman, *Taiwan and the GATT*, 1992 COLUM. BUS. L. REV. 39, 39 (1992) (stating that the Republic of China has been eager to gain admission to the General Agreement on Tariffs and Trade, the world's major international trade regulatory regime); *see also* Lee, *supra* note 18, at 352 (describing the ROC's efforts to end its diplomatic isolation and have proper representation in international agencies). *See generally* Costa, *supra* note 19, at 870 n.235 (stating that the ROC has taken a softer view of the sovereignty issue and no longer inquires into the motives of foreign governments wishing to establish relations with Taiwan).

594. *See* Attix, *supra* note 38, at 387 n.148 (describing Taiwan's flexibility with regard to how it is known in international organizations, such as being "Chinese Taipei" at the APEC); *see* also Chiang, *supra* note 41, at 982 (providing that the ROC government participated in the Asia Pacific Economic Cooperation organization under the name of "Chinese Taipei"); Merit E. Janow, *Institutions for International Economic Integration: Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947, 956 (1996) (stating that Taiwan is called "Chinese Taipei" as a member of APEC).

595. *See* Daniel C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties*, 14 STAN. ENVTL. L.J. 256, 294 (1995) (providing that Taiwan applied for entry into the GATT as the Customs Territory of "Taiwan"); Monica Hsiao, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 UCLA PAC. BASIN L.J. 431, 454 n.55 (1994) (stating that Taiwan has applied to the GATT as the Customs Territory of "Taiwan, Pescadores, Kinmen, and Matsu"); Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong Kong, and Taiwan*, 20 NW. J. INT'L L. & BUS. 1, 57 n.15 (1999) (stating that Taiwan applied for WTO membership under the title Customs Territory of "Taiwan, Penghu, Kinmen, Matsu").

596. *See* Attix, *supra* note 38, at 387 n.148 (stating that at the Asian Development Bank, Taiwan changed its name to "Taipei, China"); *see also* Hsiao, *supra* note 94, at 737 (stating that the ADB agreed to change the name of Taiwan's representation to "Taipei, China"); Xu & Wilson, *supra* note 484, at 38 n.81 (providing that Taiwan uses the name "Taipei, China" as a member of the ADB).

597. *See* Costa, *supra* note 19 at 870 n.235 (providing that the ROC is moving away from rejection of dual recognition in its relations with other countries); *see also* Lee, *supra* note 18, at 392 n.33 (discussing the historical difficulty the ROC has had in implementing dual recognition because of objection by the PRC). *See generally* Nelson C. Lu, *supra* note 309, at 308–309 (stating that previous Taiwanese administrators would not accept dual recognition).

598. *See* Irish, *supra* note 465, at 168–69 (discussing Taiwan's use of informal diplomacy with other nations to counteract China's efforts to isolate Taiwan, and concluding that the enormous costs of informal diplomacy have successfully effectuated and even improved Taiwan's influence in the international community); *see also* Jiunn-rong Yeh, *supra* note 270, at 247–48 (discussing the financial effects on Taiwan as a result of "flexible diplomacy"). *See generally* Lee, *supra* note 289, at 697 (describing Taiwan's recent campaign of "flexible diplomacy").

599. *See* Irish, *supra* note 465, at 168–69 (discussing Taiwan's increasing effectiveness in maintaining relations with other countries); *see also* Peng, *supra* note 555, at 23 (stating that Taiwan is increasing its trade relations with other countries). *See generally* Jones, *supra* note 198, at 52–53 (describing the effectiveness of Taiwan's relations with the United States).

600. *See* Judith Hippler Bello & Alan F. Homer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 NW. J. INT'L L. & BUS. 633, 664 (1986) (stating that the American Institute on Taiwan held rounds of consultations to discuss export performance requirements imposed by Taiwan); Shen, *supra* note 323, at 1116 (discussing the 1952 Peace Treaty between Japan and Taiwan). *See generally* Murphy, *supra* note 424, at 141 (providing an example of the bilateral relations between the U.S. and Japan).

As noted earlier, for the PRC, the "one country, two systems" model, as applied to Hong Kong, could have been considered a success as long as the transition of power went smoothly,[601] the government of Hong Kong was tightly controlled,[602] foreign influences did not create political chaos[603] and Hong Kong's society and economy remained stable.[604] However, this model would only be suitable for Taiwan if Taiwan were to abandon control over its own autonomy.[605] The reason that the Hong Kong model is not applicable to Taiwan is the distinct difference between Hong Kong and Taiwan, both historically and politically.[606] If Taiwan is to reunify with China, it must do so under a different model, perhaps under a model where Taiwan might find it possible to take control of its own destiny.[607] At this point, it is certain that Hong Kong will not serve as an example for unifying Taiwan with China as Beijing

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601. *See* Bradlow, *supra* note 480, at 362 (discussing Hong Kong's "one country, two systems" arrangement); *see also* Daniel C. Turack, *supra* note 466, at 78 (stating that the PRC's Constitution is the concept of "one country, two systems," an idea encompassing the PRC's socialist system and Hong Kong's capitalist system). *But see* Charles D. Booth & Xianchu Zhang, *Beijing's Initiative on Cross-Border Insolvency: Reflections on a Recent Visit of Hong Kong Professionals to Beijing*, 10 AM. BANKR. INST. L. REV. 29, 39 (2002) (discussing that the "one country, two systems" model may cause problems).

602. *See* Michael C. Davis, *supra* note 295, at 280 (stating that the Basic Law of Hong Kong tightly controlled any hope to expand democracy); *see also* Kathleen Marie Whitney, *There is No Future for Refugees in Chinese Hong Kong*, 18 B.C. THIRD WORLD L.J. 1, 29 (1998) (stating that the government in Hong Kong tightly controls the five permitted religions in that country). *See generally* Nora E. Sheriff, *Holding up Half the Sky But Not Allowed to Hold the Ground: Women's Rights to Inherit and Own Land in Hong Kong and the People's Republic Of China*, 23 HASTINGS INT'L & COMP. L. REV. 279, 280–81 (2000) (stating that Hong Kong was tightly controlled by the British).

603. *See* Michael R. Curran, *On Common Ground: Using Cultural Bias Factors to Deconstruct Asia-Pacific Labor Law*, 30 GEO. WASH. J. INT'L L. & ECON. 349, 369 (1996) (stating that Hong Kong threw the doors open to foreigners); *see also* Michael D. Pendleton, *supra* note 80, at 2069–70 (discussing Hong Kong's efforts to limit foreign influence). *See generally* Zhaodong Jiang, *China's Tax Preferences to Foreign Investment: Policy, Culture and Modern Concepts*, 18 NW. J. INT'L L. & BUS. 549, 642 (1998) (providing that Hong Kong taxes the income and profits of corporations only if they have a local source, thereby encouraging foreign relations).

604. *See* Michael C. Davis, *International Commitments to Keep: Hong Kong Beyond 1997*, 22 S. ILL. U. L.J. 293, 297–98 (1998) (providing that although China retains control over Hong Kong's foreign and defense affairs, Hong Kong does have a wide range of control over particular economic aspects); *see also* Ted Hagelin, *Economic and Legal Implications: Reflections on the Economic Future of Hong Kong*, 30 VAND. J. TRANSNAT'L L. 701, 706 (1997) (describing the expansion of stability in Hong Kong's manufacturing economy); John McDermott, *July 1, 1997: Hong Kong and the Unprecedented Transfer of Sovereignty: The "Rule of Law" in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L. REV. 263, 264 (1997) (stating that the PRC promised Hong Kong a high degree of autonomy, thereby continuing the benefits of a stable economic system).

605. *See* Edwards, *supra* note 33, at 754 (describing the "one country, two systems" model designed for Taiwan but not adapted); *see also* Shen, *supra* note 403, at 361 (maintaining that Hong Kong and Taiwan each has its own legal system). *See generally* Cooney, *supra* note 20, at 498 (providing that the government in Taiwan opposes the "one country, two systems" model).

606. *See* Edwards, *supra* note 33, at 757 (stating that there are actual and perceived differences in the history, geography, and political systems of Hong Kong and Taiwan); *see also* Fu, *supra* note 359, at 350 (discussing Taiwan's desire for reunification, but still wishing to live in a democratic nation); Puder, *supra* note 324, at 525 n.159 (stating that China recognizes that there are differences between Taiwan and Hong Kong).

607. *See* Edwards, *supra* note 33, at 766 (stating that the model will only work if Taiwan were to abandon control over its own destiny); *see also* Fu, *supra* note 359, at 350 (stating that the majority of people in Taiwan want reunification, but they also want to live in a democratic nation where personal freedom and human dignity are protected). *See generally* Chen, *supra* note 32, at 226–27 (discussing Taiwan's increasing demands to be recognized as an independent democratic nation-state).

hopes.[608] Hence, the authorities in Beijing now need to take a different view. If negotiations between the two sides of the Taiwan Straits are to progress, and the PRC's stated preference for peaceful reunification remains a realistic goal, the substance of the Hong Kong model will need to be transformed.[609]

Aside from the potential conflicts that may arise under the diverse economic and social systems of a unified Chinese government, what becomes more important is the connection between sovereignty and self-determination.[610] This concept has come very close to be what has been termed "associated statehood" within the U.N. system,[611] which is one of the options through which a people can exercise its right to self-determination.[612] Another possible alternative under U.N. norms for the exercise of self-determination is that of complete integration with another state,[613] which should be on the basis of complete equality between the peoples of the former territory and the state concerned.[614] It should only come about if the criteria are met: the integrating territory should attain an advanced stage of self-government with free

608. *See* Edwards, *supra* note 33, at 766 (describing China's plan for reunification with Taiwan); *see also* Jin Huang & Andrew Xuefeng Qian, *"One Country, Two Systems," Three Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Laws in China*, 5 DUKE J. COMP. & INT'L L. 289, 301–02 (1995) (discussing Beijing's proposals to Taiwan in its hopes for reunification). *See generally* Attix, *supra* note 38, at 358 (discussing Taiwan's increasing efforts toward gaining independence and Beijing's opposition to those efforts).

609. *See* Edwards, *supra* note 33, at 766 (stating that if Taiwan is to reunify with China, it must do so under a different model); *see also* Scharf, *supra* note 304, at 661–62 (discussing Taiwan's resistance to the Hong Kong model). *See generally* Leung & Wang, *supra* note 366, at 282 (providing that the PRC seeks peaceful reunification).

610. *See* Leung & Wang, *supra* note 366, at 281 (stating that China has always treated sovereignty as a matter of principle which cannot be compromised); *see also* Wang, *supra* note 365, at 175 (discussing potential conflicts that may arise from a unified China). *See generally* Edwards, *supra* note 33, at 775–76 (stating that the Hong Kong model would jeopardize Taiwan's sovereignty).

611. *See* Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 31 (1993) (discussing what obligations are associated with statehood); *see also* Justus R. Weiner, *Co-Existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT'L L. 591, 688 n.376 (2000) (stating that basic forms of federalism include associated statehood). *See generally* Thomas D. Grant, *Internationally Guaranteed Constitutive Order: Cyprus and Bosnia as Predicates for a New Nontraditional Actor in the Society of States*, 8 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, 55 n.280 (discussing associated statehood as a device in international law).

612. *See* Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858, 888 (1980) (discussing "associated statehood" in relation to autonomy). *See generally* Thomas D. Grant, *supra* note 611, at 55 n.280 (discussing associated statehood and its relation to international law)*;* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self- Determination?*, 46 KAN. L. REV. 283, 285–86 (1998) (stating that the U.N. Charter expressly refers to self-determination).

613. *See* Charney & Prescott, *supra* note 49, at 475–76 (stating that Taiwan's dispute with China can be resolved by alternatives short of complete integration); *see also* Taryn Ranae Tomasa, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 250 (1998) (discussing the U.N.'s pledge to the principle of self-determination). *See generally* Xiaobing Xu & George D. Wilson, *supra* note 484, at 21–22 (discussing the right to self-determination in international law).

614. *See* Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 377 (1986) (discussing the relation between equality and complete integration); *see also* Michael Carroll, *Every Man Has a Right to Decide His Own Destiny: The Development of Native Hawiian Self-Determination Compared to Self-Determination of Native Alaskans and the People of Puerto Rico*, 33 J. MARSHALL L. REV. 639, 662 n.84 (2000) (stating that integration with an independent state should be on the basis of complete equality); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133, 174 (1995) (discussing the law of self- determination with respect to the integration of territories).

political institutions resulting from the freely expressed wishes of the people through elections.[615]

The founding of the PRC in Beijing and the relocation of the ROC to Taiwan in 1949 gave the former control of the Chinese mainland and the latter control of the Chinese territory of Taiwan.[616] It is accurate that the state of China, the ROC, has been divided into two parts and ruled by separate governments, rather than a succession of states or governments.[617] In this sense, the current position of Taiwan is as part of a divided state of China similar to Korea or pre-reunification Germany.[618] As a matter of fact, divided statehood is a legal concept that can be widely recognized as defined as "a state divided into two entities, each equipped with an operative government."[619]

Practically, in the case of Germany and Korea (Germany was divided into the Federal Republic in the west and the Democratic Republic in the east;[620] Korea was divided into the Republic of Korea in the south and Democratic People's Republic of Korea in the north),[621] despite the divided statehood of the two parts being in dispute, both were admitted to the

615. *See* Charney & Prescott, *supra* note 49, at 477 (discussing the recent elections in Taiwan); *see also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 26 (1989) (providing a description of Taiwan's election laws).

616. *See* Chiang, *supra* note 41, at 974 (providing that Chinese Communists defeated the ROC government and established the PRC in 1949); *see also* Jones, *supra* note 198, at 51–52 (stating that by 1949, the Communists had completely defeated the Nationalist government); Lee, *supra* note 18, at 354 (stating that the PRC was established as the sole legitimate government of China on October 1, 1949).

617. *See* Rong-Chwan Chen, *supra* note 18, at 606 (stating that the ROC operates a "one China" policy, but the laws are enacted by separate regional authorities); *see also* Lee, *supra* note 18, at 372–73 (discussing the ROC's relations with China); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 531 (2002) (stating that Taiwan is "one land with two national flags").

618. *See* Attix, *supra* note 38, at 373–74 (describing Taiwan's divided state and its similarities to Korea and Germany); *see also* Cooney, *supra* note 20, at 548 (stating that Taiwan has adapted a "divided states" approach to its status, similar to the Koreas or the pre-unification Germany). *See generally* Albrecht Randelzhofer, *German Unification: Constitutional and International Implications*, 13 MICH. J. INT'L L. 122 (1991) (stating that West and East Germany officially united to form a single, enlarged Federal Republic of Germany in 1990, in accordance with the Treaty on the Establishment of German Unity of Aug. 31, 1990).

619. *See* GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 126–27 (3d ed. 1976); *see also* Attix, *supra* note 38, at 372–73 (defining "divided statehood"). *See generally* Keith D. Nunes, *Detentions of Political, Racial and Religious Persecutees and Dissenters: Asylum and Human Dignity*, 16 N.Y.L. SCH. J. HUM. RTS. 811, 897 n.17 (2000) (discussing examples of divided statehood).

620. *See* Attix, *supra* note 38, at 387 n.137 (stating that Germany was divided into the "Federal Republic in the West and the Democratic Republic in the East"); *see also* Clifford Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429, 488 n.129 (1999) (stating that Germany used to be divided into East and West territories). *See generally* Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 BERKELEY J. INT'L L. 296, 296 (2002) (stating that West and East Germany were created by the Western Powers and the Soviet Union).

621. *See* Jin Lee, *A Millennium Hope for Korea: Lessons from German Unification*, 9 MSU-DCL J. INT'L L. 453, 455 (2000) (discussing the history of the Koreas with an eye toward reunification). *See generally* Cecilia Y. Oh, *The Effect of Reunification of North and South Korea on Treaty Status*, 16 EMORY INT'L L. REV. 311, 329 (2002) (examining Germany's Cold War history and using it as a model for what may happen in North and South Korea as a result of reunification); Howard S. Levie, *How it all Started—and How it Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 205 (2002) (beginning a discussion on the ramifications of the Korean War by detailing the history of the creation of two sovereign Koreas).

United Nations.[622] With this historical backdrop, the presence of the "one China" policy should not prevent Taiwan from being recognized as an independent, sovereign state.[623]

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622. See Lieutenant Colonel Susan S. Gibson, *The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT'L L. 1, 15 (1998) (using Germany and Korea and their membership in the United Nations as examples of countries that can exist and function peacefully under the standard of "good governance," rather than being forced to embrace American democracy). See generally Attix, *supra* note 38, at 371–73 (1995) (discussing the little-known legal concept of "divided statehood"); Susan Carmody, Note, *Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea's Nuclear Facilities?*, 18 FORDHAM INT'L L.J. 229, n.20 (1994) (chronicling the events leading up to 1991 when the United Nations formally recognized the Democratic People's Republic of Korea as an independent and sovereign state).

623. *See* Attix, *supra* note 38, at 371–73 (concluding that "one China" is not a reality and that Taiwan is treated as independent); Lee, *supra* note 18, at 379–80 (reasoning that, in light of the examples of other divided states and the fact that foreign nations interact with Taiwan as though it is sovereign, there is no reason to treat it as a part of China). *See generally* Puder, *supra* note 260, at 418 (examining relationship of the separate Germanies, and exploring "whether the German experience may contain lessons for the relations between the People's Republic of China and Taiwan").

Edelman v. Taittinger

295 F.3d 171 (2d Cir. 2002)

28 U.S.C. § 1782(a) allows interested persons to obtain a subpoena from a district court to aid discovery in foreign litigation, compelling the deposition of a foreign national who is "found" in the district in which the court sits, although he lives and works abroad.

I. Background and Procedural Posture

In *Edelman v. Taittinger*,[1] the United States Court of Appeals for the Second Circuit vacated an order of the United States District Court for the Southern District of New York[2] that quashed a subpoena by which the petitioner sought the testimony of respondent Claude Taittinger ("Taittinger"), and remanded to the District Court to reassess the validity of the subpoena on other grounds.[3]

The petitioners were Asher B. Edelman and five investment funds controlled by him (collectively referred to as "Edelman"), which are minority shareholders in a French corporation, Société du Louvre ("Société"), of which Taittinger is a member of the Board of Directors.[4] Under authority of 28 U.S.C. § 1782(a),[5] Edelman sought subpoenas as an aid to discovery in ongoing litigation with Société in France.[6]

On October 20, 2000, U.S. District Court Judge Barbara S. Jones, sitting in the Southern District of New York, signed an order authorizing the issuance of *subpoenas duces tecum*. The order submitted by Edelman and signed by the district court judge included a blanket authorization for the issuance of subpoenas for deposition testimony to "any individuals and entities

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1. 295 F.3d 171 (2d Cir. 2002).

2. In re Edelman, 2001 U.S. Dist. LEXIS 2030 (S.D.N.Y. Feb. 26, 2001).

3. Edelman v. Taittinger, 295 F.3d 171, 180–81 (2d Cir. 2002). Although the court discussed the applicability of the Federal Rules of Civil Procedure to the subpoena in the instant case, it did not assess the validity of the subpoena at issue in the context of the Federal Rules of Civil Procedure, Rule 45(c)(3)(A)(ii), which allows for the quashing of a subpoena within certain guidelines. Fed. R. Civ. P. 45(c)(3)(A)(ii); *see infra* note 39 and accompanying text.

4. *Taittinger*, 295 F.3d at 174.

5. Section 1782(a) provides in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> 28 U.S.C. § 1782(a).

6. *Taittinger*, 295 F.3d at 174. The court discussed the background and nature of the lawsuit in France, noting that Edelman sought subpoenas as a response to Société's seeking and obtaining of orders for the issuance of several subpoenas pursuant to 28 U.S.C. § 1782(a), to gain information for use in the French litigation. *Id.*

with knowledge and information."[7] Three days later, respondent Taittinger was served with a subpoena while he was visiting an art gallery within the Southern District of New York, thus compelling him to submit to a deposition pursuant to its blanket authorization, notwithstanding that he was neither named in the order nor present in the Southern District at the time of issuance.[8]

Taittinger moved to quash the subpoena, arguing that it did not fall within the scope of section 1782(a).[9] District Judge Lawrence M. McKenna agreed with the respondent and granted the motion to quash. In ruling for Taittinger, the district court held that the statute "was not intended to provide discovery of evidence maintained within a foreign jurisdiction."[10]

In a parallel proceeding, U.S. District Judge Alvin K. Hellerstein heard motions to quash two other subpoenas issued by Edelman to individuals who had been named in the October 20th discovery order. Judge Hellerstein quashed one of the subpoenas because of improper service and denied the motion to quash with regard to the second subpoena, in effect permitting the deposition of a French resident to proceed in the Southern District.[11] In the instant action, Edelman appealed the order quashing the subpoena served on Taittinger.[12]

II. The Court's Analysis

A. Standard of Review

The court began its analysis of the district court order to quash the subpoena issued to Taittinger by discussing the standard of review regarding a section 1782(a) order. The court adopted the test set forth in *Esses v. Hanania*,[13] which involved two steps: "the first, as a matter of law, is whether the district court erred in its interpretation of the language of the statute and, if not, the second is whether the district court's decision to grant discovery on the facts before it was in excess of its discretion."[14] Accordingly, if the court, conducting a de novo review, were to find that the requirements of section 1782(a) had been properly construed by the district court, it would move to the second step, and assess whether the district court abused its discretion in giving the order to quash the subpoena.[15] In the instant case, the court based its decision on the

7. *Taittinger*, 295 F.3d at 174.

8. *Id*.

9. *Id*.

10. In re Edelman, 2001 U.S. Dist. LEXIS 2030 (S.D.N.Y. Feb. 26, 2001). The court utilized Judge Patterson's analysis of the legislative history of section 1782 in *Sarrio* to determine that it did not apply to *Taittinger*. *Id*.; *see* In re Sarrio S.A., 1995 U.S. Dist. LEXIS 14822 (S.D.N.Y. Oct. 11, 1995) (*Sarrio I*).

11. *Taittinger*, 295 F.3d at 175.

12. *Id*.

13. 101 F.3d 873 (2d Cir. 1996).

14. *Id*. at 875.

15. *Taittinger*, 295 F.3d at 175.

district court's interpretation of the statute and did not reach the question of abuse of discretion by the district court.

B. 28 U.S.C. § 1782(a)[16]

The court's review of section 1782(a) proceeded by breaking the statute down into its constituent elements.[17] The court identified three requirements, originally set forth in *Esses v. Hanania*,[18] that must be met for a valid discovery order to be issued under section 1782(a): (1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or "any interested person."[19] The court then detailed its previous rulings on requirements (2) and (3) of section 1782(a), which were not at issue here, and concluded that the scope of the first requirement needed to be analyzed in further detail.[20]

First, the court considered Taittinger's argument that section 1782(a) applied only to evidence located in the United States, or, in the alternative, that the court should recognize a procedural requirement that the issuance of the discovery order coincide with the prospective deponent's presence in the district.[21] Taittinger's argument was based on the district court's reasoning that, because Taittinger resides and works in France, the evidence in question, i.e., his knowledge regarding the French litigation with Société, was located in France. In making its decision to quash the subpoena, the district court relied on *In re Sarrio (Sarrio I)*,[22] which limited the scope of section 1782(a) to evidence located in the United States.[23] Significantly, the decision in *Sarrio I* related to documentary evidence, whereas the evidence at issue in the instant case was testimonial in nature. Taking this into consideration, the court concluded that "what a person will testify to is located wherever that person is found," and, therefore, the limitation in scope distinguished in *Sarrio I* did not necessarily apply to testimonial evidence.[24] However, in order to properly evaluate the scope of the first requirement in section 1782(a), the court undertook a further inquiry into the language and legislative history of the statute.

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16. *See supra* note 5 for the text of 28 U.S.C. § 1782(a).

17. *Taittinger*, 295 F.3d at 175.

18. 101 F.3d 873 (2d Cir. 1996).

19. *Id*. at 875.

20. *Taittinger*, 295 F.3d at 176.

21. *Id*.

22. *Sarrio I*, 1995 U.S. Dist. LEXIS 14822, at *1.

23. *Id*. at *8. The court in *Sarrio I* acknowledged that the language of the statute does not indicate a limitation on where evidence must be kept but relied on the legislative history, including the congressional intent reflected in various amendments to section 1782(a), to find that the discovery of documents is limited to evidence located in the United States. *Id*. at *6–8.

24. *Taittinger*, 295 F.3d at 177. Moreover, on appeal (*Sarrio II*) the court did not reconsider the limitation on the scope of section 1782(a) established in *Sarrio I*. *Id*. at 177; *see* Chase Manhattan Corp. v. Sarrio S.A. (In re Sarrio, S.A.) 119 F.3d 143 (2d Cir. 1997) (*Sarrio II*).

C. Analysis of Section 1782(a)'s First Requirement

1. Statutory Language

The court began its analysis of the statutory language of section 1782(a) by focusing on the requirement that a person may be subject to a section 1782(a) order only if he "resides or is found" in the district in which the issuing court sits.[25] It interpreted this language to contain an express geographic restriction solely on testimonial evidence, which was not addressed in either of the *Sarrio*[26] cases.[27] The court justified its position by limiting its inquiry solely to the words of the statute.[28] The court then noted that its inquiry would be focused on the phrase "is found," because it was undisputed that Taittinger resided in France.[29]

Taittinger argued that the phrase "is found" is in the present tense, and thus places a temporal limitation on section 1782(a), because it means "that a prospective deponent must be in the district at the precise time when the district court issues the discovery order."[30] Edelman responded that recognizing a temporal limitation on the issuance of a discovery order would be a novel procedural requirement and also that the phrase "is found" refers to the actual time of service of the subpoena.[31] The court conceded that the phrase "could mean . . . that a deponent must be residing or be found in the district contemporaneously with the district court's issuance of the discovery order," but ultimately agreed with Edelman that the phrase "resides or is found" simply creates a geographical and not a temporal limitation.[32] In order to support its position that the phrase is solely a geographic limitation, the court made a further inquiry into the statutory language of section 1782(a), including a review of other procedural mechanisms relating to the exertion of personal jurisdiction by the district court over prospective deponents and the legislative history of the statute.

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25. *Taittinger*, 295 F.3d at 177.

26. *See supra* notes 21–23.

27. *Taittinger*, 295 F.3d at 177.

28. In support of its interpretation the court cited numerous authorities on the methodology of statutory construction. *Id*. at 177; *see* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); Rubin v. United States, 449 U.S. 424 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete. . . ."); Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

29. *Taittinger*, 295 F.3d at 177.

30. *Id*. Although not cited by *Taittinger*, his argument is supported by an English court decision referred to in CIBC Mellon Trust Co. v. Mora Hotel Corporation N.V., 743 N.Y.S.2d 408, 408 (1st Dep't 2002). In *CIBC* the House of Lords affirmed the exercise of jurisdiction by the English courts "even if service could not be effectuated on the . . . defendant until a later date, as long as that defendant was domiciled in England on the date of issuance of the writ," thereby implying that the time at which the subpoena was issued (as opposed to when it was served) was the controlling factor in determining its validity with respect to the deponent. *Id*. at 413.

31. *Taittinger*, 295 F.3d at 178.

32. *Id*. at 177–78.

2. The Court's View of the Statutory Language

In continuing its evaluation of the statutory language, the court focused on the portion of section 1782(a) providing that "the testimony or statement shall be taken, and the document or thing produced, in accordance with the Federal Rules of Civil Procedure"[33] ("Federal Rules"). The court acknowledged that section 1782(a) works in conjunction with the other procedural rules and this gives the statute a degree of flexibility.[34] Rule 45 of the Federal Rules states in part: "a subpoena may be served at any place within the district of the court by which it is issued."[35] Rule 45 also contains a subsection entitled "Protections of Persons Subject to Subpoenas," which, *inter alia*, gives nonparty deponents protection from complying with a subpoena by allowing the quashing or modification of a subpoena that compels the deponent to travel more than 100 miles from the place where that person resides or works.[36] The court identified the 100-mile exception as providing protection for nonparty witnesses from undue burden on costs and time required to comply with a subpoena.[37]

Rule 26(c) authorizes a district court to modify or even quash a subpoena in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[38] The court interpreted Rules 45 and 26 together as providing ample protection from burdensome travel and expense to those persons from whom discovery is sought under section 1782(a), and therefore the court found no reason to construe the language of section 1782(a) to extend any further protection to nonresident prospective deponents.[39] The court then dismissed Taittinger's argument by stating that a temporal restriction on section 1782(a) would be procedurally impractical and unduly burdensome to the party that sought discovery under the statute.[40]

The court then addressed the well-established concept of "tag jurisdiction."[41] The Supreme Court, in *Burnham v. Superior Court of California*, approved this derivative of territorial jurisdiction, holding that physical presence was enough to authorize a court's personal jurisdiction.[42] Moreover, in *Kadic v Karadzic*, the Second Circuit upheld the Southern District's

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33. *Id*. at 178; *see supra* note 5.

34. *Id*. at 178.

35. *Id*. at 178; *see* Fed. R. Civ. P. 45(b)(2).

36. Fed. R. Civ. P. 45(c)(3)(A)(ii).

37. *Taittinger*, 295 F.3d at 178. The court cited authorities for its understanding of the protections provided in Rule 45. *See* Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994); Price Waterhouse LLP v. First American Corp., 182 F.R.D. 56, 63 (S.D.N.Y. 1998).

38. Fed. R. Civ. P. 26(c).

39. *Taittinger*, 295 F.3d at 178.

40. *Id*.

41. *Id*. at 179.

42. 495 U.S. 604 (1990) (plurality opinion). The Supreme Court stated in *Burnham* that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id*. at 619.

exercise of personal jurisdiction over a foreign national served with a summons while physically present in the Southern District.[43]

3. Review of the Legislative History of Section 1782(a)

Section 1782(a) was enacted in 1948 and subsequently underwent a series of amendments that broadened the scope of the statute.[44] Under the original statute, nonresidents could not be deposed, but Congress amended the statute in 1949 by removing the word "residing," so as to expand the scope to those persons residing outside of the United States.[45] The court viewed this amendment as an express congressional decision to include persons temporarily within a district within the purview of section 1782(a).[46] Moreover, in 1964 Congress again amended section 1782(a) to authorize other forms of discovery in addition to depositions, to describe the types of foreign proceedings for which discovery could be granted, and to describe who may petition for discovery.[47] The last amendment to section 1782(a) was made in 1996, when Congress added that the statute could be used to provide discovery in international criminal proceedings.[48]

The court interpreted the series of amendments to section 1782(a) as showing Congress's intent to expand the scope of the statute and, as a result, to give courts discretion in allowing parties to avail themselves of section 1782(a) to facilitate discovery for foreign litigation.[49] This view was confirmed in the Senate Report accompanying the 1964 amendment, which stated that section 1782(a) "leaves the issuance of an appropriate order to the discretion of the court which, in proper circumstances, may refuse to issue an order or may impose conditions it seems desirable."[50]

D. The Court's Holding

To make its decision, the court took into account the language of section 1782(a), the various amendments made to expand the scope of the statue, as well as the legislative history of section 1782(a). It concluded, with regard to testimonial evidence, that "if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for purposes of § 1782(a), he is 'found' in that district."[51] Moreover, the court held

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43. 70 F.3d 232, 246–47 (2d Cir. 1995). The court in *Kadic* stated that, "Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction." *Id.* at 247; *see also* Doreen Cronin, *Recent Decision: Kadic v. Karadzic*, 10 N.Y. INT'L L. REV. 215, 215 (1997) (providing an analysis and overview of the decision in *Kadic*).

44. *Taittinger*, 295 F.3d at 179–80.

45. *Id.*; *see* H.R. Rep. No. 81-352 at 40 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1270.

46. *Taittinger*, 295 F.3d at 180.

47. *Id.*; *see* 28 U.S.C. 1782(a).

48. *Taittinger*, 295 F.3d at 180.

49. *Id.*

50. *Id.*; *see* S. Rep. No. 88-1580, § 9, *reprinted in* 1964 U.S.C.C.A.N. at 3788.

51. *Taittinger*, 295 F.3d at 180.

that "as a matter of law, a person who lives and works in a foreign country is not necessarily beyond the reach of section 1782(a) simply because the district judge signed the discovery order at a time when that prospective deponent was not physically present in the district."[52] Accordingly, the court reversed the district court's order to quash the subpoena on grounds that Taittinger was not "found" in the United States at the time the subpoena was issued, thus determining that the district court interpreted section 1782(a) too narrowly.[53]

E Instructions on Remand

The court's holding dealt with a very specific portion of section 1782(a), i.e., the issuance of a subpoena for a deposition from a foreign national traveling in the district in which the issuing court sits. Therefore, the decision did not affect the other procedural limitations and protections available to prospective deponents. The court acknowledged that Rule 45 of the Federal Rules might still bar the deposition, regardless of the conclusion that Taittinger falls within the scope of section 1782(a).[54] Moreover, as confirmed in the legislative history, the district court is allowed discretion in issuing subpoenas and "may refuse to issue an order or may impose conditions that it seems desirable."[55] Thus, on remand, the court instructed the district court to take into account the generally recognized goals of section 1782(a): "(1) providing equitable and efficient means to assist parties engaged in international litigation and, by so doing, (2) inviting foreign countries to provide similar assistance to [U.S.] courts."[56] Furthermore, the court cautioned that, "[section] 1782(a) should not be applied in a way that [would] create obvious confusion or skew the results in foreign litigation" [57] and thus maintain "the 'procedural parity' of the parties to the French litigation."[58] In sum, the court remanded to the district court with instructions to consider the validity of the subpoena under Rule 45 of the Federal Rules, and further, if the district court needed to exercise its discretion, to take into consideration such factors as the effect on international judicial policies and fairness to the parties involved in foreign litigation.[59]

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52. *Id*.

53. *Id*.

54. *Id*. at 181.

55. *See supra* note 49 and accompanying text.

56. *Taittinger*, 295 F.3d at 181; *see* S. Rep. No. 188-1580, *reprinted in* 1964 U.S.C.C.A.N. at 3783.

57. *Taittinger*, 295 F.3d at 181; *see* Euromepa, S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101 (1995); *see also* Jennifer Marciano, *Recent Decision: Group Josi Reinsurance Company SA v. Universal General Insurance Company*, 14 N.Y. INT'L L. REV. 165, 165 (2001).

58. *Taittinger*, 295 F.3d at 181. In *Euromepa*, *supra* note 57, the court cited In re Application of Aldunate, 3 F.3d 54, 60 (1993) which addressed the following policy considerations in deciding whether to issue a subpoena pursuant to section 1782(a): "maintaining the balance between litigants that each nation creates within its own judicial system, preventing circumvention of foreign restrictions on discovery and avoiding offense to foreign tribunals." *Id.*

59. *Taittinger*, 295 F.3d at 181.

III. Conclusion

The United States Court of Appeals for the Second Circuit made a rational, well-supported decision that is consistent with applicable case law, legislative history and public policy. This case indicates that courts have the discretion to extend certain procedural "courtesies" to litigants in foreign litigation in an attempt to establish a just and equitable procedural parity between the parties. Moreover, the decision corresponds with congressional intent, as indicated by the House and Senate Reports issued with amendments made to section 1782(a), that the purpose of the statute is to provide "equitable procedures for the benefit of litigants in international litigation."[60] In addition, the court limited its holding to a very specific aspect of the statue in order to leave some discretionary power in the hands of the district courts. Finally, by following the principles set forth in *Burnham*[61] and *Kadic*[62] regarding the exertion of personal jurisdiction based on physical presence within a district, this decision comports with well-established notions of fair play and substantial justice that safeguard the due process protections at the root of our constitutional jurisprudence.

Akshay Belani

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60. *See supra* note 56.

61. *See supra* note 42 and accompanying text.

62. *See supra* note 43 and accompanying text.

Aguinda v. Texaco, Inc.

303 F.3d 470 (2d Cir. 2002)

The United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of Ecuadorian and Peruvian plaintiffs' environmental contamination suit against a United States corporation then headquartered in New York for *forum non conveniens*, but modified its ruling to extend additional time to plaintiffs to file their actions in Ecuador.

I. Holding

In *Aguinda v. Texaco, Inc.*,[1] the United States Court of Appeals for the Second Circuit upheld the United States District Court for the Southern District of New York's ruling, dismissing plaintiffs' class action suits for *forum non conveniens.*[2] The holding was premised on two theories: Ecuador is an adequate alternative forum for plaintiffs to bring suit,[3] and the balance of private and public interest factors favors conducting the trial in the foreign forum.[4] However, the court was sympathetic to plaintiffs' concern that due to Ecuador's failure to recognize class action procedures,[5] it would be extremely difficult for the nearly 55,000 plaintiffs[6] to assert their claims within the narrow statutory window.[7] Therefore, the Court of Appeals modified the District Court's ruling with respect to plaintiffs' ability to achieve timely claims, and required that Texaco waive defenses based on statute of limitations to accommodate plaintiffs.[8]

II. Facts

In 1964, Texaco Petroleum Company ("TexPet")[9] commenced oil exploration and drilling in the Oriente region of eastern Ecuador.[10] In 1965, TexPet started and operated a new petro-

1. 303 F.3d 470 (2d Cir. 2002) ("*Aguinda II*").
2. *Id.* at 480.
3. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 539-47 (S.D.N.Y. 2001) (*"Aguinda I"*). Texaco satisfied the threshold requirement of an adequate alternative forum by submitting to personal jurisdiction in Ecuador, and plaintiffs' objections to the adequacy of an Ecuadorian forum lacked merit. *Id.*
4. *Id.* at 537 (explaining that "the record establishes overwhelmingly that these cases have everything to do with Ecuador and nothing to do with the United States").
5. *Id.* at 541–42. While the absence of the class action device may complicate the filing requirement for plaintiffs, it does not render Ecuador an inadequate forum, because these actions might not qualify for class action status under United States jurisdiction. *Id.*
6. *Aguinda II*, 303 F.3d at 478.
7. *Id.* Sixty days is inadequate for Plaintiffs to obtain individual authorizations to assert their claims in the Ecuadorian forum.
8. *Id.* at 478–79. Dismissal is conditioned on Texaco's waiving of statute of limitation defenses "for limitation periods expiring between the date of filing these United States actions and one year (rather than 60 days) following the dismissal of these actions." *Id.*
9. *Aguinda I,* 142 F. Supp. 2d at 537. TexPet is a Delaware corporation and fourth-tier subsidiary of Texaco.
10. *Aguinda II*, 303 F.3d at 473.

leum concession for a joint venture ("Consortium"), in which Gulf Oil Corporation[11] and later PetroEcuador[12] also acquired ownership interests. In 1976, PetroEcuador acquired Gulf's interest, enabling the agency to become the majority stakeholder in the Consortium.[13] TexPet operated a trans-Ecuadorian oil pipeline and handled the Consortium's drilling activities until PetroEcuador assumed those responsibilities in 1989 and 1990, respectively.[14] In 1992, PetroEcuador attained complete ownership over the Consortium after TexPet abdicated its interests in the operation.[15]

In November 1993, Ecuadorian plaintiffs[16] filed a class action suit against Texaco in the Southern District of New York.[17] In December 1994, Peruvian plaintiffs ("*Jota*" plaintiffs)[18] filed a separate class action against Texaco in the same court.[19] Both groups ("Plaintiffs") alleged that between 1964 and 1992, Texaco's oil operations polluted rain forests and rivers in the two countries.[20] Plaintiffs sued under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy,[21] and violations of the Alien Tort Claims Act.[22] Plaintiffs alleged that Texaco's activities in Ecuador were the product of directives ordered from Texaco's New York headquarters.[23] In addition to securing money damages, Plaintiffs sought substantial equitable relief to remedy the ill effects of the water and environmental contamination.[24]

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11. *Id.* Gulf and Texaco owned equal shares when the Consortium began operations.

12. *Id.* PetroEcuador, Ecuador's state-owned oil agency, obtained a 25 percent share in the Consortium in 1974.

13. *Id.*

14. *Id.*

15. *Id.*

16. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001) ("*Aguinda I*") (noting that plaintiffs consisted of 76 residents of the Oriente region suing on behalf of thousands of Ecuadorian residents).

17. Aguinda v. Texaco, Inc., Dkt. No. 93 Civ. 7527 (S.D.N.Y. filed Nov. 3, 1993).

18. *Aguinda I,* 142 F. Supp. 2d at 537. Twenty-three Peruvian residents of the area adjoining the Oriente region in Ecuador (and four related organizations), filed suit on behalf of thousands of such residents. Plaintiffs were also referred to as "Ashanga plaintiffs."

19. Jota v. Texaco, Inc., Dkt. No. 94 Civ. 9266 (S.D.N.Y. filed Dec. 28, 1994).

20. *Aguinda I,* 142 F. Supp. 2d at 537. Plaintiffs claimed that the injuries were sustained as a result of "negligent or otherwise improper oil piping and waste disposal practices." For detailed analysis of the extent of pollution, *see* Lyndsy Rutherford, Note, *Redressing U.S. Corporate Environmental Harms Abroad through Transnational Public Law Litigation: Generating a Global Discourse on the International Definition of Environmental Justice*, 14 GEO. INT'L ENVTL. L. REV. 807–08 (Summer 2002).

21. *Aguinda I,* 142 F. Supp. 2d at 537 (explaining that "[n]either lawsuit alleges any injury to persons, property, or commerce in the United States").

22. 28 U.S.C. § 1350 (2002). "Alien's action for tort. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *See* Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (discussing the United States' interest in deciding a question of law pertaining to a United States statute such as ATCA).

23. Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002) ("*Aguinda II*"). Plaintiffs alleged that Texaco's activities in Ecuador were "designed, controlled, conceived, and directed . . . through its operations in the United States."

24. *Id.* at 473–74.

III. Procedural History

In December 1993, Texaco moved to dismiss the *Aguinda* complaint on three grounds[25] and presented a letter from Ecuador's ambassador to the United States addressed to the U.S. Department of State stating that the government of Ecuador regarded the suit as "an affront to Ecuador's national sovereignty."[26] The District Court initially reserved decision, instead ordering discovery to ascertain the extent of Texaco's activities in Ecuador.[27] In November 1996, Texaco's motion to dismiss for *forum non conveniens* and international comity was granted.[28] Additionally, the court justified dismissal because Plaintiffs failed to join PetroEcuador and the Republic of Ecuador ("Republic") as parties.[29] After the court declared that the Foreign Sovereign Immunities Act[30] barred the assertion of jurisdiction over either entity, the Republic then filed a motion to intervene,[31] but the Republic refused to comply with the District Court's order to completely waive sovereign immunity.[32] At the same time, the *Aguinda* plaintiffs asked for reconsideration of the court's dismissal,[33] and the court denied both motions.[34] Thereafter, the court dismissed the *Jota* complaint.[35]

On appeal, the United States Court of Appeals for the Second Circuit vacated the dismissal and remanded for reconsideration[36] to ensure that Texaco would submit to jurisdiction in Ecuador.[37] The court instructed the District Court on remand to re-weigh the relevant fac-

25. *Id.* at 474. The three grounds were: 1) failure to join the Republic of Ecuador, 2) international comity, and 3) *forum non conveniens*.

26. *Id*.

27. *See* Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 at *31 (S.D.N.Y. April 11, 1994).

28. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

29. *Id.* The court noted the dangers of proceeding without PetroEcuador and the Republic of Ecuador: granting plaintiffs equitable relief "would be unenforceable on its face, prejudicial to both present and absent parties, and an open invitation to an international political debacle."

30. 28 U.S.C. §§ 1603(b), 1604. Section 1604 states: "Immunity of a foreign state from jurisdiction. Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

31. Jota v. Texaco Inc., 157 F.3d 153, 158 (2d Cir. 1998). An affidavit was submitted stating that the Republic of Ecuador was motivated to "protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company."

32. *Id.* While the Republic would "procure the necessary indemnization in order to alleviate the environmental damages caused by Texaco," it refused to waive sovereign immunity with respect to any claims made by the *Jota* plaintiffs or counterclaims asserted by Texaco.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Jota,* 157 F.3d at 163.

37. *Id.* at 159.

tors for *forum non conveniens*[38] and comity,[39] and reasoned that the District Court's assertion that Plaintiffs failed to join an indispensable party had only limited ramifications.[40]

In the aftermath of the Court of Appeals' decision, Ecuador informed the District Court that its intervention was not necessary, as Ecuador did not wish to be deemed a party in this action.[41] Meanwhile, Texaco expressed its willingness to proceed in Ecuador and even Peru, by consenting to personal jurisdiction in those countries.[42] In addition, Texaco stipulated it would waive its statute of limitations defenses in part,[43] and that Plaintiffs could use the accumulated discovery to date in later proceedings.[44] Texaco then renewed its motion to dismiss for *forum non conveniens.*[45]

On May 30, 2001, for the second time, the District Court granted Texaco's motion to dismiss.[46] The court concluded that Texaco satisfied the burden of demonstrating the availability of an adequate alternative forum,[47] the private and public interest factors weighed heavily in Texaco's favor,[48] and Plaintiffs' assertion that public interest factors should be analyzed under the Alien Tort Claim Act (ATCA) was without merit.[49] The court also dismissed Plaintiffs' objection to Ecuador as an adequate alternative forum due to alleged Ecuadorian courts' bias against Peruvians arising from a border dispute.[50] Furthermore, the court addressed Plaintiffs' concern regarding the effects of a new Ecuadorian Statute ("Law 55/98") on the Ecuadorian court's ability to maintain an action that had been previously filed in a foreign forum.[51] The District Court reassured Plaintiffs by noting that it would be willing to reconsider if the Ecuadorian court upheld dismissal on the basis of Law 55/98.[52]

The case was appealed again to the United States Court of Appeals for the Second Circuit.

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38. *Id.* On remand, the District Court was instructed to independently re-weigh the factors relevant to a *forum non conveniens* dismissal, rather than simply relying on findings made in Sequiha v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

39. *Jota*, 157 F.3d at 161. On remand, the District Court should review comity "in light of all the then current circumstances, including Ecuador's position with regard to the maintenance of this litigation in a United States forum."

40. *Id.* at 161–63.

41. Aguinda v. Texaco, Inc., 303 F.3d 470, 475 (2d Cir. 2002) ("*Aguinda II*"). Ecuador's ambassador to the United States informed the District Court that his country was "not willing, under any circumstance, to waive its sovereign immunity and be subject to rulings by Courts in the United States. . . ."

42. *Id.*

43. *Id*

44. *Id*.

45. *Id*.

46. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001) (*"Aguinda I"*).

47. *Id.* at 543.

48. *Id.* at 548.

49. *Id*. at 552–54.

50. *Id.* at 546. Plaintiffs failed to demonstrate any competent evidence to support the proposition that Ecuadorian courts are biased to Peruvians. The border dispute referred to by plaintiffs had been settled in 1998.

51. *Id.* at 547.

52. *Id*.

IV. The Test for *Forum Non Conveniens*

The United States Court of Appeals for the Second Circuit articulated the test to apply in determining whether a dismissal predicated on *forum non conveniens* is proper. First, the court must ascertain the degree of deference to afford to Plaintiff's choice of forum.[53] Following that inquiry, the court then considers whether an adequate alternative forum exists,[54] and if it does, the court balances private and public interest factors of the parties to see whether the balance favors transfer.[55] The burden of proof as to these questions lies with the defendant.[56]

A. Ecuador Is an Adequate Alternative Forum

The court declared that the general requirement of an adequate alternative forum is that the defendant is willing to submit to jurisdiction in that forum;[57] however, rare exceptions may exist, barring such a move to that forum.[58] Plaintiffs objected to Ecuador as an adequate alternative forum on several grounds: Law 55/98 precluded plaintiffs from bringing suit in Ecuador, the courts were unsympathetic to tort claims, the courts do not recognize class actions, the courts were inefficient and subject to corrupt influences and the risk of partiality, and the District Court's allowance of 60 days for the assertion of Plaintiffs' claims was unjust in light of the large number of Plaintiffs involved in the litigation.[59]

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53. *See* Moscovits v. Magyar Cukor Rt, 2002 U.S. App. LEXIS 9498 (2d Cir. May 14, 2002) (unpublished) at *2 (stating that the court may not reverse a District Court's dismissal on the ground of *forum non conveniens* unless the dismissal constituted a clear abuse of discretion); *see also* Murray v. BBC, 81 F.3d 287 (2d Cir. 1996) (foreign plaintiffs are entitled to less deference as to choice of forum because the "central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient") (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981)). *See generally* Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) (defendants will have an easier time succeeding on *forum non conveniens* motion when they can establish plaintiff's motive to forum-shop). Forum-shopping may be sought due to tactical advantages resulting from local laws, "habitual generosity" of juries within certain districts, the party's popularity within particular forums, etc. *Id.*

54. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947) (explaining that the *forum non conveniens* doctrine "presupposes" that there will be two adequate forums to choose from where the defendant will be amenable to process); s*ee also* Flores v. S. Peru Copper Corp., 2002 U.S. Dist. LEXIS 13013 at *44 (S.D.N.Y. July 16, 2002) (In addition to establishing service of process on defendants, the forum must permit litigation of the subject matter of the dispute).

55. The second part of the test is based on notions of convenience and serving the ends of justice. *See* Peregrine Myanmar v. Segal, 89 F.3d 41, 46 (2d Cir. 1996).

56. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000), noted, 14 N.Y. Int'l L. Rev. 153 (2001) (defendant has burden as to both prongs of *forum non conveniens* test to show that the factors "tilt[] strongly in favor of trial in the foreign forum") (citing R. Maganlal & Co. v. M.G. Chemical Co., 942 F.2d 164, 167 (2d Cir. 1991)).

57. *See* Valarezo v. Ecuadorian Line, Inc., 2001 U.S. Dist. LEXIS 8942 at *8 (S.D.N.Y. June 29, 2001) (court conditioned dismissal for *forum non conveniens* on the defendants' agreement to submit to the jurisdiction of the Ecuadorian courts in personal injury action).

58. *See* DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 57 (2d Cir. 2000) (explaining that a forum will likely be inadequate where the remedy available is unsatisfactory); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (noting that the alternative forum must recognize the cause of action); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 908 (2d Cir. 1986) (alternative forum must not bar the action from being brought in that forum due to the statute of limitations); Bhatnagar v. Surrendra Overseas Ltd., 52 F. 3d 1220, 1227–31 (3d Cir. 1995) (India was found to be inadequate forum because delays in proceedings may last up to 25 years).

59. Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002) ("*Aguinda II*").

Law 55/98 did not preclude Plaintiffs from bringing suit in Ecuador, because it had been declared unconstitutional subsequent to the institution of this suit.[60] Additionally, the District Court provided a safeguard for Plaintiffs in the unlikely event that the Ecuadorian courts would dismiss the suit under the statute by allowing for reconsideration.[61]

The court found no merit to Plaintiffs' contention that Ecuadorian courts are unreceptive to tort claims based solely on the absence of tort actions on Ecuador's Supreme Court docket.[62] The court noted, in fact, that several plaintiffs had recovered judgments from TexPet and Petro-Ecuador for tort claims similar to those asserted here,[63] and other U.S. courts have found Ecuador to be an adequate forum.[64]

The failure of Ecuador to recognize class actions did not deprive Plaintiffs of an adequate forum simply because the litigation procedures were a little burdensome.[65] In fact, Ecuadorian courts do allow similar litigants to join together in a single suit, as long as the individuals authorize the action in their names.[66]

In finding that there was no abuse of discretion by the District Court, the Court of Appeals made specific findings that the importance and nature of the suit[67] and Ecuador's adequacy in handling other civil suits[68] made the risk of corrupt influences low.[69]

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60. *Id.* at 477. The court was informed by the parties that on April 30, 2002, the Tribunal Constitutional Court declared Law 55/98 unconstitutional.

61. *Id.*; Bank of Credit and Commerce Int'l v. State Bank of Pakistan, 273 F. 3d 241, 248 (2d Cir. 2001) (noting that District Courts must analyze the relevant issues of foreign law when considering if an alternative forum is adequate, and the court should support its "justifiable belief" with evidence from the record).

62. *Id*.

63. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001) (*"Aguinda I"*) (explaining that tort judgments have been obtained in Ecuadorian courts by some of the members of Plaintiffs' class and three affected Ecuadorian municipalities against TexPet, PetroEcuador, and members of the Consortium).

64. *See* Valarezo v. Ecuadorian Line, Inc.,2001 U.S. Dist. LEXIS 8942 at *9 (the possibility of "insurmountable difficulties" in proceeding in Ecuador are, at best, conjectural, and cannot make an alternative forum "clearly inadequate"); Leon v. Millon Air, Inc., 251 F.3d 1305, 1314 (11th Cir. 2001) ("the two percent allocation of Ecuadorian national budget to the judiciary is insufficiently probative of an inadequate forum when one considers that in the United States the federal judiciary's budget is only two-tenths of one percent of the national budget") (citing Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 954 (2000)); cf. Capital Currency Exch. v. National Westminster Bank PLC, 155 F.3d 603, 610 (2d Cir. 1998) (England is an adequate forum despite plaintiffs' assertion that the English courts will not award treble damages under the Sherman Act and the courts have never awarded money damages in a anti-trust case, even though the court has the power to issue such damages).

65. *Aguinda II*, 303 F.3d at 478. *See* Ciba-Geigy Ltd. v. Fish Peddler, 691 So. 2d 1111, 1117 (Fla. Dist. Ct. App. 1997) (noting that a delay of "many, many" years will not render a forum inadequate in a complex case).

66. *Id*.

67. *See Aguinda I*, 142 F. Supp. 2d at 545 (government of Ecuador comments that the underlying claim has been a hotly contested issue of public scrutiny and political debate, so the possibility of undue influence or corruption is remote).

68. *See Ciba-Geigy Ltd.*, 691 So. 2d 1111, 1117 (stating that the Civil Code of Ecuador allows actions for negligence and strict liability in tort).

69. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (defendants did not meet burden of proving an adequate alternative forum when they alleged corruption in the form of major political parties influencing decisions in particular cases and that "judges are underpaid, poorly disciplined, and susceptible to political influence").

The court did side with Plaintiffs in regard to the sixty-day period that the Ecuadorian court maintains for plaintiffs to authorize their actions before the court. The Court of Appeals determined sixty days to be insufficient because of the extremely high number of plaintiffs that would have to authorize each individual action within the narrow time frame.[70] Accordingly, the Court of Appeals parted with this aspect of the District Court's ruling, and directed the District Court to modify its ruling to condition dismissal on Texaco's agreeing to waive certain statute of limitations defenses.[71]

B. Balance of Private and Public Interest Factors Favors Trial in Ecuador

The Court of Appeals upheld the District Court's decision that the private interest factors "weighed heavily" in favor of an Ecuadorian forum.[72] The court relied on the factors enumerated in *Gulf Oil v. Gilbert*[73] in reaching this conclusion. The relative ease of access to sources of proof can be found in Ecuador.[74] The injuries were sustained in Ecuador, the relevant medical and property records in addition to the Consortium's record of decisions are housed there, and all the Plaintiffs live in either Ecuador or Peru.[75] In addition, Texaco's evidence regarding Petro-Ecuador and the Republic's involvement in the Consortium's operations may be found in Ecuador.[76]

Other practical considerations voiced by the Court of Appeals included the tremendous translation problems if the suit were based in New York;[77] the Ecuadorian court would provide a better vantage point from which to gauge the effects of the pollution; and it would be possible to join PetroEcuador and the Republic in a suit brought there.[78] Plaintiffs' concerns regarding any evidence that might be procured in the United States were dealt with when Texaco stipulated that Plaintiffs were entitled to use in Ecuador or Peru the discovery that had already been

70. *Aguinda II*, 303 F.3d at 478.

71. *Id*. at 478–79. Texaco has to waive any defense based on statute of limitations for limitation periods expiring between date of filing these United States actions and one year following the dismissal of these actions. *See* Ilusorio v. Ilusorio-Bildner, 103 F. Supp. 2d 672, 675 (S.D.N.Y. 2000) (maintaining that dismissals for *forum non conveniens* are often conditioned on a waiver of statute of limitations, discovery procedures, or on consent to jurisdiction in the new forum).

72. *Aguinda II*, 303 F.3d at 479.

73. 330 U.S. 501, 508 (1947) (private interests to consider by the Court include: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive). *See* Abdullahi v. Pfizer, Inc., 2002 U.S. Dist. LEXIS 17436 at *32 (S.D.N.Y. Sept. 17, 2002) (noting that the *Gilbert* factors are flexible and must be applied depending on the unique facts of each case).

74. *Aguinda II*, 303 F.3d at 479.

75. *Id*; Becker v. Club Las Velas, 1995 U.S. Dist. LEXIS 6101 at *12 (S.D.N.Y. May 8, 1995) (in a personal injury action alleged by plaintiffs against defendant foreign resort corporation, nearly all of the evidence involving the alleged conduct was based in Mexico, the adequate alternative forum).

76. *Aguinda II*, 303 F.3d at 479.

77. *Id*. The 55,000 putative class members consisted of different indigenous groups speaking different dialects.

78. *Id*.

obtained, and that Texaco would not oppose further discovery in Ecuador which would be otherwise available in the United States.[79]

Plaintiffs tried to raise two other practical considerations, but the court did not recognize them, because they were introduced only on appeal.[80] Plaintiffs argued that Ecuador's filing fee for civil actions was too expensive because Plaintiffs comprised primarily low-wage farmers.[81] In addition, Plaintiffs took note of a travel advisory issued by the U.S. State Department for the Ecuadorian province where the trial would be located.[82] The court reasoned that both assertions would have lacked merit anyway. With regard to the filing cost, Ecuador had passed a new law reducing filing fees to a minimal level for indigent persons.[83] With regard to the travel advisory issue, there was no evidence as to why the trial had to be conducted in the province suggested by Plaintiffs.[84]

Based on the *Gulf Oil Corp.* test, the public interest factors for the competing forums also favored trial in Ecuador.[85] The *Gulf Oil Corp.* considerations included: the "administrative difficulties associated with Court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law."[86] The District Court explained that the Ecuadorian local interest in the controversy is very substantial because the environmental pollution of Ecuador's rain forests and other property directly injured tens of thousands of Ecuadorian and Peruvian citizens.[87] Additionally, the government of Ecuador, which controlled the oil operations, could be joined as a necessary party to the case, and the Ecuadorian judge would be better equipped to apply Ecuadorian law with regard to Spanish language testimony and documents relating to thirty years of the Consortium's operations.[88] Finally, the congestion of American dockets and the delays associated with mass-tort litigation in America indicated that Plaintiffs might be better off bringing their individualized actions in Ecuador, for which they had already found success.[89]

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79. *Id.*

80. *Id.*; DelGaudio v. Aetna Ins. Co., 262 A.D.2d 641 (1999) (noting that appellant improperly raised a new argument on appeal, as the issue "does not present a dispositive issue of law discernible on the record").

81. *Aguinda II*, 303 F.3d at 479.

82. *Id.*; Hatzlachh Supply, Inc. v. Tradewind Airways, Ltd., 659 F. Supp. 112, 114 (S.D.N.Y. 1987) (Nigerian courts found not to provide an adequate forum when U.S. State Department issued a travel advisory discussing the legal ramifications of the new military government's rise to power and noted the fact that if successful, plaintiff would only be allowed to take $20 out of the country due to Nigeria's strict currency controls).

83. *Aguinda II*, 303 F.3d at 479; *see also* M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996) (U.S. Supreme Court asserts that the Due Process Clause of the 14th Amendment may grant an indigent the right to access judicial process without paying filing fees in civil actions in which there exists a "fundamental interest" at stake).

84. *Aguinda II*, 303 F.3d at 479.

85. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 551–52 (S.D.N.Y. 2001) (*"Aguinda I"*).

86. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

87. *See Aguinda I*, 142 F. Supp. 2d at 551.

88. *Id* at 551–52.

89. *Id.* at 552. *But see* Simon v. Philip Morris, 200 F.R.D. 21, 44 (E.D.N.Y. 2001) (explaining that mass tort litigation must be brought within the Federal Rules of Civil Procedure drafters' aims of "securing the just, speedy, and inexpensive determination of every action").

Plaintiffs' final plea was for the court to analogize the ATCA to other legislation that has been aligned with U.S. policy interests.[90] However, the court held that this contention would not be addressed, and said that even if it had been, the result would have been meaningless in the face of the dominant factors favoring trial in the Ecuadorian forum.[91]

V. Conclusion

The *Aguinda* decision is the product of more than eight years of litigation. The proceedings were closely watched by the courts, domestic corporations, environmental and ethical committees, government agencies, and foreign entities that house transnational corporations. Accordingly, the finding of *forum non conveniens* for Texaco has far-reaching effects in today's global economy.

Aguinda re-asserts notions of U.S. sovereignty and adherence to the *forum non conveniens* principles of providing an efficient, convenient judicial forum for plaintiffs to seek their remedies. Plaintiffs were afforded the required "balancing" test under the *forum non conveniens* factors. Trial was simply found to be better served in Ecuador, because the evidence, injury, and Plaintiffs all could be found in that country. This decision symbolizes the court's affirmation that foreign forums should be receptive and capable of providing justice and furnishing an adequate remedy to their injured citizens. Accordingly, the *forum non conveniens* doctrine has become a shield protecting transnational corporations from liability in U.S. courts in the wake of burgeoning globalization.

Michael Edelman

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90. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002) ("*Aguinda II*").

91. *Id;* Matthew R. Skolnik, Comment: *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After* Wiwa, 16 EMORY INT'L L. REV. 187, 220–24 (Spring 2002) (noting that while after Wiwa v. Royal Dutch Petroleum Co., more multinational corporations, "especially resource extraction companies" will be subject to a greater number of ATCA claims, there still exist exceptions for *forum non conveniens* to be invoked).

Virtual Countries, Inc. v. Republic of South Africa

300 F.3d 230 (2d Cir. 2002)

A foreign nation will be immune under the Foreign Sovereign Immunities Act to a suit brought in a United States court over a domain name when the alleged action of the foreign nation does not have a direct effect in the United States.

In *Virtual Countries, Inc. v. Republic of South Africa*, the United States Court of Appeals for the Second Circuit affirmed the District Court for the Southern District of New York's judgment that the court lacked subject matter jurisdiction[1] under the Foreign Sovereign Immunities Act of 1976[2] (FSIA) because the defendant's actions did not have a direct effect in the United States.[3]

The Seattle, Washington-based plaintiff in this case, Virtual Countries, is a corporation that owns Internet domain names, such as "bangladesh.com" and "algeria.com."[4] Since May 1995, Virtual Countries has also owned "southafrica.com"[5] and, since October 1996, it's been using this domain name to provide tourist information, weather, travel information, and online shopping opportunities with regard to the southern part of the African continent.[6]

The defendant, South Africa, is a foreign sovereign nation and owns "southafrica.net."[7] Also named in the lawsuit was Satour, the national travel agency of South Africa.[8] Satour has offices in New York and owns "satour.org," "satour.net," and "satour.com."[9]

Also involved in the lawsuit are two international organizations, the World Intellectual Property Organization (WIPO)[10] and the Internet Corporation for Assigned Names and Numbers (ICANN).[11] WIPO is an agency of the United Nations that helps to administer twenty-three international treaties related to intellectual property and has 179 member nations.[12]

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1. Virtual Countries v. South Africa, 300 F.3d 230, 232 (2d Cir. 2002).
2. 28 U.S.C. §§ 1330, 1602–1611 (2002).
3. *Virtual Countries*, 300 F.3d at 232
4. *Id.*
5. *Id.* at 233.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*; World Intellectual Property Organization, About WIPO (discussing the general mission and vision of WIPO and giving general information about the organization), *at* http://www.wipo.org/about-wipo/en/index.html (last visited Oct. 28, 2002).
11. *Virtual Countries*, 300 F.3d at 233; Internet Corporation for Assigned Names and Numbers, Toward a Statement of the ICANN Mission (Mar. 10, 2002) (discussing the role and mission of ICANN), *at* http://www.icann.org/general/toward-mission-statement-07mar02.htm (last visited Oct. 28, 2002).
12. *Virtual Countries,* 300 F.3d at 233.

ICANN is a private corporation that coordinates the Internet's technical management functions.[13] In order to resolve disputes over domain names, it monitors the Uniform Domain Name Dispute Resolution Policy (UDRP), which is a non-binding arbitral system.[14]

Responding to possibilities of "bad faith, abusive, misleading or unfair use of . . . geographical indications," WIPO started the Second Internet Domain Name Process in July 2000.[15] South Africa commented to WIPO that second-level domain names and generic top-level domain names that were the same as the official names of foreign sovereigns should be protected "against bad faith, abusive, misleading, or unfair registration and use."[16] South Africa did not mention Virtual Countries, but did say that these domain names were of substantial value to sovereign nations and therefore should be the property of the respective sovereign nations.[17]

South Africa issued a press release on October 30, 2000, stating that it would challenge the right to its own domain name in the top-level domain ".com."[18] The release said that South Africa was going to file a claim with WIPO for the domain www.southafrica.com.[19] South Africa wished to use the domain as a marketing tool for tourism.[20] The press release also said that South Africa intended to make its claim in the international community with organizations such as ICANN.[21] South Africa stated its position that sovereign nations should have the first claim to their own domain names.[22]

On November 6, 2000, Virtual Countries filed a claim in the United States District Court for the Southern District of New York.[23] It first sought declaratory relief, stating that South Africa did not have any rights to www.southafrica.com.[24] It also sought injunctive relief against any worldwide forum's arbitration or court decision.[25] Virtual Countries claimed that South

13. *Id.*

14. *Id.*; Internet Corporation for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), *at* http://www.icann.org/udrp/udrp-policy-24oct99.htm (last visited Oct. 28, 2002); *see also* Internet Corporation for Assigned Names and Numbers, Rules for Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999) (stating the rules that govern the UDRP) (last visited Oct. 28, 2002).

15. *Virtual Countries,* 300 F.3d at 233; *see also* Holger P. Hestermeyer, *The Invalidity of ICANN's UDPR Under National Law*, 3 MINN. INTELL. PROP. REV. 1, 31 (2002) (noting that the goal of the Process was to investigate unfair and abusive domain name usage).

16. *Virtual Countries*, 300 F.3d at 233.

17. *Id.*

18. *Id.* at 233–34 n.3 (noting that the parties do not state the press release was issued outside of the United States, but since it is not in dispute, the court assumes it was an action taken outside of the United States).

19. *Id.* at 234.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*; 28 U.S.C. §§ 2201–02.

25. *Virtual Countries*, 300 F.3d at 234.

Africa was attempting to "reverse-hijack"[26] the domain name, because Virtual Countries would not have a claim before ICANN's arbitration forum or under U.S. law.[27] Virtual Countries stated that the hijacking of www.southafrica.com would have a devastating and long-lasting effect on its business operations, causing uncertainty in its ownership of domain names.[28] It asserted that it had already been forced to sell switzerland.com.[29]

South Africa then filed a motion to dismiss, based on a lack of subject matter jurisdiction based on the FSIA.[30] South Africa also stated that it would not file a claim under WIPO until WIPO had adopted the UDRP.[31]

The district court granted South Africa's motion to dismiss.[32] The court found that there would be subject matter jurisdiction under the FSIA only if South Africa had taken its action "in connection with a commercial activity" that had a "direct effect" in the U.S.[33] The court concluded both that a press release was not a commercial activity and that the press release did not have a direct effect in the U.S.[34] It also found that Virtual Countries did not state a claim against Satour, which did not take part in the press release.[35]

The Court of Appeals affirmed the district court's decision solely on the ground that there was no direct effect in the United States[36] and did not reach the question whether the district court's decision that South Africa's actions were not commercial in nature was correct.[37] The court did not review the dismissal of the claim against Satour, because Virtual Countries did not raise the issue on appeal.[38]

Under the FSIA, federal district courts have original jurisdiction in civil actions against foreign states,[39] as long as the foreign state is not immune by 28 U.S.C. §§ 1605–1607[40] of the

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26. *Id.* at 234 n.4 (noting that the term "reverse-hijack" indicates the situation where a more powerful actor attempts to take the property of a legitimate owner).

27. *Id.* at 234.

28. *Id.*

29. *Id.*

30. *Id.*; Fed. R. Civ. P. 12 (b)(1).

31. *Virtual Countries*, 300 F.3d at 234.

32. Virtual Countries v. South Africa, 148 F. Supp. 2d 256, 268 (S.D.N.Y. 2001); *see also* Jennifer Tazzi, Recent Decision, Virtual Countries, Inc v. Republic of South Africa, 15 N.Y. INT'L L. REV. 165 (2002) (discussing the holding of the District Court for the Southern District of New York).

33. *Virtual Countries,* 300 F.3d at 263.

34. *Id*. at 263–65.

35. *Id*. at 269.

36. *Id.* at 235.

37. *Id.*

38. *Id.*

39. *Id.* at 236.

40. 28 U.S.C. §§ 1605–07.

FSIA or an international agreement.[41] The sole way to get subject matter jurisdiction over a foreign nation is through the FSIA.[42] In order not to be immune, unless a treaty is involved, the foreign state's activity must be based on the categories of section 1605, such as the "commercial activity" exception in section 1605(a)(2).[43] Virtual Countries claimed subject matter jurisdiction was conferred based on the third clause of this subsection, namely that the claims of Virtual Countries were based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States."[44] The court focused on the "direct effect" requirement.[45]

"An effect is direct if it follows as an immediate consequence of the defendant's activity."[46] The mere fact that an event outside the boundaries of the United States has a rippling effect inside the United States did not, according to the court, mean that Congress intended there to be jurisdiction.[47] There is also no implied requirement of substantiality or foreseeability within the immediacy requirement.[48]

The court stated that the issuance of a press release of this type, which is issued abroad, is not the type of action that would constitute an action causing a direct effect inside the United States.[49] There were a number of intervening factors in the chain of causation from the press release to the effects felt by Virtual Countries.[50] The press release first had to be picked up by newspapers and wire services, which report the news and then disseminate it throughout the world.[51] Then individual investors and business persons had to receive the information and

41. 28 U.S.C. § 1330(a) provides that:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [28 USCS §§ 1605–1607] or under any applicable international agreement.

42. Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992) (holding that the only way to get jurisdiction over a foreign sovereign is through the FSIA).

43. 28 U.S.C. § 1605(a)(2), providing in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

44. *Virtual Countries*, 300 F.3d at 236; 28 U.S.C. § 1605(a)(2).

45. *Virtual Countries*, 300 F.3d at 236.

46. *Argentina*, 504 U.S. at 618.

47. *Virtual Countries*, 300 F.3d at 236.

48. *Id.*

49. *Id.* at 237.

50. *Id.*

51. *Id.*

formulate their opinions about it, then decide on its validity.[52] Only then, if they feared what might come to pass, would they choose not to invest or to do business with Virtual Countries.[53] This chain of independent actors and intervening transactions was too tenuous to establish subject matter jurisdiction.[54]

To extend the direct effect rule in this instance would frustrate the purposes of the FSIA.[55] The Congressional intent was to put a stop to the uncertainty that existed in the instances when private actors deal with foreign governments.[56] If the direct effect doctrine were extended to occasions when independent third parties were causing the effects to be felt within the United States, predictability of the existence of subject matter jurisdiction would be damaged.[57] This attack on predictability would therefore frustrate the intent of Congress to maintain international stability by enacting the FSIA.[58]

In addition, the injury in this instance was wholly speculative.[59] The plaintiff's argument assumes that potential investors would be willing to invest more capital in Virtual Countries.[60] The press release mentioned only South Africa's intent to file with WIPO.[61] The investor's decisions would be based solely about speculation of South Africa's future actions.[62] Such speculative actions do not warrant subject matter jurisdiction.[63]

Virtual Countries then pointed to the effect on its business as being so devastating that that alone should suffice to satisfy the direct effect requirement.[64] It argued that any corporate financial loss would meet the requirement.[65] Virtual Countries looked to the inherent difficulty in determining if the actions caused a direct effect in the United States to support its argument.[66] It pointed to a case in which the anticipatory repudiation of a contract was enough to

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52. *Id.*

53. *Id.*

54. *Id.* at 237–38.

55. *Id*. at 238; *see also* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257 (1994) (discussing the meaning of "direct effect" as stated in the FSIA).

56. *Virtual Countries*, 300 F.3d at 238; *see also* H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607.

57. *Virtual Countries,* 300 F.3d at 238; *see also* David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1498 (1983) (discussing the role of the FSIA as attempting to further stability and predictability in the international community).

58. *Virtual Countries*, 300 F.3d at 238; *see also* H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607.

59. *Virtual Countries,* 300 F.3d at 238.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 312 (2d Cir. 1981) (discussing the inherent difficulties in trying to determine just what are "effects" in the United States), *cert. denied,* 454 U.S. 1148 (1982).

satisfy the direct effect requirement.[67] However, in that case the breach resulted in the corporation not receiving the benefit of the contract, which was supposed to be conferred on the corporation within the borders of the United States.[68] The court distinguished that case by noting that when there is an anticipatory breach, it occurs within the United States for jurisdictional purposes if performance could have occurred within the United States and was requested there.[69]

In addition to there not being an effect in the United States,[70] the court noted that the relationship between Virtual Countries and South Africa was not analogous to the plaintiff's argument because there was no obligation on the part of South Africa to Virtual Countries, whether in contract or in tort.[71] To expand the scope of the FSIA to cover a foreign tort and a loss by a United States actor, without looking to the location of the tortuous conduct, would frustrate the purpose of foreign immunity.[72] If a tort caused by a foreign sovereign upon a US individual were to allow for jurisdiction without looking to the relationship between the foreign tort and its contacts with the United States,[73] sovereign immunity would be severely eroded.[74] Tort claims and contractual breaches without sufficient contacts, pleaded as conversion, would subject the foreign sovereign to litigation within the United States.[75] This court shut down the possibility of sneaking in a tort claim, where there is not an injury within the United States, through the "commercial activities" exception of the FSIA.[76]

In addition, Virtual Countries had to pass the "legally significant acts' test,"[77] which requires that the conduct in question be legally significant for the exception from immunity under the FSIA to apply.[78] Virtual Countries argument was that a "cloud" had been placed over them in the equity markets."[79] Despite being given several opportunities to show that Virtual Countries had suffered specific injuries, such as lost investment opportunities or that South Africa's actions had resulted in financial difficulties, they were unable provide evidence to this

67. *Id*. at 316.

68. *Id*. at 312.

69. *Virtual Countries*, 300 F.3d at 239.

70. *Id.* at 240.

71. *Id*.

72. *Id.;* Antares Aircraft v. Nigeria, 999 F.2d 33, 36 (2d Cir. 1993) (noting that loss by an American individual or corporation from a foreign tort does not necessarily trigger the tort exception to foreign immunity because there must also be "sufficient contacts" between the tort and the United States).

73. *Antares Aircraft*, 999 F.2d at 36.

74. *Virtual Countries*, 300 F.3d at 240; *see also,* Monroe Leigh, Decision, *Foreign Sovereign Immunities Act—Tortuous Act Exception—Implied Waiver of Immunity—No Private Right of Action Under UN Charter and Helsinki Accords*, 79 AM. J. INT'L L. 1057, 1058 (1985) (noting that Congress wanted to preclude international tort claims from being brought within the United States).

75. *Virtual Countries*, 300 F.3d at 240.

76. 28 U.S.C. § 1605.

77. *Virtual Countries,* 300 F.3d at 240.

78. Filetech S.A. v. France Telecom S.A.,157 F.3d 922, 931 (1998) (noting that the activities must be legally significant for the exemption from immunity to be applicable).

79. *Virtual Countries,* 148 F. Supp. 2d 256, 266.

effect.[80] Mere financial loss, however, does not render the action legally significant.[81] If the mere financial loss that Virtual Countries claimed did satisfy the test, then any type of economic harm would suffice, thus rendering the "legally significant acts' test" useless.[82]

Virtual Countries also failed to produce sufficient evidence of harm to carry its burden of production.[83] Under the FSIA, the plaintiff has the burden of proof to show that immunity should not be given to the foreign sovereign.[84] Virtual Countries did not provide evidence that investment opportunities were lost or that it suffered any financial difficulty resulting from South Africa's press release.[85]

In following established precedent by dismissing this case for a lack of subject matter jurisdiction, the court continues to reaffirm the immunity of foreign sovereigns. It holds that there must be an actual effect that is measurable and it must be directly from the foreign sovereign.[86] This promotes the certainty that the FSIA is intended to foster. A nation will not have to worry about being drawn into litigation if it engages in an action that may or may not cause an individual third party to cause something to happen affecting an aspect of commerce within the United States. In promoting the certainty aspect, the court recognizes the independence of sovereign nations to act in their interest without being subjected to wholly unpredictable litigation predicated by third parties.

Jason Nielson

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80. *Virtual Countries*, 300 F.3d at 241.

81. Adler v. Nigeria, 107 F.3d 720, 726–27 (1997) (noting that a mere financial loss is not sufficient to constitute a direct effect).

82. *Virtual Countries*, 300 F.3d at 241.

83. *Id.*

84. *Id.*; *see also* Daniel E. Murray, Decision, *Phaneuf v. Indonesia*, 91 AM. J. INT'L L. 738 (1997) (noting that the plaintiff bears the burden to show that the defendant should not be immune).

85. *Virtual Countries*, 300 F.3d at 241.

86. *Id.* at 232.

King v. American Airlines, Inc.

284 F.3d 352 (2d Cir. 2002)

Passengers' discrimination claims arose from events that occurred in the course of embarkation on flight, and thus fell within the scope of, and were preempted by, the Warsaw Convention.

In *King v. American Airlines, Inc.*,[1] the United States Court of Appeals for the Second Circuit held that Article 17 of the Warsaw Convention preempted the Kings' discrimination claim[2] under 42 U.S.C. § 1981,[3] rendering it untimely.[4]

I. Facts and Proceedings Below

On April 25, 1997, plaintiffs George King and Judy King, an African-American couple, purchased two round-trip tickets for a flight from New York City to the Bahamas.[5] The July 26, 1997, flight from New York was scheduled to land in Miami, where plaintiffs were to transfer to another plane.[6] The flight from Miami was scheduled to leave for the Bahamas the same afternoon.[7]

Plaintiffs arrived in Miami as planned,[8] but were allegedly informed upon their arrival that their flight to The Bahamas was overbooked.[9] Plaintiffs claim they were offered monetary compensation to give up their seats,[10] which they refused.[11] Plaintiffs assert that they were the only African-American passengers with confirmed reservations that did not give up their seats.[12]

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1. 284 F.3d 352 (2d Cir. 2002).
2. *Id*. at 355.
3. 42 U.S.C. § 1981 provides in pertinent part:

   > (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
   >
   > (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
   >
   > (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

4. *King*, 284 F.3d at 355.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *King*, 284 F.3d at 355.
11. *Id*.
12. *Id*.

Plaintiffs possessed tickets and boarding passes for their American Airlines flight to the Bahamas,[13] and were actually on the vehicle that transports passengers to the aircraft,[14] when agents of the airline supposedly informed them that they were being involuntary "bumped" from their flight.[15] Meanwhile, plaintiffs allege that all of the white passengers were allowed to board the flight, even those without confirmed reservations.[16]

On July 24, 2000, the Kings brought an action under 42 U.S.C. § 1981, which ensures equal rights under the law,[17] the Federal Aviation Act ("FAA"),[18] and other state and federal laws.[19] Their claim alleged that they had been racially discriminated against when they were unwillingly bumped from their flight.[20] The United States District Court for the Southern District of New York found that the Kings' suit fell within the scope of Article 19[21] of the Warsaw Convention.[22] The district court noted that the Kings did not bring their suit within the two-year time limitation set forth by the Convention and entered a judgment on the pleadings, dismissing the claim.[23]

In *King v. American Airlines, Inc.*, the United States Court of Appeals for the Second Circuit reviewed the district court's conclusion.[24] In an opinion written by Circuit Judge Sotomayor,[25] the Court of Appeals affirmed the district court's judgment,[26] but, rather than relying on Article 19,[27] the court found that Article 17[28] of the Warsaw Convention preempted plaintiffs' claim.[29]

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13. *Id.*; *see also Warsaw Convention: Second Circuit Affirms That Discriminatory Bumping Claims Fall Within the Substantive Scope Of The Warsaw Convention in* King v. American Airlines, Inc., Firm Publications (Condon & Forsythe, LLP, June 2002), *available at* http://www.condonlaw.com/nl_june2002.htm (offering a brief summary of the facts and supporting the notion that plaintiffs were in the course of embarkation).

14. *King*, 284 F.3d at 355.

15. *Id*.

16. *Id*.

17. 42 U.S.C. § 1981(a), *supra* note 3, para. (a).

18. 49 U.S.C. § 41310(a).

19. *King*, 284 F.3d at 355.

20. *Id*.

21. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 19, 49 Stat. 3000, 3001, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 note (hereinafter "Warsaw Convention") reads: "The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods."

22. *King*, 284 F.3d at 355.

23. *Id*. at 356.

24. *Id*. at 356.

25. *King*, 284 F.3d 352 (2d Cir. 2002).

26. *Id*. at 362.

27. *Id*. at 358.

28. Warsaw Convention, art. 17, reads:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damages so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

29. *King*, 284 F.3d at 354.

II. The Warsaw Convention

The Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Convention" or "Warsaw Convention"), more commonly known as the Warsaw Convention,[30] resulted from two international conferences held in Paris in 1925 and Warsaw in 1929.[31] It is a multilateral treaty[32] that applies "to all international transportation . . . performed by aircraft for hire."[33]

Two main objectives were identified and served by the Warsaw Convention.[34] The first goal of the Warsaw Convention was to establish a certain degree of uniformity.[35] The Convention determined that in an industry like aviation, where different lands, languages, customs, and legal systems come into play, uniformity was necessary.[36]

The second and more important purpose of the Convention was not to establish, but to limit the liability of carriers in case of accidents.[37] "The Convention established internationally the rule that carriers are liable for damage sustained by a passenger in the course of a flight or while embarking or disembarking."[38] In limiting carriers' liability, the Convention conferred a benefit on both carriers and passengers, providing for an explicit and equitable basis for recovery and also lessening the probability and amount of litigation.[39]

III. The Relevant Statute of Limitations[40]

The Court noted that federal courts apply the forum state's statute of limitations to claims brought under section 1981.[41] The court conceded that the Kings' claim of alleged discriminatory bumping would normally be considered timely under state law,[42] because it was brought within both New York's three-year statute of limitations[43] and Florida's four-year statute of limitations.[44]

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30. Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 497 (1967).

31. *Id*.

32. Monroe Leigh, *Treaties—Warsaw Convention Preempts California Law Regarding Limitation of Liability—Constitutionality of Warsaw Convention*, 77 AM. J. INT'L L. 153, 153 (1983) (discussing a case that held that a California law that disallowed contractual limitations on wrongful death recoveries was preempted by the damage limitations imposed by the Warsaw Convention).

33. Warsaw Convention, art. 1.

34. Lowenfeld & Mendelsohn, *supra* note 30, at 498.

35. *Id*. at 498.

36. *Id*. at 498.

37. *Id*. at 499.

38. *Id*. at 500–01.

39. *Id.* at 499.

40. King v. American Airlines, 284 F.3d 352, 356 (2d Cir. 2002).

41. *Id*.

42. *Id*.; *see* Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993) (noting New York's three-year statute of limitations for claims arising under section 1981); see Baker v. Gulf & Western Indus., Inc., 850 F.2d 1480, 1482 (11th Cir. 1988) (noting Florida's four-year statute of limitations for such actions).

43. N.Y. CPLR 214.

44. Fla. Stat. § 768.28 (2002).

IV. Preemption Under Article 17 of the Warsaw Convention[45]

After identifying the relevant statute of limitations, the court moved to consider the preemptive effect of the Warsaw Convention.[46] Preemption is covered by the Convention in Article 24[47] and primarily serves the stated objective of uniformity.[48]

In addressing the issue of preemption, the court relied heavily on the United States Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*.[49] In that case, a passenger was subjected to an intrusive security search,[50] from which she suffered psychic, but no bodily, injury.[51] Because the Warsaw Convention does not permit recovery from carriers for purely mental distress,[52] the passenger tried to bring her action under New York tort law.[53] The Supreme Court held that passengers could not circumvent the requirement for bringing a claim under the Warsaw Convention by opting to bring the claim under local or state law.[54] More particularly, the Court concluded that a claim, "if not available under the Convention, is not available at all."[55]

In *King*, the Court of Appeals echoed the Supreme Court's holding in *Tseng*, stating that plaintiffs' action "must be brought under the terms of the Warsaw Convention or not at all."[56] The Court of Appeal's analysis focused on the purposes of the Warsaw Convention[57] and the "substantive scope" of Article 17.[58]

The court made particular mention of the Convention's goal of uniformity.[59] Using the language of the *Tseng* court, the Court of Appeals affirmed that "[t]he cardinal purpose of the Warsaw Convention . . . is to 'achieve uniformity of rules governing claims arising from international air transportation.'"[60] Furthermore, the court recognized that "[u]niformity requires . . .

45. *King*, 284 F.3d at 356.

46. *Id*.

47. Warsaw Convention, art. 24, provides in pertinent part:

> "(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

48. Leigh, *supra* note 32, at 153.

49. 525 U.S. 155 (1999).

50. *Id*. at 160.

51. *Id*.

52. *See* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) (demonstrating the Supreme Court's refusal to hold carriers strictly liable for solely psychic or psychosomatic injuries).

53. *Tseng*, 525 U.S. at 160.

54. *Id*. at 176.

55. *Id*. at 161.

56. King v. American Airlines, 284 F.3d 352, 360 (2d Cir. 2002).

57. *Id*. at 356–57.

58. *Id*. at 359.

59. *Id*. at 356–57.

60. *Id*. at 356 (quoting 525 U.S. 155 (1999)) (internal citation omitted).

that passengers be denied access to the profusion of remedies that may exist under the laws of a particular country, so that they must bring their claims under the terms of the Convention or not at all."[61]

The court found that the Kings' claim would be preempted by the Convention if the incident upon which the claim is based "occurred in the course of the international 'carriage of passengers and baggage.'"[62] Article 24, however, is not to be looked at in isolation.[63] "In determining whether a claim is preempted because it falls within what the Supreme Court has termed the ?substantive scope' of the treaty, [the Court is] directed to look to the Convention's liability provisions."[64]

The court's inquiry then turned to the substantive scope of Article 17. It is at this point that the Court of Appeals departed from the rationale of the court below.[65] The district court had dismissed plaintiffs' claim under Article 19 of the Convention,[66] reasoning that "bumping" is a delay in travel as contemplated by the relevant provision.[67] The Court of Appeals, however, did not reach that conclusion, because it instead found the Kings' action to fall within the ambit of Article 17.[68]

By its terms, Article 17 limits the liability of carriers to damages sustained as a result of bodily injury sustained on board the plane or during embarkation or disembarkation of the aircraft.[69] However, relying once again on the Supreme Court's *Tseng* decision,[70] the Court of Appeals noted that the restriction on liability to bodily injuries does not affect the substantive scope or the preemptive effect of Convention.[71] Thus, the court pointed out that the Kings' claim of discriminatory bumping would be preempted if it occurred during embarkation.[72]

In adopting a flexible approach to determine whether a passenger is in the course of embarkation,[73] the court considered four factors: "(1) the activity of the passengers at the time of the accident; (2) the restrictions, if any, on their movements; (3) the imminence of actual boarding; (4) the physical proximity of the passengers to the gate."[74] Applying this test to the

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61. *King*, 284 F.3d at 356.

62. *Id*. at 358; *see also* 114 Cong. Rec. S11059-02 (Sept. 28, 1998).

63. *King*, 284 F.3d at 358.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. *King*, 284 F.3d at 358.

69. Warsaw Convention, art. 17, 49 Stat. 3000, 137 L.N.T.S. 11 (Oct. 12, 1929), *reprinted in* 49 U.S.C. § 40105 note.

70. El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 172 (1999) (maintaining that article 17 preempts any claim for any injury, whether physical or not, when the injury is sustained while on board, embarking, or disembarking the aircraft).

71. *King*, 284 F.3d at 359.

72. *Id*.

73. *Id*.

74. Buonocore v. Trans World Airlines, Inc., 900 F.2d 8, 10 (2d Cir. 1990).

facts of this case, the court concluded that the Kings' injury was sustained in the course of embarkation.[75]

The Kings alleged that they had already checked in and were in possession of the boarding passes at the time they were involuntarily bumped from their flight.[76] In fact, they alleged that they were already on board the vehicle that would transport them to the aircraft, when they were bumped. The Kings were not only "actively engaged in preparations to board the plane,'[77] but they had progressed further in those preparations than had the plaintiffs in [two cases where the passengers had been found to be in the course of embarkation]."[78] Based on the facts and on precedent, the Court of Appeals again concluded that the Kings were injured in the course of embarking the plane within the meaning of Article 17.[79]

V. Discrimination Cases Under the Warsaw Convention[80]

The Kings urged the court to make a distinction between civil rights claims and tort claims[81] and asserted that civil rights claims, such as theirs, did not fall within the scope of the Warsaw Convention.[82]

The Court of Appeals refused to make such a distinction, reasoning that such an interpretation of the Convention would render its purpose of uniformity futile.[83] "The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of the international carriage of passengers and baggage . . . [t]he scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered."[84] The inquiry is not what *type* of injury is alleged, but *where* and *when* the injury occurred.[85] Allowing plaintiffs with discrimination claims to circumvent the Warsaw Convention by filing their claims in state court goes against the stated objectives of the Convention. As such, all claims that fall within the substantive scope of the Convention—all claims arising from any injuries sustained during embarkation—are preempted by the Convention.[86]

Plaintiffs made the final assertion that discrimination would run rampant in the international airline industry if the Warsaw Convention preempted civil rights and discrimination

75. *King*, 284 F.3d at 360.

76. *Id*. at 359.

77. *Buonocore*, 900 F.2d at 10.

78. *King*, 284 F.3d at 359; *see also* Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 164 (3d Cir. 1977) (finding that passengers waiting at the gate for the vehicle that would transport them to the aircraft were in the course of embarkation); Day v. Trans World Airlines, Inc., 528 F.2d 31, 33–34 (2d Cir. 1975) (concluding that passengers who had surrendered their tickets and were waiting at the departure gate in an area reserved for departing passengers were in the course of embarkation).

79. *King*, 284 F.3d at 360.

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*. at 361.

84. *King*, 284 F.3d at 361.

85. *Id.* at 360.

86. *Id*. at 361–62.

claims.[87] This amounted to a policy argument,[88] one that the court declined to accept.[89] The court recognized, "'[I]t is not our responsibility to give specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.' It is not for the courts to rewrite the terms of a treaty between sovereign nations."[90]

VI. Conclusion

The Court of Appeals for the Second Circuit concluded that the Kings' action for discrimination arose from events that occurred in the course of their embarkation of the aircraft[91] and therefore was within the scope of Article 17 of the Warsaw Convention.[92] Because of the preemptive effect of the Warsaw Convention, the court determined that the Kings' claim did not come within the Convention's two-year limitation period and was barred.[93]

The opinion by the Court of Appeals is consistent with and supported by case law and sound policy. The court cited numerous cases that supported its interpretation and application of the Warsaw Convention, making the court's rationale clear and persuasive. Furthermore, the court's decision stays loyal to and serves the original purposes of the Convention. Thus, the court reminds us that all signatories and their citizens are subject to the provision of the Warsaw Convention and cannot circumvent its purposes by resorting to local law. This adherence to the Convention bodes well for the continued predictability of liabilities and remedies in the international aviation industry.

Carol Simpao

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87. *Id*. at 362.

88. *Id*.

89. *King*, 284 F.3d at 362.

90. *Id.* (*quoting* Air France v. Saks, 470 U.S. 392 (1985)); *see also* Turturro v. Continental Airlines, 128 F. Supp. 2d 170, 181 (S.D.N.Y. 2001).

91. *King*, 284 F.3d at 358.

92. *Id*.

93. *Id*. at 362.

CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.

743 N.Y.S.2d 408 (1st Dep't 2002)

Enforcement of a money judgment issued by an English court was upheld, where defendants were Netherlands corporations doing business in New York that maintained no presence in England and appeared only for the purpose of contesting personal jurisdiction, but New York courts could have exercised jurisdiction on the evidence presented to the English court.

In *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*,[1] the court held that a money judgment ordered by the English court could be recognized in New York, because the foreign judgment was not "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"[2] and the foreign court's exercise of personal jurisdiction over the defendant was consistent with New York standards and due process.[3]

Defendant Mora Hotel Corp. N.V. ("Mora"), a Netherlands Antilles corporation authorized to do business in New York, was the ground lessee and operator of the Hotel Gorham in Manhattan.[4] Defendant Chascona N.V. is the fee owner of that property.[5] Castor Holdings Ltd. was a Canadian real estate and financial investment company that declared bankruptcy in 1992.[6] Plaintiff CIBC Mellon Trust Co. (CIBC), as trustee of several trust funds, invested and lost millions of dollars in Castor Holdings investments.[7] Mora and Chascona were owned and controlled by Marco Gambazzi, who also served as director of Castor Holdings' principal lending subsidiaries, as well as serving as officer or director of other Castor Holdings subsidiaries.[8] The proceedings were commenced in the English High Court of Justice, alleging that plaintiffs had been defrauded into these investments.[9] The claim against Mora and Chascona was analogous to a claim for a constructive trust, alleging that they had received, for no consideration, funds that could be traced to investments made by CIBC based upon the alleged fraud by Castor Holdings.[10] The claim was amended in 1999, adding an overall fraud claim against Mora and Chascona.[11]

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1. 743 N.Y.S.2d 408 (1st Dep't 2002).
2. *Id*. at 414. *See* N.Y. CPLR 5304 (providing grounds for recognition of foreign judgments) (hereinafter "CPLR").
3. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 414 (citing CPLR 5304).
4. *Id*. at 411.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 411–12.
11. *Id*. at 412

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Through the Supreme Court of England Order Rule 11, the English court asserted jurisdiction over Mora and Chascona on the basis that they were necessary and proper parties.[12] Rule 1[1][c] of Order 11 permits the court to grant leave to a plaintiff to serve process on an out-of-jurisdiction defendant in a multi-defendant case as long as one base or anchor defendant is a domiciliary of England, and the out-of-jurisdiction defendant is either a necessary or a proper party.[13] The English court determined that CIBC had properly made the requisite showing of a "good, arguable case" against the defendants.[14] In March 1997, plaintiffs then served Mora with a Mareva order, restraining it from transferring assets and directing certain disclosure; this order was extended to Chascona in 1999.[15] Mora challenged the jurisdiction of the English court on the grounds that the base defendant was no longer domiciled in England, therefore no longer attaching Mora to the claim.[16] The court denied the challenge, finding that jurisdiction over the anchor defendant was proper, because it had been domiciled in England on the date of the issuance of the writ.[17] The court eventually entered judgment for damages to CIBC in amount equal to about 330 million U.S. dollars.[18]

In New York, plaintiffs then commenced an action to seize defendants' property in an effort to recover under the Uniform Foreign Country Money Judgments Recognition Act (UFMJRA) by recognition and enforcement of the judgments entered in the English court.[19] CIBC moved for an order to confirm the attachment of the property and sought summary judgment recognizing the English judgments.[20] Defendants' cross-motion for dismissal was denied, and plaintiffs' motions were granted.[21]

Defendants brought this appeal, alleging that the money judgments were obtained without personal jurisdiction and due process, and therefore should not be enforced in New York.[22] Jurisdiction turned on Article 53 of the New York CPLR,[23] which provides that non-recognition

12. *Id*. (citing Rules of the Supreme Court of England Order 11 Rule 1[1][c]). A party is "proper" when, had he been in the country, he could have been joined as a proper party to the proceeding. A "necessary" party is any person whose "presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon."

13. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 412.

14. *Id*.

15. *Id*. at 415 (describing a Mareva order as a provisional remedy that does not remove a defendant from a title or the power to conduct its ordinary business). *See* Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, 527 U.S. 308, 329 (1999) (stating that the Mareva injunction has been recognized as a powerful tool for general creditors, and has been called the "nuclear weapon of the law.").

16. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 413.

17. *Id*. (noting that following the decision, Mora failed to comply with the Mareva order, thereby barring it from defending on the tracing claim).

18. *Id.* at 414.

19. *Id.*

20. *Id*.

21. *Id*.

22. *Id.*

23. *Id. See* CPLR 5304 (providing grounds for recognition of foreign judgments, which is New York's enactment of the Uniform Foreign Country Money-Judgments Recognition Act).

of foreign money judgments is mandatory when the foreign judgment was rendered under a system that does not provide procedures compatible with due process or the foreign court did not have jurisdiction.[24]

It is a rare occurrence that recognition of a foreign money judgment is denied for lack of due process[25] and the Appellate Division considered that the English system of law could not be seen as a system that fails to provide such due process.[26] The defendants anticipated this and therefore focused on the English court's use of the Mareva injunction, rather than attacking the English judicial system as a whole.[27] The court, following the Seventh Circuit, held that this did not meet the statutory standard of New York CPLR 5304, which refers to a "system" of law, and cannot be relied upon to challenge a specific legal process within that "system."[28] In addition, the court emphasized that the Mareva order was merely a provisional remedy, having no effect on the defendants' power to conduct their ordinary business.[29] In England, Mora was debarred from defending on the tracing claim following its failure to comply with the Mareva order; the courts in New York have employed similar practices where orders are issued for failure to comply with injunctive relief or disclosure orders.[30] Regarding the due process issue, the court held that the English judicial system was compatible with procedures of due process.[31] Also, the defendant's decision not to participate in litigating the merits in an effort to interpose a collateral challenge enforcement of a final judgment could not form a basis of a claimed denial of due process.[32]

Defendants' second claim for dismissal alleges that the English court did not have personal jurisdiction.[33] N.Y. CPLR 5305(a)(2) suggests that a New York court may review the issue of whether the foreign court had personal jurisdiction over a defendant following a limited appearance.[34] The court states that it is necessary for a court in the United States to scrutinize

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24. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 414. *See* CPLR 5304(a).

25. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 414. *See* Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995) (finding that Iranian trials were highly politicized and the judiciary biased, therefore holding that the defendant could not have received a fair trial there). *But see* S.C. Chimexim S.A. v. Velco Enter., 36 F. Supp. 2d 206 (S.D.N.Y. 1999) (concluding that the requirements of due process were satisfied by the Romanian judicial system that was newly reformed in 1992).

26. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 415. *See* Society of Lloyd's v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000) (stating that the courts of England are fair and neutral forums and each level corresponds with our federal court system).

27. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 415.

28. *Id*. at 415 (citing *Society of Lloyd's*). *See* CPLR 5304.

29. *CIBC Mellon Trust Co*, 743 N.Y.S.2d at 415.

30. *Id*. at 416. *See* Peterson v. Spartan Industries, Inc., 33 N.Y.2d 463, 465 (1974) (upholding an order of continuance and production of records that was cross-moved by plaintiff, while holding defendant's motion to dismiss in abeyance).

31. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 416.

32. *Id.* at 416. *See* Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc., 157 F. Supp. 2d 245, 251–52 (S.D.N.Y. 2001) (holding that defendants' failure to appear in a Dutch arbitral proceeding caused the judgment to be enforceable because the defendants failed to show that any of the defenses under CPLR 5304 were applicable).

33. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 416. *See* CPLR 5304(a)(2).

34. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 417–18. *See* CPLR 5305(a)(2) (providing that "the foreign country judgment shall not be refused recognition for lack of personal jurisdiction if: the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him").

the basis for asserting jurisdiction when a court is asked to recognize a foreign judgment.[35] Therefore, the merits of the English court's jurisdiction over Mora should be addressed in the New York court.[36]

New York courts have adopted the position that any jurisdictional basis recognized under CPLR 5305[37] should be recognized for foreign judgments as well.[38] The Fourth Department adopted this position in *Porisini v. Petricca*,[39] where it enforced an English money judgment against a New York domiciliary based upon the evidentiary submissions before the English court.[40] Therefore, in the present case plaintiffs had to show that the equivalent of the evidentiary materials presented to the English court would have permitted the courts of this state to exercise personal jurisdiction over defendants.[41] The nature of the burden of proof on the plaintiff must then be decided.[42] Case law dealing with this issue provides that the plaintiff must show: a final judgment, conclusive and enforceable where rendered; subject matter jurisdiction; jurisdiction over the parties or res; and regular proceedings conducted under procedures compatible with due process.[43] The court's review of the record showed that plaintiffs were successful in showing that defendants' conduct was sufficient for personal jurisdiction to be exercised.[44]

Jurisdiction in New York is not decided by any one simple test, but some courts have held that one transaction in New York is sufficient to confer jurisdiction over a non-resident as long as the activities were purposeful and there is a substantial connection to the claim asserted.[45] Plaintiffs asserted that the defendants were co-conspirators in England, thereby providing the basis for England's exercise of personal jurisdiction.[46] The court held that the affidavits and supporting materials provided to the English court were sufficient to have demonstrated, prima facie, that defendants were active participants in the alleged conspiracy.[47] Therefore, it could be concluded that the English court's exercise of personal jurisdiction over the defendants was presumptively proper, unless the defendants can rebut the presumption by showing that they were not active participants in the conspiracy.[48] The court held that the defendants failed to demonstrate that the English court lacked jurisdiction over them.[49]

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35. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 418.

36. *Id.* at 419.

37. *See* CPLR 5305.

38. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 420. *See* Porisini v. Petricca, 90 A.D.2d 949 (4th Dep't 1982).

39. 90 A.D.2d 949 (4th Dep't 1982).

40. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 420.

41. *Id.*

42. *Id.* at 421.

43. *Id. See* Ackerman v. Levine, 788 F.2d 830, 842 n.12 (2d Cir. 1986) (setting forth the prima facie elements a plaintiff must establish in seeking enforcement of a foreign money judgment).

44. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 421.

45. *Id. See* Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1252–53 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 352 (2d Cir. 1996) (holding that long-arm jurisdiction is proper when a clear nexus exists between business transacted by the defendant and the cause of action).

46. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 421.

47. *Id.* at 422.

48. *Id.* at 423.

49. *Id.*

This case is important because it provides state support for the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) and thus enables foreign country money judgments fair recognition in U. S. courts. More than twenty-eight states have adopted the UFMJRA and more states are examining the possibility of enacting it.[50] The Act is a useful tool in creating uniformity among the United States with regard to streamlining procedures for recognizing judgments rendered in a foreign country. Money judgments have always been difficult for creditors to enforce when the case was decided in a foreign country. This case may make the process more efficient for creditors to obtain their money and not be left with outstanding debts.

Jennifer N. White

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50. *See* Chelsea P. Ferrette, *A Critical Analysis of the International Child Support Enforcement Provisions of the Social Security Act: The Inability of the States to Enter into Agreements with Foreign Nations*, 6 ILSA J. INT'L & COMP. L. 575, 612 n.26 (2000) (providing a listing of the state statutes enacting the adoption of the UFMJRA).