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The Development of China's Securities Regulatory Framework and the Insider Trading Provisions of the New Securities Law

Sharon M. Lee*

Introduction

China demonstrated a commitment to converge its developing stock markets with international norms by passing a long overdue piece of national legislation, the Securities Law of the People's Republic of China (hereinafter "Securities Law"), on December 29, 1998, and implemented on July 1, 1999.[1] After six years and five drafts, the new Securities Law was welcomed by investors as the savior to the master plan of the late Chairman of the Chinese Central Military Committee, Deng Xiaoping, to erect a "social market economy,"[2] a plan that was losing momentum as China's markets were plagued with insider trading, corruption and abuses of government office.[3] China's economy has doubled since China opened its doors to foreign investment in 1978, and the stock markets in 1996 had a daily trading volume approximately U.S.$2 billion,[4] with over 20 million Chinese participants, growing at a rate of 10,000 per

1. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

2. *See infra* note 13 and accompanying text.

3. *See* Xian Chu Zhang, *The Old Problems, the New Law, and the Developing Market—A Preliminary Examination of the First Securities Law of the People's Republic of China*, 33 INT'L LAW. 983, 989 (1999) (stating the government entanglement with the market has resulted in corruption and violations, compounded with uncertain procedures and guanxi); Christine Chan, S. CHINA MORNING POST, May 28, 1994, at 1 (1994) (asserting widespread securities violations by brokers, bankers and regulators and analysts comment that insider trading is a large concern because companies and brokerage houses are all state-owned); *Investors See Red Over Grey Shares*, S. CHINA MORNING POST, April 30, 1995, at 8 (reporting on investors' outcry over unfairness of insider trading during a period of depressed stock prices).

4. *See generally* Li Yining, *Foreign Listings Appear to be a Necessary Evil,* S. CHINA MORNING POST, Feb. 21, 1994, at 3 (discussing foreign interest in the 1994 Securities Markets); *Chinese Enterprises Raise Over 460 Billion Yuan From Securities Markets,* XINHUA GEN. NEWS SERV., May 8, 2000, (noting that the Chinese securities markets have developed rapidly, and the stock exchanges have reached over 3 trillion yuan); *China Vows to Protect Interests of Securities Investors*, XINHUA ECON. NEWS SERV., Dec. 18, 2000, at Economic ("The opening of the stock exchanges in Shanghai and Shenzhen in 1990 marked the launch of China's securities market. By the end of November this year, the total value of stocks amounted to 4,600 billion yuan.").

* **J.D., 2001, St. John's University School of Law. B.A. and M.A. in East Asian Studies, St. John's University.** **The author is sincerely grateful to Professor Jianming Shen, formerly Kenneth Wang Research Professor of Law and Adjunct Professor of Law, St. John's University School of Law. Professor Shen is now with the New York office of Jun He Law Offices.**

day.[5] However, insider trading continues to cause heavy losses and impedes market growth.[6] The new Securities Law aims to preserve the unprecedented economic growth and cultivate investor confidence and maintain the integrity of the financial markets.[7] The new law also serves as another progressive step toward fulfilling the transparency, efficiency and liquidity conditions of acceding to World Trade Organization membership.[8] Although a framework has been provided to decontaminate China's markets of insider trading by emphasizing shareholder protection, there are gaps within the new law regarding private remedies and damages.[9] Further, in the case of an aggrieved foreign investor, the Chinese court system provides little assur-

5. *See* Minkang Gu & Robert C. Art, *Securitization of State Ownership: Chinese Securities Law,* 18 MICH. J. INT'L L. 115, 117 (1996) (noting that there are "over 20 million Chinese participants in the securities markets, a number that grows by more than 10,000 people per day."); *China's Securities Market Valued At US$556.44B*, CHINAONLINE, Dec. 15, 2000 (noting that the current statistics on the Chinese securities market reflect that "there are 1,063 public companies, and the amount of registered investors number more than 55 million"). *See generally* Leontine D. Chuang, Comment, *Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China,* 20 J. INT'L L. BUS. 509, 510 (2000) ("From 1978 to 1993, [the Chinese] economy grew between US$ 2,000 and $ 4,000 per capita and in the early 90s its economic growth was unprecedented at 13% a year.").

6. *See* CHENGXI YAO, STOCK MARKET AND FUTURES MARKET IN THE PEOPLE'S REPUBLIC OF CHINA xvii (1998) (asserting that China's gross national product nearly doubled in the mid-1980s); Gu & Art, *supra* note 5, at 116 (describing the booming growth of China's markets). *See generally Vice-Premier Says Securities Market "Integral" to Socialist Economy,* THE BRIT. BROADCASTING CORP., June 29, 1999 at part 3 (noting Wen Jiabao's position that "interests of investors need to be protected to keep the securities market running safely and efficiently").

7. *See* Shirley C. Y. Wong, *Chinese Law: The Law of Guarantee in China and Hong Kong,* 26 HONG KONG L.J. 369, 369 (1996) (noting that the goals of the Security Law are to: "(i) promote financing and circulation of commodities; (ii) safeguard fulfillment of obligations; and (iii) develop the socialist market economy."); *see also Chinese Firms Raise Record Capital From Securities Market,* XINHUA GEN. NEWS SERV., Jan. 15, 2001 (discussing that fact that although China's security market has been quite successful over the last ten years, there are still many problems which require greater regulation and punishments); *CSRC Official Says Securities Market Will Need Time To Fully Mature,* CHINAONLINE, Nov. 8, 2000 (noting that the CSRC aims to improve regulation and investigation of securities fraud). *See generally* Li, *supra* note 4, at 2 (noting that "the Securities Law mainly deals with matters relating to the secondary [securities] market.").

8. *See* Michael E. Burke, IV, *China's Stock Markets and the World Trade Organization*, 30 L. & POL'Y INT'L BUS. 321, 321 (1999) (stating the WTO membership mandates China to improve the efficiency, transparency and liquidity of its markets in order to liberalize competition); Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong Kong, and Taiwan,* 20 J. INT'L L. BUS. 1, 6-10 (1999) (stating that, as a prerequisite to joining the WTO, China must adhere to the General Agreement on Trade in Services (GATS) which prescribes non-discriminatory treatment of foreign financial institutions); Lam, *supra* note 8, at 11 (stating that China must converge with international standards). *See generally* Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma,* 9 MINN. J. GLOBAL TRADE 369, 377-79 (2000) (describing the history of China's involvement in the WTO and its interests in becoming a member of the organization).

9. *See* Daniel M. Anderson, Note, *Taking Stock in China: Company Disclosure and Information in China's Stock Markets,* 88 GEO. L.J. 1919, 1940 (2000) (noting that the Securities law leaves investors "without redress for egregious, even criminal, behavior on the part of [company] management"); Chuang, *supra* note 5, at 512 ("There are still some sectors of the Chinese economy that are not governed by any formal laws.").

ance of enforcing any favorable judgment.[10] By failing to provide a private cause of action for individual investors in general, there is little incentive for them to assist the resource-strapped government agencies in regulating the markets.[11] So long as the Chinese society operates on networks of *guanxi* and benefits from resulting relationships, insider trading cannot be contained.[12]

This article surveys the development of China's stock markets, its regulation, and the impact of the Securities Law. Part I will discuss Deng Xiaopeng's "Open Door Policy" and the concomitant reinvigoration of the stock exchanges. It will also explore China' preliminary steps toward regulating the markets. The new Securities Law and its articles on insider trading are analyzed in Part II. Comparisons are made with its predecessor, the Provisional Measures on Prohibiting Securities Fraud passed in 1993, as well as the insider trading section of the United States Securities Exchange Act of 1934. Finally, Part III addresses the lack of private remedies under the Securities Law and how this jeopardizes the integrity of the new legislation.

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10. *See* Chuang, *supra* note 5, at 509-11 ("Foreigners who invest in China, however, face many difficult hurdles and will often face tremendous setbacks."); Anderson, *supra* note 9, at 1924-25 (noting that foreign investors should be aware that the Securities Law does not apply to foreign currency denominated shares or shares listed on Hong Kong Stock Exchange); *see also* Anyuan Yuan, Perspective: *Foreign Direct Investments in China—Practical Problems of Complying with China's Company Law and Laws for Foreign-Invested Enterprises,* 20 J. INT'L L. BUS. 475, 508 (2000) (noting that "foreign legal practitioners and investors should not be too discouraged by the slow pace of China's legislative action" because China will continue to reform the market system).

11. *See* Anderson, *supra* note 9, at 1939 (stating that China has not allowed investors to bring a private cause of action if they manipulated by a company's fraudulent practices); Wenhai Cai, *Private Securities Litigation in China: Of Prominence and Problems,* 13 Colum. J. Asian L. 135, 142 (1999) (describing the incentives of providing a private cause of action within the Securities Law); Matthew D. Latimer, *Gilding the Iron Rice Bowl: The Illusion of Shareholder Rights in China,* 69 WASH. L. REV. 1097, 1105 (1994) (noting that the lack of basic shareholder protections in the Chinese markets may be connected to China's "relative inexperience in regulating securities markets and in part to historical, economic, and political forces.").

12. *See* CONTRACT, GUANXI, AND DISPUTE RESOLUTION IN CHINA xviii (Tahirih V. Lee 1997) (defining "guanxi" as informal and personal relationships that cultivate mutual loyalty, and were formed to circumvent intrusion by the state); 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, 349-50 (discussing the importance of guanxi within Chinese culture and the relations between government and private entities); Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village,* 24 YALE J. INT'L L. 223, 250 (1999) (noting guanxi is a network of personal relationships that the Chinese, among other cultures, are encouraged to use to achieve certain objectives); Chan, *supra* note 3, at 1 (reporting on the insider trading, cheating, violations, and market officials taking bribes when the markets were bearish).

I. History of China's Regulatory Framework

A. Open Door Policy

In 1978, China began to emerge from the Marxist model of a centrally planned economy by opening its doors to foreign investment.[13] Mandated by Deng Xiaoping, the "Open Door Policy" was an effort, *inter alia*, to (1) decentralize the economy, (2) jumpstart the market to respond to natural forces of supply and demand, and (3) to attract foreign capital.[14] Decades of socializing its closed economy and operating state-owned enterprises (hereinafter "SOE"), among other reasons, had drained the nation's economy and rendered China further lagging behind other global powers.[15] Among the many reforms introduced by the Open Door Policy,[16] overhauling China's financial sector and developing an equity market was of utmost pri-

13. *See* YAO, *supra* note 6, at xvii, 3 (asserting that China moved towards socialist modernization by reforming its economy and welcoming foreign interests). *See generally* Ann P. Vandevelde, Note, *Realizing the Re-Emergence of the Chinese Stock Markets: Fact or Fiction?,* 30 VAND. J. TRANSNAT'L L. 579, 583 n.9 (1997) (citing MEI XIA ET AL., THE RE-EMERGING SECURITIES MARKET IN CHINA xii (1992) (discussing the way China's centrally planned economy involved state-owned enterprise, collectives and communes of land); K. Matthew Wong, Note, *Securities Regulations in China and their Corporate Finance Implications on State Enterprise Reform*, 65 FORDHAM L. REV. 1221, 1221 (1996) (noting that prior to 1978, China adopted the Marxist theory that a planned economy would improve productivity and efficiency because it avoids economic variables such as unemployment).

14. *See* Todd Kennith Ramey, Comment, *China: Socialism Embraces Capitalism? An Oxymoron for the Turn of the Century: A Study of the Restructuring of the Securities Markets and Banking Industry in the People's Republic of China in an Effort to Increase Investment* Capital, 20 HOUS. J. INT'L L. 451, 456 (1998) (discussing the "Open Door Policy" and how it consisted of utilizing market mechanisms and foreign resources to accelerate economic growth, including reformation of the banking and securities industries such that there would be investment capital for domestic industries); Vandevelde, *supra* note 13, at 583-84 (asserting the "Open Door Policy" was the brainchild of Deng Xiaoping and encouraged opening the economy to the outside world through the fulfillment of the three objectives); Jay Zhe Zhang, Comment, *Securities Markets and Securities Regulation in China*, 22 N.C. J. INT'L L. & COM. REG. 557, 558 (1997) (stating as a result of China's "Open Door Policy" the economy has grown to be one of the world's largest). *See generally* YAO, *supra* note 6, at xvii, 3.

15. *See* Ramey, *supra* note 14, at 452 (explaining that the strong hold of the Chinese government on business policies resulted in China's industrial development not being on par with other nations, and the government has failed to raise enough capital to compete with other nation states); *see also* Wong, *supra* note 13, at 1221 (stating that the state enterprise system was unmanageable because no one was held responsible for any fluctuation in profits, and thus the industrial sector suffered enormous waste and losses); *e.g.*, I. A. TOKLEY & TINA RAVN, COMPANY AND SECURITIES LAW IN CHINA 62 (1998) (stating that prior to the restructuring introduced in 1978, the Chinese government depended upon the collection of funds and taxes from state-owned enterprises to generate revenue); Wong, *supra* note 13, at 1226 (pointing to state-owned enterprises as the "lynch-pin" of China's economy because of their manufacturing capacity).

16. *See* Ramey, *supra* note 14, at 456 ("[Deng's] 'open-door policy' centered on utilizing 'market mechanisms and foreign resources (including foreign capital and technology) to speed up the growth and modernization of the economy"); *see also* Robert E. Lutz II, *Public International Law And The Future World Order* (reviewing JOSEPH JUDE NORTON, LIBER AMICORUM (1987)), 22 INT'L LAW. 583, 583 (1988) (discussing China's efforts to "try to transform the present International Economic System into a more equitable and beneficial-to-all New World Economic Order"); Vandevelde, *supra* note 13, at 584 (noting that the Open Door Policy was meant to "focus its attention on economic development, rather than class struggle").

ority.[17] Deng's strategy incorporated the use of market mechanisms and foreign capital and technology to expedite and promote the growth and modernization of the economy.[18] It is notable, however, that in this second great leap in China's innovative economic planning,[19] Deng insisted on continuing to "'build socialism with Chinese characteristics.'"[20]

In the early 1980s, China began its movement towards *quasi* privatization,[21] expressly provided for in the 1982 amendment of the Chinese Constitution, when the rights of private busi-

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17. *See* TOKLEY & RAVN, *supra* note 15, at 63 (suggesting the securities market emerged as a result of economic restructuring in the late 1970s which demanded capital expansion and more liquidity in the market); Latimer, *supra* note 11, at 1099 ("[T]he advent of securities markets in China stemmed primarily from a need to obtain new sources of capital for Chinese industry and to relive the state'' financial organs from the burden of finding investment funds for projects"); Ramey, *supra* note 14, at 459 (noting that China will relied its securities markets to raise capital for projects to improve transportation, energy and communications infrastructure).

18. *See* Gu & Art, *supra* note 5, at 116 ("The ongoing reform of China's economic system towards increased reliance on market mechanisms has generated dramatic growth in many sectors, including the creation and vigorous development of securities markets."); *see also* Ramey, *supra* note 14, at 462 (explaining the mechanisms employed by the "Open Door Policy"). *See generally* Chuang, *supra* note 5, at 523-24 (noting that while China has tried to move towards capitalism, "the country still holds on to its Communist roots.").

19. *See* RONALD M. GLASSMAN, CHINA IN TRANSITION: COMMUNISM, CAPITALISM, AND DEMOCRACY 33-40 (1990) (discussing Mao Zedong's belief that his economic restructuring plan, the Great Leap Forward, would foster industrialization of the rural areas of China, instead of concentrating on the bourgeois urban centers); BUILDING CHINA: STUDIES IN INTEGRATED DEVELOPMENT 37 (John F. Jones, ed. 1980) (describing the nationwide effort to expand heavy industry resulted in devastating employment and social disruption); Ramey, *supra* note 14, at 454 (noting that in 1958 Mao Zedong launched the Great Leap Forward, a program which focused on the industrialization of China).

20. *See* YAO, *supra* note 6, at xvii, 3; Wong, *supra* note 13, at 1226-27 (discussing Deng Xiaoping's plans for economic reforms that retained Chinese characteristics by replacing the commune system with one where a single family is responsible for fulfilling government output quotas, and which eventually applied to urban centers as well). *See generally* Ramey, *supra* note 14, at 451, 461 ("The PRC has certainly adopted its market reforms around the government's social goals").

21. *See* YAO, *supra* note 6, at xvii, 3 *See* YAO, *supra* note 6, at xvii, 4 (explaining the reasons why China's socialist market economy, based on public ownership, does not resemble customary notions of privatization based on private ownership); JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 369, 369 n.2 (1999) (describing China's move toward private enterprises independent of the state, and the process of "corporatization," a limited form of privatization, which involves converting SOEs into issuers of minority ownership interests in such enterprises); Zhang, *supra* note 14, at 559-560 (discussing the "corporatization" process); Gu & Art, *supra* note 5, at 126 (stating "limited privatization" is where private investments are made in state-owned enterprises while the state retains majority ownership therein).

nesses were acknowledged,[22] and again in the 1988 amendments when the individual economy was further granted legal protection.[23] The private enterprise system was to be recognized as a complement to the socialist public economy which was to remain the "leading force in the national economy" (*shehui zhuyi gongyou jingji*).[24] Initially, China moved to decentralize its banking sector away from the monolithic state-controlled central and commercial bank, the People's Bank of China (hereinafter "PBC"),[25] and also beyond specialized industry banks including the Industrial and Commercial Bank of China, the Bank of China, the Agricultural Bank of China, and the Construction Bank of China.[26] Several regional and national financial institutions were formed thereafter, including investment banks, foreign-owned commercial banks, investment companies and finance companies, thereby providing the infrastructure nec-

22. *See* Constitution of the People's Republic of China, adopted Dec. 4, 1982 by the 5th Sess. of the 5th National People's Congress, *available in* LEXIS, China Laws and Regulations from the People's Republic of China, Chinalaw file; *see also* ZIMMERMAN, *supra* note 21, at 369 n.1. Articles 6, 7 and 11 of the Constitution state:

> Article 6: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work.
>
> Article 7: The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy.
>
> Article 11: The individual economy of urban and rural working people, operated within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the individual economy.

Id.

23. *See* Constitution of the People's Republic of China, adopted Dec. 4, 1982 by the 5th Sess. of the 5th National People's Congress, arts. 6, 7, & 11; *available in* LEXIS, China Laws and Regulations from the People's Republic of China, Chinalaw file; *see also* ZIMMERMAN, *supra* note 21, at 369 n.2.

24. *See* Constitution of the People's Republic of China, adopted Dec. 4, 1982 by the 5th Sess. of the 5th National People's Congress, *available in* LEXIS, China Laws and Regulations from the People's Republic of China, arts. 6, 7 & 11, Chinalaw file arts; *see also* ZIMMERMAN, *supra* note 21, at 369 n.2; Gu & Art, *supra* note 5, at 126 (opining that limited privatization can be reconciled with the idea of a socialist economy in that private capital is raised and then controlled by the state, but the state need not relinquish control in the SOEs or sell any enterprise assets).

25. *See* LEGAL DEVELOPMENTS IN CHINA 218-19 (Wang Guiguo & Wei Zhenying eds. 1996) (discussing Deng's vision that the People's Bank of China should serve as a lever for economic advancement by erecting a new financial system and many banks and financial institutions); Vandevelde, *supra* note 13, at 585 (asserting China's economic reforms included permitting state banks to allocate financial resources more efficiently and forming nonbank financial entities). *See generally* ZIMMERMAN, *supra* note 21, at 235 (stating in 1978, China assigned the duties of the People's Bank of China, including currency issuance, deposits, lending, settlements, and currency exchange, to other commercial banks so to separate the Bank's central bank and commercial functions).

26. *See* YAO, *supra* note 6, at xvii, 42 (submitting the PBC establishes its regional branches, and trading centers shall be governed by its regional and municipal branches); ZIMMERMAN, *supra* note 21, at 235 (listing the four commercial banks that were created in 1978, when the State Council severed the commercial and central bank functions of the PBC); Vandevelde, *supra* note 13, at 585 (explaining the re-emergence of China's financial sector was stimulated by authorizing state banks to allocate financial resources more efficiently and establishing other types of financial institutions, thus diluting the control of the limited number of specialized banks). *But see* LEGAL DEVELOPMENTS IN CHINA, *supra* note 25, at 221 (Wang Guiguo & Wei Zhenying eds. 1996) (asserting the Central Bank Law grants the PBC the power to approve the establishment and closure of financial institutions, including commercial banks, investment, insurance and trust companies).

essary to implement a socialist market economy.[27] Such institutions operated independent of the government and provided investors with the financial services and advice on how to attain higher returns for their money than if they kept it in a bank account.[28] In 1984, the Third Plenary Session of the Twelfth Central Committee of the Chinese Communist Party encouraged measures to stimulate the efficiency of the economy, from which arose a "shareholding system in its primitive and embryonic form. . . ."[29] From the issuance of government bonds designed to eliminate China's budget deficit[30] to the development of joint stock companies to become public issuers,[31] China's securities markets began to reemerge from the dormancy that has existed since their *de facto* disappearance and formal abolishment in 1949.[32] Chairman Mao Zedong had accused capitalism as the source of China's patent corruption, bureaucracy, and

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27. *See* Vandevelde, *supra* note 13, at 585 (explaining the re-emergence of China's financial sector was stimulated by authorizing state banks to allocate financial resources more efficiently and establishing other types of financial institutions, thus diluting the control of the limited number of specialized banks).

28. *See* Anderson, *supra* note 9, at 1951 ("[T]rading centers provide investors with news and rumors about listed companies and State policies."); Vandevelde, *supra* note 13, at 585 ("China initially overhauled its financial sector by allowing the state-controlled banks to allocate financial resources more efficiently and by creating non-bank financial institutions."). *See generally* Latimer, *supra* note 11, at 1099 (asserting in the early 1990s, the accumulated savings of private Chinese citizens amounted to 1.2 trillion Renmenbi, but experts estimate that twice that amount is hidden under mattresses such that the total savings ratio of the Chinese population is close to 45%).

29. *See* YAO, *supra* note 6, at xvii, 3; *China's Economic Reform a Great Success*, BUS. RECORDER, Oct. 1, 1999 (stating that the "Decision of Reform of the Economic Set-up" was adopted by the Third Plenary Session of the Twelfth Central Committee of the Chinese Communist Party, and which facilitated urban economic reform). *See generally* TOLKEY & RAVN, *supra* note 15, at 63 (submitting that the establishment of a securities market was a result of necessary capital expansion and illiquidity in the market, and subsequently, state treasury bonds, enterprise bonds, and shares were introduced).

30. *See* Latimer, *supra* note 11, at 1099 (stating that government treasury bonds were issued for the first time in 1981 to raise capital for China's industries). *See generally* TOLKEY & RAVN, *supra* note 15, at 62 (concluding that because government bonds were distributed according to quotas rather than freely in the market, and the interest rates on bonds were lower than the rates on savings accounts and therefore, enterprises did not readily purchase bonds); Ramey, *supra* note 14, at 462 (stating that "early Chinese corporate securities tended to take the form of American debentures and bonds").

31. *See* Vandevelde, *supra* note 13, at 585 (stating in the mid-1980s, joint-stock companies emerged). *See generally* Wong, *supra* note 13, at 1232-33 (discussing the Company Law of 1993 and its governance of joint stock companies which shares may be publicly traded. Further, state enterprises may be converted into joint stock companies); Zhang, *supra* note 14, at 566 (commenting the Company Law governs two types of stock companies, that is, limited liability companies and joint stock companies, the latter organizational form which allows for its shares to be publicly traded).

32. *See* Chuang, *supra* note 5, at 512 ("For two decades after Chairman Mao Zedong declared the formation of the People's Republic of China on October 1, 1949, China remained dormant in the international economic arena."); Ramey, *supra* note 14, at 466 (stating that securities trading in China stopped when communism was introduced); Wong, *supra* note 13, at 1221 (noting in 1949, the Chinese Communist Party began its rule with implementing a centrally controlled economy where free markets were abolished).

smuggling.[33] Mao's radical cynicism, however, may have some legitimacy given China's market conditions today.[34]

In 1983, China converted for the first time an SOE into a stock corporation, issuing minority shares to private investors while the State maintained control as the majority shareholder.[35] "Limited privatization"[36]—China's version of privatization—however, controverts customary notions of a free market economy that stimulates efficient allocation of resources and private ownership.[37] The conversion of SOEs was designed to raise capital for China's ailing economy,[38] and at the same time shift the risk of operating SOEs to investors by "chang[ing] the enterprise into an independent economic entity responsible for its own profits. . . ."[39] Concom-

33. *See* Vandevelde, *supra* note 13, at 583 (stating that, under Mao Zedong, the Communist Party perceived the stock markets as corrupt and, thus, eliminated them). *See generally* Yuan, *supra* note 10, at 508 (noting the Chinese national leaders' suspicion of capitalism).

34. *See Revised Law Improves Transparency,* CHINA DAILY, Nov. 29, 1999 (noting the assessment of the markets by China's auditor-general after a draft amendment was made to China's accounting law); *China's Exchanges Issue New Rules for Listed Firms: Regulations Should Foster More-Transparent Markets,* ASIAN W. ST. J., May 9, 2000, at 17 ("China's decade-old stock market has been plagued by corruption and corporate malfeasance that feed wild boom-and-bust cycles of speculation.").

35. *See* Vandevelde, *supra* note 13, at 591 (asserting in 1983, the State Council permitted SOEs to issue corporate stock, converting SOEs into shareholding entities). *See generally* YAO, *supra* note 6, at xvii, 6 (explaining the process of converting state enterprises into shareholding corporations to abide by a quota system managed by the State Council); Yuan, *supra* note 10, at 501 ("In a traditional SOE . . . the state is the highest authority in the enterprise.").

36. *See* Gu & Art, *supra* note 5, at 126 (defining Limited Privatization as issuing shares in SOEs to private investors while the state retains a controlling interest). *But see id.* (comparing Limited Privatization with "Corporatization" which entails transforming SOEs into corporate entities that are independent of the government, and in which the State only has partial control).

37. *See* Gu & Art, *supra* note 5, at 126 (defining Limited Privatization as issuing shares in SOEs to private investors while the state retains a controlling interest).

38. *See* Anderson, *supra* note 9, at 1921 (discussing the fact that China allowed the conversion of SOEs in the 1980s in part so that "idle personal savings could be channeled into ailing state enterprises"); Jenny S. C. Chung, *Tax Benefits Enjoyed by H Share Companies: A Legal Analysis*, 29 HONG KONG L.J. 294, 298-99 (1999) ("The Company Law of the People's Republic of China has laid down the legal framework for the conversion of state-owned enterprises into joint stock companies to issue shares for listing on domestic or overseas stock exchanges."); Gu & Art, *supra* note 5, at 125 (noting that one purpose of the Chinese securities market "is to absorb money from Chinese citizens, which is then channeled into productive enterprises controlled by the state."); Latimer, *supra* note 11, at 1099 (discussing the fact that the Chinese securities industry developed out of a need to "obtain new sources of capital for Chinese industry and to relieve the state's financial organs from the burden of finding investment funds").

39. *See* YAO, *supra* note 6, at xvii, 5; Ramey, *supra* note 14, at 462 (noting that "state assets" are sometimes sold so that the state may use the money in "other areas"); Latimer, *supra* note 11, at 1098-99 (noting that as securities markets were created, the central government created "[programs] to increase China's competitiveness in the world market"). *See generally* Wonacott, *China's Securities Law Criticized for Failing to Empower Holders*, ASIAN WALL ST. J., Jan. 8, 1999, at 24 (noting almost half of SOEs do not make profits); Henny Sender, ASIAN WALL ST. J., July 23, 1999, at 13 (asserting China's securities regulator, China Securities Regulatory Commission, issues shares as a means to raise capital for cash-strapped SOEs).

itantly, other forms of stock issuing entities have appeared on the exchanges.[40] It was anticipated that if alternative investment opportunities were made available, then Chinese citizens would allocate their savings to higher yield investments such as securities—until recently, China had had one of the highest rates of savings, measured at $310 billion in 1994.[41] Soon afterward, the Shanghai and Shenzhen national stock exchanges opened in 1990 and 1991, respectively, each of which emerged under different sets of regulations promulgated by the regional branches of the PBC.[42] The configuration of the markets was such that domestic investors could only invest in A-shares,[43] whereas foreign investors were limited to the B-share markets.[44] The premise of such division was that it would insulate the domestic market from the risks of international market volatility resulting from the inflow of foreign capital.[45] Conversely, the B-share market would operate to raise foreign capital to facilitate the expansion of China's economy. B-shares, however, are illiquid in that they may only be held and transferred to foreigners.[46] Having rolled out a welcome mat to foreign investments, an insurgence of west-

40. *See* Vandevelde, *supra* note 13, at 585-86 (discussing the evolution of the Chinese stock markets from the 1980s through the 1990s). *See generally* Anderson, *supra* note 9, at 1941 (noting that until recently, only small and mid-sized firms were allowed to trade shares in the Chinese market, due to the fact that the Chinese government has focused upon approving only those companies whose publicly trades stock as are within its economic plan).

41. *See* Ramey, *supra* note 14, at 471 (describing the large savings of Chinese citizens); Yonghao Pu, *Why China Won't Be Asia's Next Basket Case Economy*, CHINAONLINE, Apr. 19, 1999 (noting that in 1997, China had the highest savings rate in the world).

42. *See* TOLKEY & RAVN, *supra* note 15, at 63 (explaining the establishment of the Shanghai and Shenzhen Stock Exchanges and the procedure for trading and types of financial products that were traded); Vandevelde, *supra* note 13, at 592 (describing the establishment of the Shanghai and Shenzhen Stock Exchanges and the development of separate regulations that followed).

43. *See* TOLKEY & RAVN, *supra* note 15, at 71 (defining A-shares as the shares in companies listed on the Shanghai or Shenzhen exchanges, and which are only available to domestic investors, denominated in Renmenbi, and which dividends are also paid in Renmenbi). *See generally* Andrew Xuefeng Qian, *Why Does Not the Rising Water Lift the Boat? Internationalization of the Stock Markets and Securities Regulatory Regime in China,* 29 INT'L LAW. 615, 617 (1995) (commenting that China created two separate markets to expeditiously modernize the stock markets and encourage foreign investment).

44. *See* TOLKEY & RAVN, *supra* note 15, at 71 (defining B-shares as those which can only be purchased by foreign investors, and have created a means of raising foreign capital); Qian, *supra* note 43, at 617-18, 617 n.7 (defining B-shares and discussing the history, and future of the B-share market); Lee, *supra* note 8, at 13-14 (commenting that China's markets are segmented in terms of type and geographic area. Foreign brokers are limited to dealing in B-shares which are extremely illiquid, and "cannot be traded with the same immediacy or volume as regular "A"-shares.").

45. *See* Qian, *supra* note 43, at 619 (stating the objective of forming two separate stock markets); *cf.* TOLKEY & RAVN, *supra* note 15, at 73 (defining A-shares as the shares in companies listed on the Shanghai or Shenzhen exchanges, and which are only available to domestic investors, denominated in Renmenbi, and which dividends are also paid in Renmenbi).

46. *See* Qian, *supra* note 43, at 617-19, 617 n.7 (stating that B-shares are only traded internally, and the purpose of B-shares is to raise foreign funds to finance projects, and this method was chosen because issuance of the shares was easier and required less experience than A-shares); Ramey, *supra* note 14, at 471 (submitting B-shares are not convertible and are illiquid and are used to attract foreign capital).

ern capital and foreign direct investment into China resulted, amounting to approximately $59 billion in 1993 since implementing the Open Door Policy in 1978.[47]

B. Regulation of the National Exchanges

Prior to the establishment of the Shanghai and Shenzhen national exchanges, the state-controlled PBC acted as China's premier securities regulator.[48] Pursuant to its delegated authority under Article V, Section 11 of the Interim Regulations of Banks 1986 (hereinafter "Interim Regulations of Banks"),[49] the PBC delegated to its regional branches supervision of the passing of local securities regulations by the governments of Beijing Municipality, Guangdong Province and Xiamen Special Economic Zone, and regulated the issuance and trading of stocks, bonds and negotiable instruments. [50] In particular, as a result of regulating the local exchanges, the regional PBC branches developed conflicting, yet significant, sets of regulatory provisions, each of which exhibited distinct regional attributes.[51] Amidst the unprecedented economic growth when China's gross national product nearly doubled[52] and when the economy struggled to reconcile inconsistent issuing and trading requirements of the local exchanges,[53] China was com-

47. *See* Wei Jia, *Tidal Changes in Chinese Foreign Investment Laws and Policies*, 2 TUL. J. INT'L & COMP. L. 23, 24 (1994) (noting that "between 1978 and 1993, China approved over 172,000 foreign direct investment contracts with total utilized capital exceeding fifty-nine billion dollars"); Qian, *supra* note 43, at 615 (attributing the growth of China's economy to economic reform and Deng Xiaoping's open door policies); Ramey, *supra* note 14, at 471 (describing the expansion of China's economy between 1978 and 1993).

48. *See* YAO, *supra* note 6, at xvii, 77 (stating prior to 1992 "the PBC exercised 'comprehensive' regulatory as well as administrative jurisdiction over the financial industry . . . [including] the securities industry."); Ramey, *supra* note 14, at 484-485 (noting that the PBC was authorized to regulate both the regional and national exchanges); Benjamin R. Tarbutton, *China—A National Regulatory Framework for the PRC's Stock Markets Begin to Emerge*, 24 GA. J. INT'L & COMP. L. 411, 414-15 (1994) (explaining that the PBC was delegated the powers to regulate the regional exchanges in a decentralized scheme that involved further delegating regulatory powers to the local branches of the PBC).

49. *See* Interim Regulations of Banks 1996, art. V, Sec. 11 *cited in* Ramey, *supra* note 14, at 484; *see also* Tarbutton, *supra* note 48, at 414-15 (noting that PBC was delegated the responsibility of regulating the regional stock exchanges); Amy Chunyan Wu, Note, *PRC's Commercial Banking System: Is Universal Banking a Better Model?*, 37 COLUM. J. TRANSNAT'L L. 623, 631 (1999) (noting that Shanghai and Shenzhen stock exchanges are governed by an interim National Securities Law).

50. *See* YAO, *supra* note 6, at xvii, 77.

51. *See* YAO, *supra* note 6, at xvii, 3 (discussing the assistance provided by the local branches of the PBC to local provincial governments in formulating their own rules for regulating the markets in their own local markets); Ramey, *supra* note 14, at 485 (asserting the regional branches of the PBC in Shanghai and Shenzhen developed two major securities regulations, the Shenzhen Provisional regulations on Companies Limited by Shares and the Shanghai Municipality Provisions Regulations on Companies Limited by Shares, each of which exhibited distinct characteristics).

52. *See* YAO, *supra* note 6, at xvii, 77; Ramey, *supra* note 14, at 456-57 (discussing the growth of China's economy).

53. *See* Tarbutton, *supra* note 48, at 412-13 (noting the disjointed nature and lack of a national framework of equities trading in China prior to the Interim Regulations); David Fairlamb, *Surging, Churning China*, INSTITUTIONAL INVESTOR, Jan. 1993, at 33 (stating that "due to the lack of a central clearing mechanism, the Securities and Exchange Commission has prevented U.S. Investors from trading on the exchanges at all"); Tony Walker & Deirdre Nickerson, *Chinese Regulators Face an Unenviable Task*, FIN. TIMES, Mar. 25, 1993, at 28 (noting that lack of consistency in China's stock markets led it to become one of the world's riskiest).

pelled to establish uniformity in its securities laws.[54] In March 1987, China promulgated its first national securities regulation entitled, "Interim Regulation Governing the Administration of Bonds for [State-Owned] Enterprises,"[55] accompanied by a Directive issued by the State Council which stipulated the limited conditions upon which enterprises could act as issuers.[56] Clearly, the Regulation and the Directive laid the groundwork for China to launch its shareholding system and stock experimentation endorsed by Deng.[57]

As a result of the inconsistencies emanating from the different regional regulations, the Shanghai and Shenzhen exchanges were cesspools of widespread fraud and abuse.[58] Not only were investors flocking to the Shanghai exchange to take advantage of its less restrictive measures, but also exploiting personal relationships with insiders or officials of regulatory bodies.[59] Exacerbating the already unstable investment climate, the PBC, acting as the nation's largest lending institution *and* regulator of the regional and national stock exchanges, monopolized the financial industry and consequently created a major conflict of interest.[60] The conflict of inter-

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54. *See* Tarbutton, *supra* note 48, at 412-13 (discussing how fraud and corruption lead to the enactment of the Interim Regulations); Vandevelde, *supra* note 13, at 592-93 (discussing the evolution of securities law in China). *See generally* Walker & Nickerson, *supra* note 53, at 28 (discussing why China was compelled to establish uniformity in its securities law).

55. *See* Qiye Zhaiquan Guanli Zhanxing Tiaoli [Interim Regulations on Administration of [State Enterprise] Bonds], issued by the State Council on March 27, 1987, *available in* LEXIS, China Laws and Regulations from the People's Republic of China, (visited Mar. 26, 2001) <http://www.peopledaily.com.cn>; *see also* Zhang, *supra* note 14, at 562 n.32 (citing the Interim Regulations on Administration of [State Enterprise] Bonds); Vandevelde, *supra* note 13, at 585 (discussing China's first attempt at formulating national securities regulations).

56. *See* Directive of the State Council on Reinforcement of Administration on Stocks and Bonds *available in* LEXIS, China Laws and Regulations from the People's Republic of China, Chinalaw file, *and cited in* Vandevelde, *supra* note 13, at 591 (describing the Directive of the State Council on reinforcement of Administration on Stocks and Bonds which stipulates few situations where an enterprise can issue stock); Latimer, *supra* note 11, at 1099, n.14 (setting forth the directive's three basic principles); Tarbutton, *supra* note 48, at 414-16 (stating that the 1987 Directive originally prohibited SOEs from issuing shares to the public as a means to obtain control over the growing stock issues, however, the Directive was later interpreted to contain broad strokes under which the local PBC branches developed distinct stock issuance requirements).

57. *See* Qian, *supra* note 43, at 26 ("[N]ational laws will only be promulgated when experiments have been conducted on a small scale and when successful results have been achieved.").

58. *See* Gu & Art, *supra* note 5, at 125 (noting the widespread fraud that occurred in Shenzhen in 1992); Tarbutton, *supra* note 48, at 412-13 (recognizing the fraud and corruption in the Chinese Stock Market); Vandevelde, *supra* note 13, at 592-93 (noting the fraud and abuse problems in the Shanghai and Shenzhen exchanges).

59. *See* Vandevelde, *supra* note 13, at 592-93 ("In October of 1992, [there were] fraud and abuse problems associated with the lack of unity between the Shanghai and Shenzhen Measures"); Gu & Art, *supra* note 5, at 122 (commenting on the widespread fraud that resulted from the separate regulations drafted by each regional exchange); David Holley & Christine Courtney, *Would-Be Capitalists Riot in China Protests: Police fire small arms and use tear gas as thousands run amok in southern city, charging stock-sale corruption*, L.A. TIMES, Aug. 11, 1992, at Part A (reporting on a public protest concerning limited applications for stock issuance's available to public and some resold on a black market). *See generally* YAO, *supra* note 6, at xvii, 77 ("[T]he PBC local branches worked closely with the local government and were motivated more by the provincial growth to outstrip the rival provinces than by their loyalty to the central bank's head office in Beijing.").

60. *See* Ramey, *supra* note 14, at 484 ("[A]llowing the country's largest bank and lending institution to regulate the markets created a major conflict of interest."); Tarbutton, *supra* note 48, at 415 (providing an example of a potential problem posed by the PBC's control of the national exchanges); *see also John T. Shinkle, Observations on Capital Market Regulation: Hong Kong and the People's Republic of China*, 18 U. PA. J. INT'L ECON. L. 254, 261 (1997) (discussing the licensing and regulatory duties of the People's Bank of China).

est jeopardized the integrity of the securities markets.[61] As Chinese citizens invested their savings, the PBC witnessed the depletion of deposits and its reallocation into the securities markets.[62] In essence, the PBC was competing directly with the markets it was designated to regulate.[63] Further, the PBC's managerial structure of the regional PBC branches collapsed as the branch offices were more inclined to advance provincial interests to compete with other provinces, than answer to the PBC central office in Beijing.[64] On August 10, 1992, local PBC officers conspired with the local governments to take for themselves share application forms intended to be distributed to the public for stock purchases.[65] Tens of thousands of would-be investors in Shenzhen rioted and alleged that the government was corrupt and guilty of insider trading.[66]

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61. S*ee* Ramey, *supra* note 14, at 473-74 (noting that the securities markets of China were involved with fraud and corruption causing them to be a risky investment); Tarbutton, *supra* note 48, at 420 ("The decentralized regulation of the PBC led to large scale abuses that threatened the legitimacy of the markets in the eyes of potential investors."); Vandevelde, *supra* note 13, at 593 (discussing the problems of fraud and abuse that occurred necessitating the need to replace the PBC as the regulator of China's securities markets).

62. S*ee* Ramey, *supra* note 14, at 472 (noting the decline in deposits that PBC faced, in the late 1980s, as investors looked to the securities markets for more favorable returns."); Tarbutton, *supra* note 48, at 415 ("The potential for mismanagement increased as the PBC saw its deposits dwindle, due in part to negative real interest rates and the attractive returns offered in the marketplace."). *See generally* Vandevelde, *supra* note 13, at 592-95 (discussing the birth of the Shanghai and Shenhzen markets and the trading on each of these markets).

63. *See* Ramey, *supra* note 14, at 472, 484-85 (highlighting the conflict of interest that developed by the PBC serving as both the central bank of China and regulator of the securities market, giving rise to potential mismanagement); Tarbutton, *supra* note 48, at 415-16 (discussing the conflict of interest as a fundamental problem in regulating the markets, compounded by the local PBC branches' disregard for each others' regulations).

64. *See* YAO, *supra* note 6, at xvii, 77; *see also* Andrew Xuefeng Oian, *Transforming China's Traditional Banking Systems Under the New National Banking Laws*, 25 GA. J. INT'L & COMP. L. 479, 486 (1996) (noting that the PBC's provincial branches were supervised by both the headquarters in Beijing and the local government); Tarbutton, *supra* note 48, at 415 ("The regional nature of these emerging markets and the decentralized regulatory framework of the PBC have destabilized the growth and maturation of the two national stock markets.").

65. *See* Simon Holberton, *Impasse or Impetus on the Road to Reform: Riots in Southern China Pose a Dilemma for the Leadership's Programme of Liberalization,* FIN. TIMES (London), Aug. 12, 1992 at 12 ("Small investors were angry at having been allegedly cheated by corrupt officials out of the chance to participate in the local stock exchange's latest round of share issues."); *e.g.,* Tarbutton, *supra* note 48, at 420 (providing examples of wide-spread fraud in regional markets); Vandevelde, *supra* note 13, at 592 n.74 ("Significant fraud and abuse occurred under the decentralized leadership of the PBC, prompting citizen riots in Shenzhen on August 10, 1992.").

66. *See* YAO, *supra* note 6, at xvii, 77 (describing the 1992 Shenzhen incident amounted to rioting that was quelled by shots and tear gas shot by the police); Gu & Art, *supra* note 5, at 121 (explaining the Shenzhen incident was a result of rampant fraud in the market place). *See* Burke, *supra* note 8, at 328-29.

> Corruption negatively impacts Chinese stock markets in three ways. First, it fosters the perception that the economy is not under the rule of law, which hinders the development of a stock market. Second, as with local protectionism, corruption decreases transparency and the transaction costs of a stock market transaction. Third, corruption undermines stock markets by fostering the perception that the markets are not fair and open, thereby decreasing investor confidence in the securities market.
>
> *Id*.

In 1993, the Vice Premier of China acknowledged the need for China to expedite its legislative work on national securities laws.[67] Other law makers and scholars agreed that "'[m]any laws [in China] must converge with international norms,'"[68] particularly to improve the country's chances of entering the World Trade Organization.[69] Analysts, however, were skeptical that the Communist Party would take the initiative to enact laws banning insider trading when many of its own party units and cadres reaped huge profits from the practice.[70]

Wary of eroding investor confidence and the departure from its original ambitious plan to erect a socialist market economy that rivals other nations,[71] China acknowledged the necessity of an autonomous, centralized regulatory body capable of fashioning and enforcing a uniform body of law.[72] Particularly, that regulatory body had to eradicate the epidemic corruption and insider trading surrounding the securities markets.[73]

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67. S*ee* Tarbutton, *supra* note 48, at 420-21 (noting that the SCSC and the CSRC were the main regulatory agencies); Vandevelde, *supra* note 13, at 593-94 (stating that the implementation of the Interim Regulations on the Issue of Trading of Shares in 1993 replaced many regional regulations). *See generally* Wong, *supra* note 13, at 1221 (noting the implementation of the National Securities Law).

68. *See* Lam, *supra* note 8, at 11. *See* Michael E. Burke, IV, *Improving China's Bank Regulation to Avoid the Asian Bank contagion*, 17 UCLA PAC. BASIN L.J. 32 (1999) ("China should bring its bank regulations in line with international 'best practices', including prudential regulation of risk management and licensing and oversight of bank operations, in order to protect its banking sector from the Crisis."); Ramey, *supra* note 14, at 475 (noting that China's market regulation needs reform, however, a model similar to the United States' is unlikely to last long).

69. *See* Burke, *supra* note 8, at 321 (stating the WTO membership mandates China to improve the efficiency, transparency and liquidity of its markets in order to liberalize competition); Lee, *supra* note 8, at 6-10 (explaining as a prerequisite to joining the WTO, China must adhere to the General Agreement on Trade in Services (GATS) which prescribes non-discriminatory treatment of foreign financial institutions); Lam, *supra* note 8, at 11. *See generally* Bacon, *supra* note 8, at 377-79 (describing the history of China's involvement in the WTO and its interests in becoming a member of the organization).

70. *See* Gu & Art, *supra* note 5, at 137 (commenting that government agencies and officials use their power to obtain inside information and purchase stocks before such information is made public); Lam, *supra* note 8, at 11 (acknowledging how Communist Party officials contribute to insider trading in China).

71. *See* Ramey, *supra* note 14, at 453 (discussing a belief that will incorporate capitalist functions while retaining control by implementing underlying social policy); Wong, *supra* note 13, at 1223 (discussing the incorporation of significant socialist characteristics which distort the normal functions of a financial market); *see also* Holberton, *supra* note 65, at 17 ("Mr. Deng, who is 88, wants the party to 'elect' pro-economic reformers to prominent party positions and embrace his concept of a 'socialist market economy'.").

72. *See* Tarbutton, *supra* note 48, at 420 (noting that the SCSC and the CSRC replaced the PBC as the new regulatory policymakers for the national markets in China); TingTing Tao, *The Burgeoning Securities Investment Fund Industry in China: Its Development and Regulation*, 13 COLUM. J. ASIAN L. 203, 215 (1999) ("In order to centralize regulation, a two-tier structure—the State Council Securities Commission ("SCSC") and the China Securities Regulatory Commission ("CSRC")—was established in October 1992."); Zhang, *supra* note 14, at 562 ("The China Securities Regulatory Commission (CSRC) was formed as the executive arm of the SCSC to implement the administrative tasks of the SCSC."); Anthony Rowley, *Making It Safer to Trade in the Chinese Stock Markets*, BUS. TIMES, Jan. 21, 1994, at 17 (the SCSC and the CRSC replaced the PBC in hopes of creating a regulatory body for the security markets).

73. *See* Tarbutton, *supra* note 48, at 420 ("The riots prompted the State Council to take more control of the markets, leading to the removal of the PBC from its regulatory function in October, 1992."); Zhang, *supra* note 14, at 562 (discussing the reasons for establishing an independent agency, the State Council Securities Commission, to implement tighter control for the securities industry); *see also Underground Stock Market Thrives in China*, L.A. TIMES, June 21, 1993, at D3 (noting that there is a market for trading unauthorized shares in China).

1. The State Council Securities Commission and the China Securities Regulatory Commission

In April 1993, China replaced the PBC by implementing a two-tiered regulatory system comprised of the State Council Securities Commission (*Guowu Yuan Zhengquan Weiyuanhui,* hereinafter "SCSC"),[74] an administrative body, and the China Securities Regulatory Commission (*Zhongguo Zhengquan Jiandu Guanli Weiyuanhui,* hereinafter "CSRC"), a government agency charged with regulating the issuing and trading of stocks in China.[75] The SCSC, staffed with 14 ministers from various state organs such as the PBC, the State Planning Commission, the Ministry of Finance and the Supreme People's Court,[76] was primarily responsible for promulgating securities regulations, developing regulatory policies, and inspecting entities affiliated with the securities industry.[77] Moreover, the SCSC customarily delegated its rulemaking function to the CSRC. One questions, however, whether the two-tiered system really resolved the conflict of interest problem apparent when the PBC was in power when the judiciary participated in the SCSC and was responsible for entertaining appeals from that very administrative body.

Since the passing of the new Securities Law at the end of 1998,[78] the two-tier structure has merged into one regulatory body, the CSRC, which now assumes the administrative functions of the former SCSC as well.[79] Now, not only is the CSRC empowered to supervise the issuing, trading and registration of securities, but also formulates new policies *and* serves as the enforce-

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74. *See* The SCSC, staffed with 13 ministers from various state organs such as the PBC, the State Planning Commission, the Ministry of Finance and the Supreme People's Court, was primarily responsible for promulgating securities regulations, developing regulatory policies, and inspecting entities affiliated with the securities industry. ZIMMERMAN, *supra* note 21, at 371. Anderson, *supra* note 9, at 1923 (discussing the establishment of the SCSC and the CSRC in 1992 in response to the problems with the PBC acting as regulator).

75. *See* ZIMMERMAN, *supra* note 21, at 371 (listing the departments within the CSRC that are also responsible for regulating the markets); Anderson, *supra* note 9, at 1923 (discussing the establishment of the SCSC and the CSRC in 1992 in response to the problems with the PBC acting as regulator).

76. *See* Shinkle, *supra* note 60, at 261 (identifying the 14 members appointed to SCSC by the State Council); Tao, *supra* note 72, at 215 (noting the responsibilities of the SCSC and its primary functions); Zhang, *supra* note 14, at 562 ("In essence, the SCSC is a loosely organized coordinating body consisting of officials from various Central Government ministries and commissions related to securities issuance and trading.").

77. *See* ZIMMERMAN, *supra* note 21, at 371 (describing the functions of the SCSC); YAO, *supra* note 6, at xvii, 77 (listing the staff of the SCSC).

78. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, and *translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999. *Id.*

79. *See* Xian Chu Zhang, *Symposium: Law Based Nature of the New International Financial Infrastructure*, 33 INT'L LAW. 983 n.61 (1999) (stating that the current two-tier structure with the SCSC and CSRC will be substituted with a single unified system); *see also* Tao, *supra* note 72, at 215 ("As the SCSC played a limited role in regulating the securities market, it was eventually merged into the CSRC in October 1998"); Zhang, *supra* note 14, at 565 (noting that the securities exchanges are controlled primarily by the CSRC, leaving little or no control to the local governments).

ment and investigative arm of the government.[80] Assigning such sweeping powers to the CSRC raises red flags with respect to potential abuses of governmental power and conflicts of interests given that the State holds interests as majority shareholders in the very issuing enterprises the CSRC is appointed to regulate.[81] Consequently, the chances of restoring investor confidence and maintaining the integrity of the market place through China's new regulatory structure is dubious given the lack of autonomy between the agencies and the Chinese government.[82]

Unlike the Securities and Exchange Commission in the United States which stands as an independent and non-partisan organ of the federal government,[83] the CSRC and its two predecessors, the SCSC and the CSRC, are mere subordinates of the National People's Congress which operate as catalysts in executing the State policies.[84] Moreover, if the new regime has not deterred brokers and bankers from insider trading and other corrupt practices, there is little doubt that regulatory officials are dissuaded from taking advantage of their positions.[85]

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80. *See* Zhang, *supra* note 3, at 1000 (discussing the combination of the SCSC and CSRC into one regulatory organ); Anderson, *supra* note 9, at 1923 (stating in 1997, the State Council delegated regulatory authority over the Shanghai and Shenzhen Exchanges to the CSRC, and the SCSC and CSRC merged into one organ later that year).

81. *See* ZIMMERMAN, *supra* note 21, at 369 n.2 (describing China's move toward private enterprises independent of the state, and the process of "corporatization," a limited form of privatization, which involves converting SOEs into issuers of minority ownership interests in such enterprises); Zhang, *supra* note 14, at 558 ("Establishing shareholder ownership, however, does not mean privatization. Rather, it is a so-called 'corporatization' process, wherein a system of multiple classes have been established, with the state being majority shareholder"); Zhang, *supra* note 3, at 1009 (explaining excessive government control may impede the development and maintenance of the integrity of the market, as it has already had such effect prior to the enactment of the new Securities Law).

82. *See* Victor L. Hou, *Derivatives and Dialectics: The Evolution of the Chinese Futures Market*, 72 N.Y.U. L. REV. 175, 227 (1997) (noting that with a separation of government and business will restore fairness into the marketplace); *see also* Todd Carrel & Richard Hornik, *A Chinese Gold Rush? Don't Hold Your Breath,* N.Y. TIMES, Sept. 14, 1994, at A19 (discussing how the "economic backwardness" of China, including its lack of sufficient investor protections, stymies commercial success and creates overall losses for United States companies and individuals operating in the market). *See generally* David L. Weller, *The Bureaucratic Heavy Hand In China: Legal Means For Foreign Investors to Challenge Agency Action,* 98 COLUM. L. REV. 1238, 1238 (1998) (finding that the Chinese government is attempting to modernize its economy to attract more foreign investors).

83. *See* Thomas C. Singher, Note, *Regulating Derivatives: Does Transnational Regulatory Cooperation Offer a Viable Alternative to Congressional Action?,* 18 FORDHAM INT'L L.J. 1397, 1420-21 (1995) (noting the Securities Exchange Act of 1934 created the Securities and Exchange Commission which is an independent and non-partisan agency charged with administering and enforcing securities laws); Zhang, *supra* note 3, at 1009 (explaining the SEC is an independent entity charged with the duty to protect investors).

84. *See* Zhang, *supra* note 3, at 1009 ("[U]nlike the SEC . . . the main function of the CSRC as a subordinate government instrument is to implement the government financial policy."); *see also* William D. Holmes, *Symposium: Capital Market and Financial Service in the Pacific Rim: Prospect for Harmonization Panel I: Regional Trends: Diversity and Convergence China's Financial Reforms in the Global Market*, 82 LAW & POL'Y INT'L BUS. 715, 753 (1997) (discussing how the State Council Securities Policy Committee is an administrative check on the CSRC and can second guess its policy decisions). *See generally International Agreements and Understandings for the Production of Information and Other Mutual Assistance* 29 INT'L LAW. 780, 818 (1995) (outlining the regulation of CSRC's powers).

85. *See* Gu & Art, *supra* note 5, at 137 (finding that one problem with the market in China is that high-level officials use their power to buy stock before the public can); *see also* Chan, *supra* note 3, at 1 (asserting widespread securities violations by brokers, bankers and regulators and analysts comment that insider trading is a large concern because companies and brokerage houses are all state-owned). *See generally* Vandevelde, *supra* note 13, at 607 (noting that before China becomes a internationally recognized stock market they have to implement more strict securities laws).

2. Pre-1998 Regulations

Prior to the enactment of China's Securities Law, the SCSC and the CSRC jointly participated in the drafting and enactment of numerous regulations of national implication, including the Interim Regulation on the Administration of the Issuing and Trading of Stocks of 1993 (hereinafter "Interim Regulation")[86] and the 1993 Company Law, as amended in 1999 (hereinafter "Company Law"),[87] both of which became effective in 1994. The Interim Regulation was China's first attempt at creating its national securities laws and governed all trading activity,[88] whereas the Company Law introduced standardized measures by which more efficient and modern corporate organizations could function without the interference of the State.[89] The Company Law also regulated the establishment of (1) limited liability companies, and (2) "companies limited by shares," commonly referred to as joint stock companies, that is, corporations with limited liability and an unlimited number of shareholders that may issue shares upon obtaining approval from the State Council.[90] Of utmost significance to this discussion, how-

86. *See Gupiao Faxing yu Jiaoyi Guanli Zanxing Tiaoli* [Interim Regulation on the Administration of the Issuing and Trading of Stocks], issued by the SCSC on April 22, 1993 (visited Mar. 26, 2001) <http://www.people-daily.com.cn>. The Regulation entered into force on the same date. *Id. See* TOLKEY & RAVN, *supra* note 15, at 179-196 (translating the Interim Regulation); Tarbutton, *supra* note 48, at 420-431 (stating that the Interim Regulations affirm the authority of the SCSC and CSRC as central regulators of all issues and trading in China, as well as limit public issuance of shares to limited liability companies and SOEs authorized to convert into limited liability companies, and impose disclosure requirements); Zhang, *supra* note 3, at 985 (noting the among the many pre-1998 enactments of national implication was the Interim Regulations on Stock Issuing and Trading of 1993).

87. *See* The Company Law of the People's Republic of China, adopted Dec. 29, 1993, at the 5th Sess. of the Standing Committee of the 8th NPC, as amended Dec. 25, 1999 at the 13th Sess. of the Standing Committee of the NPC, *reprinted and translated in* CHINA'S NEW COMPANIES (Nicole Yuen ed. 1994); *see also* Han, *supra* note 87, at 459 (stating that the Company Law fosters a fundamental change in the organizational structure of enterprises and allows state-owned enterprises to operate under a market system); Preston M. Torbert & Jia Zhao, *An Overview of China's Internet Market and its Regulation,* 5 CYBERSPACE LAW 14 (2000) (discussing the 1999 amendment to the Company Law).

88. *See* Anderson, *supra* note 9, at 1923 ("[T]he 1993 Interim Regulations [ ] and the Provisional Measures on Eliminating Securities Fraudulent Activities were the precursors to the national Securities Law."); Benjamin R. Tarbutton, *China—A National Regulatory Framework for the PRC's Stock Markets Begin to Emerge*, 24 GA. J. INT'L & COMP. L. 411, 420-431 (1994) (stating that the Interim Regulations were established soon after the SCSC and CSRC were formed and appointed to formulate a national securities policy).

89. *See* Anna M. Han, *China's Company Law: Practicing Capitalism in a Transitional Economy,* 5 PAC. RIM. L. & POL'Y 457, 460 (1996) (discussing changes promoted by the 1993 Company Law). *See generally* TOLKEY & RAVN, *supra* note 15, at 73 (discussing the Company Law and stock-issuing companies); Zhang, *supra* note 14, at 566-69 (noting same).

90. *See* The Company Law of the People's Republic of China, adopted Dec. 29, 1993, at the 5th Sess. of the Standing Committee of the 8th NPC, as amended Dec. 25, 1999 at the 13th Sess. of the Standing Committee of the NPC, *reprinted and translated in* CHINA'S NEW COMPANIES (Nicole Yuen ed. 1994); *see* TOLKEY & RAVN, *supra* note 15, at 1-8 (stating that the Company Law introduces two forms of companies, i.e., limited liability companies and joint stock companies, and further discussing the process, consequences and rights of enterprise incorporation); Vandevelde, *supra* note 13, at 587-89 (defining joint stock companies and Limited Liability Companies).

ever, is the Provisional Measures on Prohibiting Securities Fraud (hereinafter "Provisional Measures") passed in 1993.[91]

Article 3 of the Provisional Measures provides that all units and individuals are prohibited from using insider information to carry out securities issues and trading to make a profit or reduce losses.[92] By broadly stating that all "units and individuals" are prohibited from benefiting from insider information, it seems that the measures thus apply to all persons who come into possession of such information, not just "insiders."[93] It is interesting, however, that only insiders are explicitly defined in the Provisional Measures, and they include (1) directors, supervisors, high-ranking managers, and other staff of the issuer; (2) professional personnel employed by the issuer such as attorneys, accountants, and investment advisers, or management or other personnel of securities organizations; (3) personnel with certain management or supervisory rights over the issuer in accordance with laws and regulations; (4) personnel who may come into contact with or obtain inside information because of their professions or relations with the issuer; and, as a catchall, (5) other personnel who may come into contact with inside information via legitimate channels.[94] Although the provisions seemed over-inclusive, by explicitly including as insiders governmental securities regulators in item (3), the State seemed to acknowledge the monopolistic stranglehold it maintains on the market and through the SCSC, but perhaps it was ignorant such power may translate into a breeding ground for potential abuses.

Conduct qualifying as insider trading is set forth in Article 4 and includes (1) an insider's use of inside information to buy or sell securities, or advise others to do so; (2) an insider leaking or "tipping" inside information to others who use that information to engage in insider trading; (3) a non-insider or "tippee" obtaining inside information through improper or other channels and using such information to buy or sell securities or advise others to do so; and another catchall, (4) other acts of insider trading.[95] "Inside information" is initially loosely defined to be "major" non-public information that may affect prices on the securities market if

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91. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3. *See generally* Gu & Art, *supra* note 5, at 136 (noting that China has developed similar laws to the United States in regard to insider trading and inside information).

92. *See generally* Latimer, *supra* note 11, at 1103 (discussing how the Professional Measures have helped define the administration of securities in China); Han, *supra* note 87, at 507 n.80 (stating that these measures don't have clear definitions which make it difficult to navigate); Zhang, *supra* note 14, at 600 ("The Provisional Measures expressly forbid four categories of fraud: insider trading, market manipulation, deceptive practices, and false statements.").

93. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3 ("[A]ll units and individuals are prohibited from using insider information to carry out securities issues and trading aimed at making profits or reducing losses").

94. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3, art 6.

95. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3, art 4.

disclosed; however, it is further defined in a laundry list of examples of events which are also described using the word "major"[96]—a rather unhelpful means of construction.

Section 10B of the United States Securities and Exchange Act of 1934 and Rule 10b-5 prohibits any person to trade on the basis of material, non-public information in connection with the sale or transfer of the company or its securities.[97] Unless in connection with a tender offer, a non-insider is not liable for trading on the basis of insider information, except when the tipper breaches a fiduciary duty by tipping such information, and the tippee had knowledge of this breach.[98] However, under a theory of misappropriation, a non-insider can be liable for trading on the basis of insider information if she or he breaches a duty to the source of the information.[99] In contrast, the broad language of Article 4 of the Provisional Measures seem to implicate even non-insiders who come into contact with inside information through legitimate means, and even if they do not trade on the basis of such information. Again, the broad language, the catchall provision in item (4), and the long list of culpable conduct seems to embody the intent to crack down on all activities that threaten the integrity of the market.[100] Further

96. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3 art 5 ("Inside information mentioned in these Procedures refers to major information that is known to insiders but has yet to be made public and may affect prices on the securities market." Examples of such information are listed thereafter).

97. *See* Securities Exchange Act 1934 § 10, 15 U.S.C.S. § 78j and Rule 10b-5, 17 CFR § 240.10b-5 (1999)

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

98. *See* Dirks v. S.E.C., 463 U.S. 646, 656 (1983) (stating that "[s]uch a tippee breaches the fiduciary duty which he assumes from the insider when the tippee knowingly transmits the information to someone who will probably trade on the basis thereof"); *see also* U.S. v. O'Hagen, 521 U.S. 642, 675 (1997) (stating that a tippee is liable only when the information has been disclosed and the tippee knew or should have known that there was a breach); Bateman Eichler, Hill Richards, Inc. v. Berner et. al., 472 U.S. 299, 313 (1985) (stating that "[a] tippee trading on inside information will in many circumstances be guilty of fraud against individual shareholders, a violation for which the tipper shares responsibility.").

99. *See* Dirks v. S.E.C., 463 U.S. 646, 659 (1983) ("As we noted in *Chiarella*, '[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty.'"); U.S. v. O'Hagan, 117 S.Ct. 2199, 2207-08 (1997) (stating that the misappropriation theory aims to protect investors against abuses by non-insiders of a corporation who may have access to privileged information that, if revealed, will impact the price of the corporation's stock, even though such person has no duty to the shareholders).

100. *See Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, *available in* LEXIS, News Library, ARCNWS File (defining, in Article 4, the scope of insider trading which includes insiders who use inside information as well non-insiders who obtain information "through other channels"); *Procedures for Management of Treasury Bond Futures*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 2, 1995, *available in* LEXIS, News Library, ARCNWS File (noting that, in Article 65, even treasury bond futures should be governed in part by the provisions of the securities markets); *see generally China's 8% Growth in 1998 Year of the GDP Chase,* FT ASIA INTELLIGENCE WIRE, Jan. 27, 1999, *available in* LEXIS, News Library, ARCNWS File (noting that China has promulgated "about 250 sets of provisional rules and regulations governing the securities markets").

evidence of this is the civil and administrative penalties for violating the insider trading provisions, which are so severe that punishments include fines up to 500,000 yuan (about US$60,975 in November 2000),[101] forfeiture of all profits derived from such trading,[102] forfeiture of any shareholder interest, and with respect to issuers, forfeiture of the right to issue shares in the company.[103]

In 1995, the CSRC promulgated the Administrative Measures on Own-Account Securities Business Conducted by Securities Institutions (hereinafter "Administrative Measures") to regulate broker-dealer and underwriting firms when they trade for their own account.[104] The Measures prohibit the institutions from insider dealing and market manipulation and punish any such conduct by confiscating any illegal gains, fines, bars from such trading, and stripping any licenses to trade for its own account.[105] By reserving the right to conduct random audits on securities trading institutions, and retaining the power to grant or deny trading for one's own accounts, the CSRC is better able to monitor and prevent insider trading among securities firms and investment companies.[106]

Numerous other laws and regulations emerged between the promulgation of the 1993 Interim Regulation and Provisional Measures and the passing of the new Securities Law in December 1998, amounting to over 250 statutes and regulations in various

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101. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at art. 13.

102. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at art. 14.

103. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at arts. 13-14; *see also* Zhang, *supra* note 14, at 601 (describing the severe penalties for insider trading). *Compare* Tarbutton, *supra* note 48, at 425 (noting the penalties for insider trading under the Interim Regulations include very similar punishments).

104. *See* Administrative Measures on Own-Account Securities Business Conducted by Securities Institutions 1995, *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS *and cited in* ZIMMERMAN, *supra* note 21, at 402-04 (explaining the Administrative Measures); *CSRC Sets Standards for Futures,* S. CHINA MORNING POST, June 20, 1995, at Business 1 (noting that "separate management systems would be established for brokerages which traded on their own accounts").

105. *See* Administrative Measures on Own-Account Securities Business Conducted by Securities Institutions 1995, *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS *and cited in* ZIMMERMAN, *supra* note 21, at 402-04 (explaining the Administrative Measures); Mark O'Neill, *Stock Laws Likely to Get Nod This Year,* S. CHINA MORNING POST, Mar. 7, 1997, Business Post at 5 (noting that an apparent division between client and own account trading should be present).

106. *See* Administrative Measures on Own-Account Securities Business Conducted by Securities Institutions 1995, *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS *and cited in* ZIMMERMAN, *supra* note 21, at 402-04 (explaining the Administrative Measures); Leu Siew Ying, *Chinese Watchdog Takes Action Against Company for Falsifying Accounts,* AGENCE FRANCE PRESSE, Apr. 29, 1998, at Financial Pages (describing a multi-commission investigation including the CSRC and the Hainan province audit department).

fields.[107] The long-proposed Securities Law, however, underwent five drafts in this period of six years.[108] Both the interim rules discussed above and the statutory drafts sought to clarify the existing laws in addition to creating a preliminary model of China's regulatory regime, but the ultimate effect was a tangled web of complexities and inconsistencies.[109]

In 1994, the CSRC and the United States Securities and Exchange Commission signed a memorandum of understanding setting forth methods in which the U.S. agreed to assist China in developing its regulatory framework, and drafting a comprehensive body of national securities laws.[110] As China demonstrates its interest in revamping its regulatory system to mirror that of the U.S., many Chinese officials and scholars agreed that the Chinese system has distinct characteristics that may render it incompatible or unmanageable by a Western model that is disclosure-oriented.[111] For example, the Chinese system has different listing, stock issuance

107. *See generally China's 8% Growth in 1998 Year of the GDP Chase, supra* note 87 (noting that China has promulgated "about 250 sets of provisional rules and governing the securities markets"); *China: Securities Law Published*, BBC Worldwide Monitoring, Jan. 8, 1999, *available in* LEXIS, News Library, ARCNWS File (stating that the Securities Law itself contains 214 articles); *New China Laws Regulate Online Securities Brokerages,* ChinaOnline, Apr. 17, 2000, *available in* LEXIS, News Library, CURNWS File (noting that China has issued up-to-date regulations dealing with online brokers).

108. *See China's Securities Law to Get Legislative Approval Soon,* Asia Pulse, Nov. 3, 1998, at Nationwide Financial News (noting that the first draft of the securities law was tabled for four years after its initial submission); *"Final Modifications" on China's Long-Awaited Securities Law Complete*, AGENCE FRANCE PRESSE, Dec. 28, 1998, at Financial Pages (noting that the final draft of the Securities Law will not apply to foreign investors' B-shares, rather it is limited to "locally traded A shares, corporate bonds and 'other securities approved by the State Council'"); *Draft Securities Law Under Consideration*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 30, 1998, *available in* LEXIS, News Library, ARCNWS File (referring to various revisions and proposals to the final draft).

109. *See* Qian, *supra* note 43, at 25-26 (stating the Securities Law failed to be passed several times after being presented to the legislature, and further, the drafts consisted of inconsistent rules and regulations); Wonacott, *supra* note 39, at 24 (commenting the new Securities Law was revised five times in six years).

110. *See* Memorandum of Understanding *cited in* Gu & Art, *supra* note 5, at 124 (submitting that in April 1994, the Chairman of the SEC, Arthur Levitt, signed a Memorandum of Understanding with China in order to assist China with fashioning a securities law with Western concepts); Qian, *supra* note 43, at 627 n.58 (asserting the CSRC and the SEC signed a memorandum of cooperation and reconciliation to develop China's securities markets and law according to U.S. practices; however, China's system exhibits unique attributes which may have to cede to the Western model; Duncan Hughes, *Insider Dealing Tribunal Faces Shake-Up to Promote Market,* S. CHINA MORNING POST, Oct. 6, 1994, NEWS at 2 (noting in 1994 the Securities and Futures Commission Tribunal anticipated increased communications with the United States' Securities Exchange Commission as well as Britain's Securities and Investments Board); *China Securities Regulator to Visit S'pore, HK*, THE STRAITS TIMES (Singapore), Nov. 30, 1995, Money at 2 (noting that China worked in conjunction with Singapore, the United States and Hong Kong in developing regulatory frameworks).

111. *See* The Stock Exchange of Hong Kong, *Disclosure-Based Regulation*, (visited Mar. 26, 2001) <http://www.sehk.com.hk/RPD/issue31.htm> (comparing a disclosure-based system of regulation and a merit-based regulatory scheme); Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999) (Article 167 describes the disclosure requirements and supervisory role of the State Council); *The Effects of WTO Entry on China's Securities Industry,* ChinaOnline, June 2, 1999, *available in* Lexis, News Library, CURNWS File (describing the major obstacles to China becoming a member of the world securities market); Geoffrey Murray, *News Focus on Daiwa's Move to Enter Chinese Stock Market,* Japan Economic Newswire, Sept. 2, 1994, *available in* LEXIS, News Library, ARCNWS File (noting that difficulty in obtaining a firm's financial information often leads to incompatibility with international trading).

and disclosure requirements than the U.S.[112] Moreover, the Chinese economy is to a certain extent based upon public ownership where the government, as majority shareholders in SOEs, is perceived as potentially the biggest abuser of the system it seeks to enforce.[113] An American-style, disclosure-based system relies on litigation, professionalism of those linked to the issuer, integrity of the legal system, and the institutions of class action and contingency fees.[114] This system may not be compatible with certain cultures, let alone certain markets.[115] Therefore, in order for China to fashion its regulatory system in the image of the U.S., it must not only generate a uniform body of securities law that meets international regulatory standards[116] but, also, restructure its economy to permit privatization and the growth of capital markets away from the overreaching of government interests.[117]

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112. *See The Effects of WTO Entry on China's Securities Industry*, *supra* note 111 (describing the major obstacles to China becoming a member of the world securities market); Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999) (Article 10 describes the procedures that public trading companies must adhere to, and Section II, Articles 43-57 describe the listing requirements under the Securities Law).

113. *See* Memorandum of Understanding *cited in* Gu & Art, *supra* note 5, at 124 (submitting that in April 1994, the Chairman of the SEC, Arthur Levitt, signed a Memorandum of Understanding with China in order to assist China fashion a securities law with Western concepts); Qian, *supra* note 43, at 627 n.58 (asserting the CSRC and the SEC signed a memorandum of cooperation and reconciliation to develop China's securities markets and law according to U.S. practices; however, China's system exhibits unique attributes which may have to cede to the Western model. *See generally* The Stock Exchange of Hong Kong, *Disclosure-Based Regulation*, (visited Mar. 26, 2001) <http://www.sehk.com.hk/RPD/issue31.htm> (comparing a disclosure-based system of regulation and a merit-based regulatory scheme).

114. *See* Karen Cooper, *Second Board in Sights of Panel,* S. CHINA MORNING POST, May 21, 1999, Business Post at 3 (noting that regulation would not diminish in a disclosure-based market); Catherine Ong, *Proposed Super Regulator to Get New Legal Powers,* BUSINESS TIMES (Singapore), Nov. 10, 1998, at 1 (noting that a primary concern with a disclosure-based system is the erosion of protection for smaller investors); *Companies Welcome 'Transparency' Move*, THE STRAIGHTS TIMES (Singapore), May 28, 1998, Money at 58 (noting that a disclosure-based system is more 'in line' with international financial centers [sic]).

115. *See* The Stock Exchange of Hong Kong, *Disclosure-Based Regulation*, (visited Mar. 26, 2001) <http://www.sehk.com.hk/RPD/issue31.htm> (comparing a disclosure-based system of regulation and a merit-based regulatory scheme); *see also* Murray, *supra* note 111 (noting that difficulty in obtaining a firm's financial information often leads to incompatibility with international trading); *The Effects of WTO Entry on China's Securities Industry, supra* note 111 (describing the major obstacles for China to become a member of the world securities market); *see, e.g.,* Greg Lumelsky, *Does Russia Need A Securities Law,* 18 NW. J. INT'L. L. & BUS. 111, 132-37 (1997) (discussing the compatibility of a full disclosure system in Russia).

116. *See China's 8% Growth in 1998 Year of the GDP Chase, supra* note 87 (noting that China has promulgated "about 250 sets of provisional rules and regulations governing the securities markets"); *The Effects of WTO Entry on China's Securities Industry, supra* note 111 (describing the major obstacles to China becoming a member of the world securities market); *China Two Stock Brokerages Announce Merger Plan*, CHINA DAILY, July 27, 1998, at News (noting that China's securities market faces obstacles such as "limited assets, unstandardized [sic] operation, insufficient efforts to control risks and too much competition").

117. *See China Should Tread Carefully in Final Steps of Reform Journey,* NIKKEI WEEKLY, Nov. 9, 1998, Editorial & Commentary at 14 (stating that in 1997 the 15th Communist Party Congress took steps to restructure China's state-owned businesses through privatization); *Thai Foreign Minister Addresses ASEAN Conference*, BBC Worldwide Monitoring, July 29, 1998, *available in* LEXIS, News Library, ARCNWS File (concluding that maintaining the stability of the yuan is important to financial stability); *A Grand Appetite for Change,* FINANCIAL TIMES (London), May 19, 1998, Survey—Shanghai 98 at 1 (noting that China will have to loosen its grip on private enterprise and maintain control of financial markets to boost the economy).

3. Persistent Insider Trading

Despite the 1993 Interim Regulation and Provisional Measures, insiders continued to exploit the apparent loopholes that some felt needed to be addressed in a national body of law.[118] "[D]espite the pervasiveness of embezzlement, corruption, bribery, and other misconduct, China lacks the laws to combat or deter these abuses."[119] A mere one year after the promulgation of the Provisional Measures, China exposed its first case of insider trading involving a brokerage firm, Xiangfan Credit & Investment Co., a division of the Agricultural Bank of China—itself an organ of the PBC at the time.[120] Using insider knowledge, inside officials purchased securities in a Shanghai exchange listed company that was targeted in a takeover attempt, and subsequently unloading the shares once the market frenzy was at its peak.[121] Xiangfan used investor money to make the purchase and reaped a 16.7 million yuan profit at the close of the trading day. The Beijing Securities Supervisory Commission disgorged all profits the company made, and censured them from trading for two months.[122] In response to the Xiangfan incident and other cases demonstrating the pervasive practice of insider trading, the CSRC in 1996 enacted new regulations designed to revive and strengthen the deterrent effect of the 1993 Provisional Measures.[123] The new rules prohibited the media from publishing financial forecasts

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118. *See* Amy Chew, *Counsel Calls for Big Fine In Success Case,* S. CHINA MORNING POST, May 19, 1994, Business at 2 (stating that insider trading had not been criminalized due to the difficulty in prosecuting and securing convictions); Tony Walker, *China Tries To Cure Stock Market Ills*, FIN. TIMES (London), May 16, 1994, at 4 (asserting that the Chinese government planned to increase its supervision in response to market manipulation and insider trading); *see also Shanghai Brokers Arrested for Embezzlement*, UNITED PRESS INT'L, Nov. 19, 1994, at International (noting that rampant insider trading after the bull markets of 1992 and 1993 resulted in a 17-month market slump).

119. *See* Gu & Art, *supra* note 5, at 274.

120. *See* Joseph Kahn, *China Fines, Suspends Brokerage House in First Crackdown on Insider Trading*, ASIAN WALL ST. J. WEEKLY, Feb. 14, 1994, at A17 (stating that Xiangfan Credit & Investment Co. had its license suspended as well as had a fine levied in response to insider trading).

121. *See* Kahn, *supra* note 120, at A17 (stating that Xiangfan Credit & Investment Co. had its license suspended as well as had a fine levied in response to insider trading); *China—400-Plus Securities Violation Cases Investigated in the Past Seven Years*, CHINA ONLINE (Dec. 26, 2000) (visited Mar. 26, 2001) <http://www.chinaonline.com> (noting that since the 1993 the CSRC has investigated 440 alleged violations in the securities and futures markets).

122. *See China Fines Broker in Insider-Trading Crackdown*, WALL ST. J. EUROPE, Feb. 8, 1994, at 26 (asserting China cracked down on a Shanghai branch of a brokerage house for using non-public information concerning a proposed corporate takeover).

123. *See China Issues New Rules on Insider Trading,* AGENCE FRANCE-PRESSE, Aug. 30, 1996 (reporting on the new rules barring securities exchanges from disseminating certain information to the media, and encouraging heightened supervision over management of exchanges); *see generally China Gets Tougher on Securities Crimes, Plans Easier High Tech Listings*, CHINAONLINE (Dec. 27, 1999) (stating that China has continued to increase its criminal penalties for insider trading, notably requiring up to ten years imprisonment and fines ranging from two to five times profits) (visited Mar. 26, 2001) <http://www.chinaonline.com>; *China's Criminal Law to Encompass Economic Crimes*, CHINAONLINE (Oct. 28, 1999) (reporting that China's National People's Congress Law Committee recommended that criminal penalties for fabricating and disseminating false information be instituted); (visited Mar. 26, 2001) <http://www.chinaonline.com>; *Growth of China's Futures Market Hindered by Lack of Transparency, Regulation*, CHINAONLINE (Feb. 1, 1999) (citing that laws and regulations governing the market, especially for futures brokerage, need to be further developed to improve disclosure and transparency) (visited Mar. 26, 2001) <http://www.chinaonline.com>.

based on information obtained from the exchanges.[124] Moreover, management personnel of exchanges and affiliated companies were strictly prohibited from holding concurrent positions in any commercial company or tipping or trading with inside information.[125] Needless to say, given the conflict of the State serving as both regulator and a major investor in the securities market and owners of brokerage houses, compounded by the pervasive exploitation of *guanxi* among influential persons to the market, the new rules fell upon deaf ears.[126] Numerous cases of insider trading arising after 1996 are evidence of this.[127]

The need for a national securities law was apparent as "[s]ecurities regulation since the passage of the Interim Regulation and Provisional Measures [had] been mostly regulatory and *ad hoc*."[128] Investors were skeptical and they frequently complained about the insider trading and market manipulation by business leaders, government officials and brokers who cashed in on their access to non-public information regarding regulatory policies and corporate announcements.[129] This has earned China's markets a reputation of being "policy markets" or

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124. *See China Issues New Rules on Insider Trading, supra* note 123 (reporting on the new rules barring securities exchanges from disseminating certain information to the media, and encouraging heightened supervision over management of exchanges)*;* Karby Leggett, *Regulator Targets 2 Firms*, ASIAN WALL ST. J. WEEKLY, May 4, 1998, at A20 (citing the China's Securities Regulatory Commission as having instituted a media ban on reporting an illegal market transaction); *China: Authorities Bust Stock Analyst*, CHINA BUSINESS INFORMATION NETWORK, Jul. 16, 1997, *available in* LEXIS, News Library, CB Net File (showing China's securities authorities cracking down on violations against State regulations against securities malpractice and warning stock commentators of strict penalties for fabricating information); *see generally* Foo Choy Peng, *Securities Body Launches Blitz on Cowboy Investment Advisers*, SOUTH CHINA MORNING POST, Jan. 1, 1998 at 3 (noting that in China there are up to 200 local television and newspaper analysts that regularly comment on the market).

125. *See China Issues New Rules on Insider Trading, supra* note 123 (reporting on the new rules barring securities exchanges from disseminating certain information to the media, and encouraging heightened supervision over management of exchanges).

126. *See* GLASSMAN, *supra* note 19, at 33-40 (discussing Mao Zedong's belief that his economic restructuring plan, the Great Leap Forward, would foster industrialization of the rural areas of China, instead of concentrating on the bourgeois urban centers). *See generally* BUILDING CHINA: STUDIES IN INTEGRATED DEVELOPMENT, *supra* note 19, at 37 (describing the effects of the Great Leap Forward).

127. *See, e.g.,* Michael Laris, *Chinese Investors State Protest*, WASH. POST, Aug. 8, 1998 (reporting on demonstrations by investors demanding reimbursement from the government for the swindling of millions of dollars by a futures trading institution connected with the government); Karby Leggett, *supra* note 124 (stating that the domestic investment funds industry is rampant with market manipulation, improper disclosures, and insider trading).

128. *See* Anderson, *supra* note 9, at 1923. *See, e.g., China Announces Brokerage Rules*, XINHUA NEWS AGENCY, Nov. 14, 1995 (reporting on the promulgation of new rules, "Methods on Administration of Brokers" and how they were enacted to stop insider trading, cheating, and bribery).

129. *See* Christine Chan, *Mainland Moves On Market Violations*, SOUTH CHINA MORNING POST, May 28, 1994, Business at 1 (noting that since Chinese companies and brokerage houses are state-owned, the risk of insider trading is heightened); Sheila Tefft, *The Spread of People's Capitalism*, THE CHRISTIAN SCIENCE MONITOR, Jul. 5, 1995, *available at* LEXIS, News Library, ARCNWS File (describing how "government promises to standardize market operations, tighten regulations, and speed up drafting a new securities law" has not eased investors' skepticism); *China—Debate Continues On Securities*, CHINA DAILY, Nov. 2, 1998, *available in* LEXIS, News Library, CHIDLY File (citing that securities company and exchange staff are prohibited from trading on the stock market).

"news markets."[130] Further, a Chinese scholar opines in his book that corruption is so commonplace in China that insider trading is conducted almost half-openly with the involvement of high-level officials and prominent securities firms that have strong governmental backing.[131]

In an effort to combat corruption in the market place, China amended its Criminal Law in 1997 which explicitly criminalized securities fraud, whereas such violations were only punishable by civil liabilities and administrative sanctions before.[132] Activities such as insider trading, fraudulent offerings of stocks and bonds, representation and dissemination of false information, and market manipulation were the target of the stiffened penalties.[133] The first case to test the new Criminal Law arose in April 1998, when China handed down its first criminal penalties for securities fraud against senior managers of a Shenzhen-listed company, whose major shareholder was allegedly a welfare fund headed by Deng Xiaopeng's son, Deng Pufang.[134] The CSRC found the former chairman of Minyuan Modern Agricultural Development Co. and several of his colleagues criminally liable for fraudulent market manipulation by having approved and issued false reports about the company's fiscal forecasts.[135] One of Minyuan's largest shareholders, Shenzhen Nonferrous Metals Finance, was liable for insider trading, a company whose parent company was allegedly managed by Deng's son-in-law, Wu Jianchang.[136] The half-hearted investigation which followed raises the inference that *guanxi* was a factor since Minyuan was not compelled to cooperate with the CSRC in locating its directors who disappeared soon after the investigation was commenced.[137] Moreover, "one has

130. *See* Zhang, *supra* note 3, at 989 (stating the government entanglement with the market has resulted in corruption and violations, compounded with uncertain procedures and guanxi); *Investors See Red Over Grey Shares*, *supra* note 3, at 8 (reporting on investors outcry over unfairness of insider trading during a period of depressed stock prices).

131. *See* Zhang, *supra* note 3, at 989 (citing GU XIARONG, ZHENGQUAN FANZUI YU ZHENGQUAN WEIGUI WEIFA [SECURITIES CRIMES AND VIOLATIONS] 115 (1994) (discussing insider trading and market manipulation is exacerbated by the personal involvement of high-level government officials).

132. *See* The 1997 Criminal Code of the People's Republic of China, arts. 179-82 *reprinted and translated in* WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH TRANSLATION AND INTRODUCTION 104-07; *see also* Cai, *supra* note 11, at 136 (asserting the Criminal Law makes criminal activities such as fraudulent offerings, insider dealing, false dissemination of securities information, and market manipulation—violations that only triggered civil liabilities before).

133. *See* Zhang, *supra* note 3, at 989 (explaining the scope of the revised Criminal Law with respect to securities fraud).

134. *See Deng's Son-In-Law Joins Hong Kong's Leading Property Group*, AGENCE FRANCE PRESSE, May 13, 1995, at International News (citing the Deng family as being in a "cloud of innuendo" as to recent allegations of fraud and corruption scandals among senior government officials).

135. *See* Foo Choy Peng, *Zhu Pulls No Punches in Fight to Clean Up Scandal-Riddled Economy*, SOUTH CHINA MORNING POST, Jul. 24, 1998, Bus. Post; Shanghai Briefing, at 4 (reporting that the Minyuan Modern Agricultural Development Company's former executives were indicted on criminal charges for fraudulently treating company documents).

136. *See* Foo Choy Peng, *Deng's Son Linked to Securities Fraud Case,* SOUTH CHINA MORNING POST, Apr. 30, 1998, Bus. Post at 1 (noting that Deng Xiaoping's son-in-law was in control of Shenzhen Nonferrous Metals Finance until the beginning of 1998).

137. *See* Foo Choy Peng, *CSRC to Punish Fraud Directors*, SOUTH CHINA MORNING POST, May 1, 1998, Bus. Post at 6 (citing the suspicious comment on the part of the CSRC that Hainan Minyuan was under "no obligation" to contact them despite serious nature of the charges against the company).

to wonder whether such an investigation would have occurred if Deng had lived and whether his death expedited the investigation."[138] Evidently, despite the successful installation of the new criminal regulatory scheme, enforcing it is a completely different issue.[139]

II. Insider Trading under the New Law

The new Securities Law was an overdue piece of legislation, taking more than six years to enact.[140] A final draft of the law was submitted to the National People's Congress in December 1998, having been examined and rejected by the legislature several times prior.[141] In March 1998, Zhu Ronji, an economic specialist touted as "China's Gorbachev"[142] and an "economic star,"[143] ascended the ranks to become China's Premier at which point his immediate words of caution to the legislators was that a collapse of the market would be more debilitating to the CCP's reign

138. *See* Anderson, *supra* note 9, at 1934-35 (discussing the Hainan Minyuan Modern Agricultural Company incident and how the CSRC did not compel Minyuan's help in searching for five missing directors who approved false financial reports); Peng, *supra* note 136, Bus. Post at 1 (reporting on the Hainan Minyuan Modern Agricultural Company incident which implicated Deng's son and son-in-law).

139. *See* Peng, *supra* note 136, Bus. Post at 1 (commenting that political sensitivities makes investigating securities fraud cases a difficult process); *China—400-Plus Securities Violation Cases Investigated in the Past Seven Years*, CHINAONLINE (Dec. 26, 2000) (visited Mar. 26, 2001) <http://www.chinaonline.com> (citing that the CSRC "castigated 360 institutions and 408 individuals, issuing disciplines such as warnings, fines, and the confiscation of illegal gains"); *China Gets Tougher on Securities Crimes, supra* note 123 *(*noting that in recent years China's legislature has had to toughen the criminal law relating to crimes on the stock and futures exchanges including insider trading and market manipulation) (visited Mar. 26, 2001) <http://www.chinaonline.com>.

140. *See China to Roll Out New Contract Law and Exam for Securities Lawyers*, CHINAONLINE, Mar. 23, 1999 (stating that five draft revisions and several amendments preceded the final version of the Securities Laws). *China—Debate Continues On Securities*, *supra* note 129 (citing that "the draft law only regulates capital securities, covering stocks, corporate bonds, government bonds, financial bonds, securities investment funds and other securities approved by the State Council"); Chan, *supra* note 129, at 1 (stating that as the securities market grows, necessary legislation will be passed to prevent fraudulent activities).

141. *See* Qian, *supra* note 43, at 617 (stating the Securities Law failed to be passed several times after being presented to the legislature, and further, the drafts consisted of inconsistent rules and regulations); Wonacott, *supra* note 39, at 24 (noting almost half of SOEs do not make profits).

142. *See Profile: The People's Premier*, CHINA ECON. REV., Apr. 1998, Comment & Analysis at 32 (stating that being called "China's Gorbechev" is not a title that Zhu Rongji or anyone else in China would feel comfortable with, but that his popularity abroad has enabled him to build up diplomatic ties which had suffered since the killings in Tianamen Square on June 4, 1989).

143. *See* Anderson, *supra* note 9, at 1923 (naming Zhu Rongji as an economic specialist whose advice to the legislature about China's growing securities industry and the effects of its collapse may have prompted the passage of the new Securities Law in 1998); *Zhu Charts Development Course,* CHINA DAILY, Mar. 20, 1998 (excerpting Zhu Rongji's first press conference).

than any social unrest stemming from unemployment.[144] This may have been the impetus behind passing the new Securities Law later on that year and becoming effective July 1, 1999.[145]

The new Securities Law is comprised of 214 articles and 12 chapters,[146] emphasizing open, fair and equal market principles and protecting investors,[147] and building upon earlier comprehensive laws such as the Company Law, the Interim Regulation, the Provisional Measures, the Administrative Measures, and the Criminal Law.[148] In fact, the new statute sets forth that where it is lacking, the Company Law and other laws and administrative regulations shall fill in.[149] The new law does, however, outline detailed procedures for the State regulatory bodies to follow in order to curb corruption and unfairness.[150] The new Securities Law on insider

144. *See* Anderson, *supra* note 9, at 1924 (naming Zhu Rongji as an economic specialist whose advice to the legislature about China's growing securities industry and the effects of its collapse may have prompted the passage of the new Securities Law in 1998); *Zhu Charts Development Course, supra* note 143 (excerpting Zhu Rongji's first press conference); *Premier Marks National Day with Reception Speech*, BRIT. BROADCASTING CORPORATION, Oct. 2, 1998, Part 3 Asia-Pacific, China, National Day (quoting Zhu Rongji as claiming that the CCP leadership took prompt measures to deal with the Asian economic crisis in 1998); *The Economy—A Discussion of Mainland China's Private Sector*, INSIDE CHINA MAINLAND, Jul. 1, 1998, *available at* LEXIS, News Library, ARCNWS File (noting that due to increasing levels of unemployment because of the failure of state-run companies, the CCP is encouraging private enterprise).

145. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999; *see also* Anderson, *supra* note 9, at 1924 (naming Zhu Rongji as an economic specialist whose advice to the legislature about China's growing securities industry and the effects of its collapse may have prompted the passage of the new Securities Law in 1998); *Zhu Charts Development Course, supra* note 143 (excerpting Zhu Rongji's first press conference).

146. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999).

147. *See Stimulus Measures Comfort Investors*, CHINA NEWS, Feb. 9, 1999, *available at* LEXIS, News Library, ARCNWS File (stating that the new code "outlaws insider trading and other abuses and raises operating standards for brokers").

148. *See* Daniel M. Anders, Note, *Taking Stock in China: Company Disclosure and Information in China's Stock Markets,* 88 GEO. L.J. 1919, 1924 (2000) (describing the new laws as a unification of prior regulations).

149. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn> *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.; *see also* Anderson, *supra* note 9, at 1924 (stating that the new Securities Law provides unified rules and regulations; however, "[n]odding to its own incompleteness, [article 2 of] the Securities Law states that all matters not covered under the Securities Law will be governed by the Company Law, other laws, and administrative regulations.").

150. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress (visited Mar. 26, 2001) <*h*ttp://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn> *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

trading is found in Chapter I, Article 5 and Chapter III, Section 4, Articles 67-70. Article 5 generally provides that all activities relating to the issuance and trading of securities must conform to laws and administrative regulations, and specifically prohibits, *inter alia*, inside trading.[151] Article 67 elaborates the relevant portion of Article 5 by stating that the prohibition applies to persons with knowledge of inside information relating to securities trading.[152] Article 68 provides examples of such persons with inside information, including (1) directors and senior administrators of the issuing company, (2) stockholders holding 5 percent of more of the company's stock, (3) senior administrators of a holding company that controls the issuing company, (4) employee personnel of the company who have access to the company's trading information by virtue of their position in the company, (5) personnel of regulatory agencies, (6) personnel of intermediary organs, and organs that provide securities exchange, settlement or registration functions, and (7) other personnel prescribed by the CSRC.[153]

Inside information is broadly defined in Article 69, paragraph 1, of the Securities Law as non-public information which, in the course of securities trading activities, relates to the operations or finances of a company, or which will have a *significant impact* on the price of the company's shares.[154] Such non-public information includes information relating to any of the major events listed in Article 62, paragraph 2, of the new law.[155] These major events under Article 62 refer to the following:

(1) Any major change in a company's business guidelines or scope of business;

(2) Any decision made by a company concerning a major investment or major asset purchase;

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151. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 5 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

152. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 67 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

153. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 68 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

154. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 1 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

155. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69 para. 2 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

(3) The conclusion by a company of an important contract which may have an important effect on the company's assets, liabilities, rights, interests or business results;

(4) The incurrence by a company of a major debt or default on an overdue major debt;

(5) The incurrence by a company of a major deficit or incurrence of a major loss exceeding 10 percent of the company's net assets;

(6) Any major change in the external conditions of a company's production or business;

(7) Any change in the chairman of the board of directors, or in one-third or more of the directors, or in the manager or president of the company;

(8) Any considerable change in the holdings of shareholders who each hold 5 percent or more of a company's shares;

(9) Any decision made by a company concerning capital reduction, merger, division, dissolution, or application for bankruptcy;

(10) Any major litigation involving a company, or the lawful cancellation by a court of a resolution adopted by the shareholders' general meeting or the board of directors; or

(11) Any other events that may be specified in other statutes or administrative regulations.[156]

In addition, inside information also includes non-public information relating to a company's plans to distribute dividends or increase capital;[157] any major change in the equity structure of a company[158] or in the surety of its debts;[159] any single mortgage, sale or write-off of a major asset used in the business of a company exceeding 30 percent of such asset;[160] potential

156. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 62, para. 2 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

157. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(2) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

158. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(3) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

159. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(4), (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

160. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(5) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

legal liability for major losses as a result of an act committed by a company's senior personnel;[161] and plans concerning the takeover of listed companies.[162] Further, as a catchall, the new Securities Law includes any other information that the State Council may deem to have conspicuous effects on the price of companies' securities to be within the scope of inside information.[163]

Prohibited usage of insider information is articulated in Article 70, which provides that personnel with inside information, or other personnel having unlawfully accessed inside information, shall not themselves, or advise others to, trade on the basis of that information, and/or disseminate such information.[164]

The over breadth of the new Securities Law on insider trading demonstrates China's urgent mission to crack down on corruption; nevertheless, the law seems unduly restrictive and poorly drafted.[165] First, the new law fails to sufficiently cover non-insiders and tippees. Unlike Article 4(3) of the Provisional Measures which expressly provides that non-insiders are strictly prohibited from using inside information acquired through improper means to buy or sell securities or advise others to do the same,[166] the new Securities Law seems only to apply to securities regulatory officials, company executives, or major shareholders, but not officials of

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161. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(6) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

162. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(7) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

163. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 2(8) (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

164. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 70, para. 1 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

165. *See* Zhang, *supra* note 3, at 1012 (highlighting where the Securities Law is lacking or poorly drafted); Cai, *supra* note 11, at 135 (discussing that the new Securities Law fails to adequately address civil recoveries for aggrieved investors. "The neglect for public investors and the difficulty in enforcing criminal sanctions, coupled with ill-fated self-regulation, give justifiable concerns that the current framework will not rise to the enforcement tasks of the future.").

166. *See* Jinzhi Zhengquan Qizha Xingwei Zanxing Banfa [Provisional Measures on Prohibiting Securities Fraud] *reprinted and translated in Interim Procedures Against Securities Fraud Published*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 24, 1993, at part 3 art 4(5); *see also* Zhang, *supra* note 3, at 1012 (noting that tippees are not sufficiently included in the new Law).

other government branches and other non-insiders.[167] Arguably, Article 70 can be viewed as supplemental coverage in that it applies to persons with inside information and *other persons who have illegally obtained inside information*; but this, too, is problematic.[168] This article essentially prohibits trading by anyone with insider information, regardless of whether she or he *uses* such information in her or his transactions.[169] Further, nowhere in Chapter III, Section 4 (covering Articles 67-77 on prohibited transactions) of the statute is the "illegal" nature of obtained information defined, nor a legal standard to measure what constitutes illegal.[170] Therefore, not only is the article unduly burdensome, it contains substantive gaps in its coverage.

Article 69 defines inside information to be such information that is non-publicized or undisclosed which may have a major impact on the price of a company's stock; however, it fails to define "disclosure" or give examples of what mediums of publication constitute disclosure.[171] Article 64 is illustrative, though, of what constitutes publication in the context of official announcements, stating that such information shall be publicized via newspapers and magazines and special bulletins, each of which must be posted in companies and trading cen-

167. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 68 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999; *see also* Anderson, *supra* note 9, at 1948 (noting that the new Securities Law does not seem to cover other government officials).

168. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 70 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.; *see also* Anderson, *supra* note 9, at 1948 (providing even though other government officials may not be covered in Article 69, Article 70 provides a catchall provision).

169. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 70 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

170. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 70 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999; *see also* Zhang, *supra* note 3, at 1012 (discussing prohibitions of Article 70 with respect to insider trading).

171. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

ters.[172] These mediums of publication are particular to the dissemination of official news solely for the purpose of giving notice to foreseeable persons, and does not adequately address other mediums by which insider information may be published, such as television, radio, and the Internet. Moreover, government information is not expressly listed within the scope of inside information under the new law, even though early possession of such knowledge may provide government officials with an advantage over the public; however, such information may be "determined" by the regulatory agency to be within the "catch-all" provision of Article 69, paragraph 2(8).[173]

While the provisions on disclosure and insider trading in the new law both provide examples of situations that have a significant effect on the market price of the company's securities and which the investors do not know about, the examples may potentially, or at least mistakenly, be considered not entirely consistent. Article 62 enumerates *eleven* situations qualifying as "major events" and impacting the price of a company's stock which, until disclosed to the public in accordance with paragraph 1 of Article 62, are "non-public" in nature, while Article 69 lists *eight* different examples, and incorporates by reference those enumerated in Article 62.[174]

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172. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 64 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999 ("Public statements required to be made in accordance with laws and administrative regulations must be published in periodicals as stipulated by relevant state departments, or in specialist bulletins").

173. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999; *see also* Anderson, *supra* note 9, at 1948 (providing that there is a loophole in the Securities Law for government officials and inside government information regarding issuing companies).

174. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, arts. 62, 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999. Article 62 states that the following major incidents having a large impact on the price of listed stocks shall be disclosed: (1) Significant changes in company's management policies; (2) significant decisions concerning its investments; (3) Significant contracts which the company enters into and potentially affecting its assets, liabilities, rights, interests, and management; (4) Incurring or Defaulting on the payment of significant debts; (5) Significant losses exceeding 10% of its net assets; (6) Significant changes in production and management; (7) Change in chairman or more than one third of the board of directors or management personnel; (8) Significant change in stockholders holding more than 5% of outstanding shares; (9) Reduction of capital, or corporate reorganization; (10) Significant litigation; (11) Other matters as defined in the laws and administrative rules. Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 62 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999) (listing what will qualify as insider information under Article 69).

This discrepancy may be reconciled by construing Article 69, paragraph 2, to be limited in scope to situations constituting inside information per se, whereas Article 62, paragraph 2, addresses the duty to report the occurrence of *any* major event affecting the price of a company's stock price.[175] Moreover, while both Article 69 and Article 62 discuss events that have a major impact on the price of a company's securities, only the former provision covers such events that are have not yet been made public.[176] Further, another reason for the discrepancy is that, perhaps, the list of events in either provision is not exhaustive.[177]

The catch-all provision in Article 69(8) that gives the CSRC discretion to deem information to be inside information so long as it is "important" and has a "marked impact" (*xianzhu yingxiang*) on the prices of securities trading may appear to contradict the "significant impact" (*zhongda yingxiang*) standard articulated in the opening phrase of Article 69.[178] However, this seeming inconsistency can also easily be reconciled. First, the Chinese understanding of *xianzhu yingxiang* and *zhongda yingxiang* in their original form is that the former is not a lower standard than the latter.[179] It is entirely possible that a piece of non-disclosed information may have a significant impact on the price of a company's stock, but not have a marked impact upon it. Further, it can be argued that the marked impact standard, contained in Article 69, paragraph 2(8), pertains only to the standard by which the CSRC reviews *all other information* not enumerated in paragraph 2(1) through 2(7). If such other information is deemed to satisfy the marked impact standard, it ultimately qualifies as having a significant impact on a company's securities, thus satisfying both standards. Notwithstanding, paragraph 2(8) does appear to have allocated enormous powers and wide discretion to the government which is seemingly excessive in terms of advancing a capitalist free market.

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175. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, arts. 62, 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999).

176. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). Article 69 of the Securities Law states that "non-publicized information concerning a company's operations and financial situation, and information having an important impact on the market prices of the company's securities, is inside information." *Id.*

177. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, arts. 62, 69 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> (visited Mar. 26, 2001) *and* <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). Article 62 contains eleven provisions while Article 69 contains eight. *Id.*

178. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 69, para. 1, & para. 2(8), (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

179. *See generally,* Daniel Rubenstein, *Legal and Institutional Uncertainties in the Domestic Contract Law of the People's Republic of China*, 42 MCGILL L.J. 495, 553 (1997) (for a discussion of these concepts).

Perhaps further evidence of the poor draftsmanship of the new Securities Law is that a mere one year after its enactment, the CSRC unveiled a new set of staff rules against nepotism among regulators and their family members.[180] Pitched as a governmental crackdown on corruption and an effort to promote stability in the markets, the new rule applies to managers and directors of the CSRC,[181] the stock markets and futures exchanges and other securities regulatory organs, as well as companies not controlled by the government.[182] This, in essence, is an attempt to expand upon tippee and non-insider liability as well as provide a definition of non-insider, both of which were insufficiently covered in the new Securities Law.[183]

III. Remedies

A. Private Causes of Action

Although the new Securities Law provides a legal framework to protect the integrity of China's young stock markets, the issue remains whether an investor injured by insider trading may effectively seek redress under the new law.

Unlike Article 63, which forces an issuer and/or underwriter to pay civil compensation if it is held liable for making misrepresentations in corporate documents upon which investors

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180. *See Zhongguo Zhengquan Jiandu Guanli Weiyuanhui Gongzuo Renyuan Shouze* [Staff Rules of the China Securities Regulatory Commission], issued by CSRC on Sept. 12, 2000 (visited Mar. 26, 2001) www.csrc.org.cn [hereinafter "Staff Rules"]; *see also* Jason Dean, *China Cracks Down on Nepotism: Securities Regulators and Their Families Face Tough Restrictions: Government Unveils Moves Amid Larger Effort to Halt Corruption,* ASIAN WALL ST. J., Sept. 14, 2000, at 19 (noting the new rules targeting nepotism among regulators and their families in an effort to fight corruption and insider trading).

181. *See Don't Trade Around Here No More: CSRC Issues Rules To Nip Insider Trading in the Bud,* CHINAONLINE (Sept. 21, 2000) (citing that the new rules explicitly address the "private business activities of spouses and children of leading officials above the departmental level within China's securities regulatory system") (visited Mar. 26, 2001) <http://www.chinaonline.com>; *China—It's Not A Family Affair*, *supra* note 182 (noting that the "new regulations are designed to prevent conflicts of interest involving the spouses and children of the nation's top securities regulators") (visited Mar. 26, 2001) <http://www.chinaonline.com>; *see also Officials' Family Members Banned from Profiting from Powers*, XINHUA GEN. NEWS SERVICE, Sept. 28, 2000, *available at* LEXIS, News Library, ARCNWS File (citing that family members of police officers are not allowed to work in the areas under the supervision of public security departments).

182. *See Officials' Family Members Banned from Profiting from Powers*, *supra* note 181 (noting that all government departments have issued rules prohibiting the spouses and children of officials from using their political powers to make profits); *Chinese Leader Says Officials at Ministerial Levels to Report Private Property*, BBC WORLDWIDE MONITORING, Dec. 25, 2000, *available at* LEXIS, News Library, ARCNWS File (quoting Wei Jianxing, the Secretary of the CPP's Central Commission for Discipline Inspection, as saying that China will continue to crack down on corruption during 2001 in an effort to build a "clean" government); *See China—It's Not A Family Affair: MII Prohibits Telecom-related Activities by the Relatives of Senior Government Officials,* CHINAONLINE (Sept. 22, 2000) (explaining that shortly after the CSRC issued its new regulations, China also banned the relatives of telecom officials from working in that field) (visited Mar. 26, 2001) <http://www.chinaonline.com>.

183. *See* Dean, *supra* note 180, at 19 (asserting the new rules against nepotism represent a further government crackdown on corruption).

relied to their detriment,[184] the articles on insider trading fail to provide a similar private civil remedy. Instead, Chapter XI, Article 183, sets forth the public sanctions for insider trading and states that any illegal earnings obtained on the basis of inside information are to be disgorged, and the perpetrator shall be fined for an amount ranging between one and five times their illegal profits, or an amount not exceeding the value of the securities in question.[185] Further, criminal liability may attach if the prohibited insider trading activities constitute a crime.[186] Under the Criminal Law of China as amended in 1997, if a perpetrator is held criminally liable, he may be sentenced to prison for up to ten years.[187]

To the disappointment of the injured investor who seeks damages under the new Securities Law, Article 209 states that all illegal gains and consequential fines levied upon the defendant shall be the property of the national treasury—a windfall for the government![188] This provision appears to be in direct contravention with the spirits and principles of the Common Rules of Civil Law (*Min Fa Tong Ze*, otherwise translated as General Principles of Civil Law) (hereinafter, "Common Rules"), which provides a means of recovery in civil and commercial cases. Article 92 of the Common Rules provides that where one unlawfully acquired unfair interests and causes injuries to another, she or he is required to return the improper interests so

184. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 63 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

185. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 183 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999); *see also* Cai, *supra* note 11, at 144 (commenting although the new Securities Law claims to protect investors, it provides very limited "liability-creating facts"); Henny Sender, *supra* note 39, at 33 (submitting that the new Securities Law does not grant investors a right of action against issuers).

186. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 183 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999.

187. *See* The 1997 Criminal Code of the People's Republic of China, arts. 180 *reprinted and translated in* WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH TRANSLATION AND INTRODUCTION 104-07 (stating that in exceptionally serious circumstances, an individual found liable for insider trading shall be sentenced to a prison term no less than five years, and no more than ten years); *see also* Zhang, *supra* note 3, at 1000 (asserting there are criminal liabilities for insider trading among other securities violations under the new law).

188. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 209 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999; *see also* Cai, *supra* note 11, at 149 (discussing Section 209, which forces any "unlawful income and fine collected against securities violations" to be forfeited to the state).

acquired to the injured party.[189] Under Article 117 of the Common Rules, where one unlawfully possesses the property of another, he must return such property or, if not possible, pay an amount of compensation equal to the value of the assets;[190] and similarly, where one causes damages to the property of another, she or he is liable for restitution or, if restitution is not possible, for compensation.[191] In either case, where the injured party sustains other losses, the wrong-doer is required to pay damages.[192] The lack of express remedies for the aggrieved investors in the Securities Law creates unnecessary ambiguity and confusion wholly inconsistent with other statutory remedies in Chinese law. The irony of the situation may lead one to question whether it is even worthwhile for a potential plaintiff to incur the costs of commencing an action given the eminent lack of favorable results under the most relevant statute and the fact that the State officials can not only be the culprit, but also the beneficiary of any judgment against it.

Thus, unlike the United States Insider Trading Securities Fraud Enforcement Act (ITSFEA), Section 20A of the Securities Exchange Act of 1934, which provides a private cause of action against anyone who contemporaneously trades on the basis of material insider information,[193] the Chinese Securities Law fails to explicitly prescribe a private cause of action, and it is dubious that one is implied in the statute itself.[194] The new law enumerates very few and narrow grounds upon which investors may sue, for example, misrepresentations made in offering

189. *See Minfa Tongze* (Common Rules of Civil Law), adopted Apr. 12, 1986 by the 4th Sess. of the 6th NPC, *eff.* Jan. 1, 1987, *translated and reprinted* in 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 243 (Beijing: Foreign Languages Press, 1987) [hereinafter "Common Rules"], art. 92.

190. *See Minfa Tongze* (Common Rules of Civil Law), adopted Apr. 12, 1986 by the 4th Sess. of the 6th NPC, *eff.* Jan. 1, 1987, *translated and reprinted* in 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 243 (Beijing: Foreign Languages Press, 1987) [hereinafter "Common Rules"], art. 117, para. 1.

191. *See Minfa Tongze* (Common Rules of Civil Law), adopted Apr. 12, 1986 by the 4th Sess. of the 6th NPC, *eff.* Jan. 1, 1987, *translated and reprinted* in 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 243 (Beijing: Foreign Languages Press, 1987) [hereinafter "Common Rules"], art. 117, para. 2.

192. *See Minfa Tongze* (Common Rules of Civil Law), adopted Apr. 12, 1986 by the 4th Sess. of the 6th NPC, *eff.* Jan. 1, 1987, *translated and reprinted* in 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 243 (Beijing: Foreign Languages Press, 1987) [hereinafter "Common Rules"], art. 117, para. 3.

193. *See* Securities Exchange Act 1934 § 20A, 15 U.S.C.S. § 78t-1 (2000)

> Liability to contemporaneous traders for insider trading.
>
> (a) Private rights of action based on contemporaneous trading. Any person who violates any provision of this title or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

Id.

194. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th national People's Congress, art. 192, (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS P.8-699 (Dr. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999).

memorandum.[195] According to a commentator, "Chinese courts have traditionally hesitated to act without a sufficient basis . . . [and consequently,] private citizens have no cause of action against an insider dealer for losses they may have suffered."[196] But, even if a plaintiff shareholder is afforded a private cause of action, he is subsequently confronted with an overwhelming burden to prove causation.[197] The plaintiff must prove that the defendant was liable, but he is without the luxury of a rebuttable presumption commonly available to defrauded plaintiffs in the U.S.[198] The rebuttable presumption operates in a manner where the injuries plaintiff suffered are presumed to have been caused by the defendant's actions.[199]

It is unfortunate that the new law fails to compensate plaintiffs with restitution for the defendant's wrongdoing because such a system would create incentives for the investor to assist regulators in detecting and reporting violators. The overall effect of such a system where investors have a significant interest in the efficiency and regulation of the markets would complement the CSRC's regulatory efforts and more effectively deter securities violations while protecting investors. The cooperation of the public in regulating the markets also alleviates the strain on CSRC enforcement resources so that other securities abuses and sophisticated schemes that demand labor intensive investigations, such as insider trading, may be properly addressed.[200]

On the other hand, because the new Securities Law reverts to other bodies of Chinese law in instances where it is lacking, a plaintiff is not without alternative private remedies. It is

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195. *See* Securities Law of the People's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 192 (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999). This Law entered into force on July 1, 1999 and provided that a company that conducts trading activity in violation of a client's intentions shall be liable for an amount between 10,000 and 100,000 yuan. *Id.* Article 202 states that any specialized firm that conducts audits or provides legal opinions on the issuance and marketing of securities and makes misrepresentations in any of the documents it produces, shall be liable for any illegal gains, and for compensation for any investor losses. *Id. See* Zhang, *supra* note 3, at 1001 (stating that only Articles 192 and 202 provide civil liabilities for violations).

196. *See* Cai, *supra* note 11, at 144.

197. *See* Cai, *supra* note 11, at 145 ("[P]roving causal connection can be extraordinarily difficult for the plaintiff. Share prices fluctuate for more than one reason. It is frequently difficult to say that 'but for' a particular misrepresentation, the investor would have made his investment decisions otherwise.")

198. *Compare* 15 U.S.C.S. § 786u—4(a)(3)(B)(iii)(2000) with Securities Law of the people's Republic of China, adopted and promulgated Dec. 29, 1998 at the 6th Sess. of the Standing Committee of the 9th National People's Congress, art. 192, *available in* (visited Mar. 26, 2001) <http://www.csrc.gov.cn/csrcsite/flfgk/securitiesml.htm> *and* (visited Mar. 26, 2001) <http://peopledaily.com.cn>, *and translated* in CHINESE LAW AND THE OTHER FOR U.S. LAW 8-699 (Dr. J. Chen and Dr. L. Hong, eds., Commerce Clearing House Asia Pacific, 1999).

199. *See* Cai, *supra* note 11, at 145-46 (explaining that in the United States and Canada acknowledge the difficulty in proving a causal connection between defendant's actions and plaintiff's economic injury, and resolve this by creating a rebuttable presumption).

200. *See* Cai, *supra* note 11, at 142 (asserting that providing civil remedies is conducive to giving investors incentives to report crimes and help prosecutors); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview,* 1982 DUKE L.J. 651, 653 (1982) (explaining how the "private attorney general theory" justifies a fee award because of the public benefit of advancing a particular type of claim).

entirely possible, for example, for the investor who is injured by insider trading to seek and be awarded damages under Article 92 and/or Article 117 of the Common Rules. Moreover, the Company Law grants shareholders the right to sue for injunctive relief against the board of directors or the meeting of shareholders for infringement upon investors' legal rights.[201] Further, "the Company Law imposes a deterrent criminal liability system of 'progressive discipline' ranging from fines to 'administrative sanctions' to severe criminal punishment."[202]

On the other hand, even if a private plaintiff successfully obtains a judgment against the defendant for securities fraud, the court may be unable to enforce the judgment due to non-statutory factors such as judges' lack of competence, corruption among the judicial system, judges' susceptibility to outside influence and political pressures, favoritism, local protectionism, and difficulties in punishing well-connected defendants.[203] It has been submitted that the State authorizes several types of judicial discretion, including "a blend of personal discretion designed to attain justice based on individual circumstance, self-interested discretion, and ideological discretion imposed by [the] state."[204] It is when behind the scenes decision making flourishes from illegal payoffs, gifts, nepotism and *guanxi*, that individual investors may lose their day in court even before that day arrives.[205]

B. Public Enforcement

The success of the new Securities Law, to a large extent, also depends on the ability of China's courts and the CSRC to enforce them. However, given China's governmentally

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201. *See* The Company Law of the People's Republic of China, adopted Dec. 29, 1993, at the 5th Sess. of the Standing Committee of the 8th NPC, as amended Dec. 25, 1999 at the 13th Sess. of the Standing Committee of the NPC, art. 111, *reprinted and translated in* CHINA'S NEW COMPANIES (Nicole Yuen ed. 1994).

202. *See* Vandevelde, *supra* note 13, at 611.

203. *Id.* at 610-11 (addressing shareholder's limited legal recourse in China resulting from the judiciary's inability to enforce judgments); Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 Colum. J. Asian L. 35, 88-90 (asserting that the Chinese Communist Party controls the judiciary and that it has been regarded as party of the Chinese bureaucracy. Moreover, the quality of judges and their independence is a problem). *See generally* Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 581, 603 (1999) (discussing the slow implementation of the rule of law in China and that the legal system is under supervision by China's National People's Congress which seeks to administer ideological control over the legal system).

204. *See* Woo, *supra* note 203, at 586; Cohen & Lange, *supra* note 12, at 349-50 (suggesting the Chinese legal system remains inefficient and lacks competent judges in the area of commercial law. Further, the courts are under strict control of the State, especially in cases where local government interests are affected).

205. *See* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years,* 20 J. INTL. L. BUS. 383, 396 (2000) ("[B]ack door influences on outcomes shade into downright corruption and bribery, which are potent causes of perversions of justice"); Jerome A. Cohen & John E. Lange, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 801 ("Corruption is . . . a serious matter in the local courts. . . . Although some cases of direct payoffs to judges have been publicized and severely punished, more subtle but equally corrosive influences are also at work."); James Hugo Friends, *The Rocky Road Toward the Rule of Law in China: 1979—2000,* 20 J. INT'L L. BUS. 369, 379 (2000) ("After experiencing the Chinese judicial system firsthand, [outsiders] are appalled by the pervasive influence of guanxi, or local relationships, the lack of fair treatment received by outside litigants, and the arbitrariness and unpredictability of the system.").

"stacked" regulatory structure and a judiciary that lacks independence, proper enforcement of the new Securities Laws may be jeopardized.

With respect to public enforcement of the Securities Law, the CSRC, like other nations' securities regulatory bodies, is understaffed and poorly funded such that frequent abuses may be casually overlooked or inadequately investigated.[206] A case of insider-trading, and securities fraud in general, requires an investigation that is "labor-intensive, expensive, time-consuming, and burdensome"[207] and would probably suffer as a result of the lack of CSRC resources. Moreover, the organization of different levels of government responsible for investigating and prosecuting securities fraud presents another hurdle because the various entities involved most often have disjointed purposes. Initially, the CSRC is charged with investigating securities violations, however, the police take over once the case appears to be a crime.[208] At this point, the case leaves the hands of the CSRC, but it is hardly the mandate of the police to then prosecute the securities crime *and* regulate the market when other cases more urgent and more familiar to them are pending.[209] It is also opined that the CSRC is concerned with its win-loss record of cases that go on appeal to the judiciary on the grounds the penalty imposed by the CSRC was inappropriate. The CSRC seemingly is willing to compromise the pursuit of more complicated cases or to issue severe sanctions for those cases where the result is more certain.[210]

Even the prospects of an alternative forum, that is, arbitration or mediation, fail to provide assurance of a fair and equitable result.[211] Foreign investors may find help in the China International Economic and Trade Arbitration Commission (CIETAC) which has exclusive jurisdiction over foreign parties and "foreign-related" claims.[212] The governing Arbitration Law, how-

206. *See* Cai, *supra* note 11, at 140 (noting the insufficient manpower and funds in securities regulatory agencies worldwide); Cohen & Lange, *supra* note 12, at 365 (commenting on the lack of resources available to the CSRC to develop the regulatory institution).

207. *See* Cai, *supra* note 11, at 139.

208. *Id.* at 140 (explaining the enforcement process).

209. *Id.* (noting that it is not the police department's job to monitor the securities market and that neither the police department nor the prosecutors "are likely to take securities fraud as seriously as they do murders and robberies").

210. *Id.* ("Because a high failure rate reflects adversely on its public image, the CSRC may attempt to sacrifice the severity of sanctions for the certainty of its penalties.").

211. *See* Charles Kenworthey Harer, Comment, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y 393, 405-07 (1999) (discussing at length the advantages, disadvantages and procedures of the arbitration process in China); Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the PRC*, 15 BERKLEY J. INT'L L. 329, 330 (1997) (analyzing the positive and negative aspects of arbitration in China). *See generally* Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice,* 28 J. MARSHALL L. REV. 539 (1995) (detailing the history and process of international arbitration in China).

212. *See* Harer, *supra* note 211, at 405-07 (explaining how CIETAC has jurisdiction over all disputes arising from international economic and trade transactions.); George Marchac, Note, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA, and UNCITRAL Rules*, 10 AM. REV. INT'S ARB. 123, 124 (1999) (examining how CIETAC is the Chinese tribunal responsible for handling disputes involving foreign investors); George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America,* 5 ANN. SURV. INT'L & COMP. L. 13, 20 (1999) (discussing the role of CIETAC in arbitration and mediation disputes with foreign investors).

ever, fails to define what constitutes a "foreign-related" claim, and consequently, provides uncertainty to the foreign investor as to whether his dispute will be heard by CIETAC or a domestic tribunal.[213] In 1995, CIETAC appointed a panel of arbitrators to resolve disputes between brokerage houses, and brokerage houses and the stock exchanges, but did not address individual investors and their grievances.[214] In 1996, the State Council issued a notice ending CIETAC's exclusive jurisdiction over such disputes, and expanded the jurisdiction of domestic arbitration tribunals to hear both domestic and foreign claims.[215] Apparently, the State Council and courts have encouraged investors to invoke domestic arbitration tribunals, probably because of the local protectionism harbored in domestic arbitral arenas.[216] A defrauded foreign investor is most susceptible to the dangers of arbitration in China because the process is plagued with local bias and stacked against foreigners due to the lack of choices of forum, lack of an independent arbitral board, and the requirement that the Chinese rules be followed.[217] If, by chance, the foreigner wins an arbitration judgment against a local Chinese entity which then fails to honor it, he then finds himself back in the sometimes unpredictable judicial system seeking enforcement of the judgment[218]—a place he might have sought to avoid in the first instance by submitting his dispute to arbitration. In general, arbitration in China may be time consuming and expensive, and is said to lack consistency.[219]

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213. *See* Harer, *supra* note 211, at 405-07 (explaining the bifurcated arbitration system in China and what jurisdiction CIETAC has over "foreign claim"). *See generally* Coombe, *supra* note 212, at 20 (asserting that the formation of CIETAC exemplifies China's intention to make it an acceptable tribunal for international commercial arbitration. Further, China intends on organizing a national body to supervise local arbitral commissions).

214. *See* Vandevelde, *supra* note 13, at 611 (noting that the CIETAC panel did not cover individual investors).

215. *See* Harer, s*upra* note 211, at 406-07 (suggesting that the modification in jurisdiction of CIETAC and domestic arbitration tribunals has resulted in overlap).

216. *See generally* Sam Blay, Comment, *Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments*, 8 AM. REV. INT'L ARB. 331 (1997) (examining at length choice of venue and choice of tribunals when pursuing arbitration in China); James T. Peter, Note, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 91 (1997) (demonstrating the potential for partiality among the arbitrators in arbitration concerning foreigners in China); Brown & Rogers, *supra* note 211, at 329 (showing the changing conditions and procedures in Chinese Arbitration).

217. *See* Harer, *supra* note 211, at 406-07 (suggesting that the modification in jurisdiction of CIETAC and domestic arbitration tribunals has resulted in overlap); *see also id.* at 393-95 (suggesting the disadvantages of arbitration in China particularly to a foreign investor).

218. *See* Harer, *supra* note 211, at 414-15 (explaining that the Chinese courts have a lot of discretion not to enforce arbitration awards, particularly when the judgment favors foreign parties, and the grounds for denial include that the court believes "the award is contrary to Chinese social and public interests"). *See generally* Woo, *supra* note 203, at 587 ("Individual judges in China, in deciding cases, appear not to be constrained rigidly by the four corners of the black letter law. Their approach to judging reflects a blend of personal discretion designed to attain justice based on individual circumstances, self-interested discretion, and ideological discretion imposed by state.").

219. *See* Harer, *supra* note 211, at 409 (noting the practical problems of arbitration in China); Brown & Rogers, *supra* note 211, at 333 (analyzing the positive and negative aspects of arbitration in China); *see generally* Liu & Lourie, *supra* note 211, at 539 (detailing the history and process of international arbitration in China).

C. Post-1998 Enactments and More Incidents of Insider Trading

On September 12, 2000, in the wake of China's largest corruption trial since the Communist Party began its rule in 1949 where officials were alleged to have smuggled $9.5 billion,[220] the CSRC unveiled a newly amended set of Staff Rules of the CSRC (hereinafter "Staff Rules") targeted at nepotism among regulatory officials and their families.[221] The new set of Staff Rules applies to managers and directors of the CSRC, the stock markets and futures exchanges and other securities regulatory organs, as well as companies not controlled by the government.[222] Further, the Staff Rules embody a sweeping ban on all trading by regulators and their family, and also prohibit them from engaging in any business that may conflict with the interests of the public.[223] This is, in essence, an attempt to expand upon tippee and non-insider liability as well as provide a definition of non-insider, both of which were insufficiently covered in the new Securities Law. Industry players have applauded the regulations and hoped that the markets finally will be disinfected of insider trading, conflicts of interest, and improper disclosure.[224] In May 2000, the Shanghai and Shenzhen Stock Exchanges passed tough local measures to help weed out similar problems.[225] Despite the new Securities Law, the auditor-general of the National Audit Office revealed at the end of 1999 that fraudulent disclosures and insider trading has continued to erode investor confidence, causing immense losses and handicapping the development of a healthy stock market.[226]

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220. *See* Dean, *supra* note 180, at 19 (reporting on China's biggest smuggling case on trial); *China—Shroud of Secrecy Surrounds Xiamen Trials*, CHINAONLINE, Sept. 13, 2000 (discussing the secrecy behind the smuggling trial).

221. *See Zhongguo Zhengquan Jiandu Guanli Weiyuanhui Gongzuo Renyuan Shouze* [Staff Rules of the China Securities Regulatory Commission], issued by CSRC on Sept. 12, 2000 (visited Mar. 26, 2001) www.csrc.org.cn.

222. *See* Anderson, *supra* note 9, at 1928 (noting that the CRSC rules impose that both directors and shareholders make annual reports); *see also* Tao, *supra* note 72 at 221 (noting that it is the duty of a fund custodian to monitor investments of managers and report and laws or regulations violated); Xian Chu Zhang, *Chinese Law: Practical Demands to Update the Company Law*, 28 HONG KONG L.J. 248, 257 (1998) (CSRC staff rules were in part as a response to prohibit directors and supervisors from selling out all of the shares of their companies).

223. *See Zhongguo Zhengquan Jiandu Guanli Weiyuanhui Gongzuo Renyuan Shouze* [Staff Rules of the China Securities Regulatory Commission], issued by CSRC on Sept. 12, 2000 (visited Mar. 26, 2001) www.csrc.org.cn; *see also* Dean, *supra* note 180, at 19 (noting the new rules targeting nepotism among regulators and their families in an effort to fight corruption and insider trading.

224. *See* Dean, *supra* note 180, at 19 (describing the enthusiasm for the new rules); *but see generally* Cathy Holcombe, *Divergent Views Cloud Investment Picture,* S. CHINA MORNING POST, Jul. 20, 2000, at 1 (citing Dai Xianglong, head of China's central bank, as being wary about China's ability to adequately supervise the securities market). *See generally* Seth Faison, *Trader Sentenced in China Bond Scandal*, N.Y. TIMES, Feb. 4, 1997 at D8 (noting in 1997 that Chinese authorities struggled to prosecute "rogue" securities traders due to the absence of a securities law to govern the market).

225. *See China's Exchanges Issue New Rules for Listed Firms, supra* note 34, at 17 (explaining the new rules concern more stringent rules on company disclosure and trading); *Chinese Firms Raise Record Capital From Securities Market, supra* note 7 (noting that the CSRC "stepped up its supervision and law enforcement in 2000 [of the Shanghai and Shenzen Stock Exchanges], partially due to the establishment of inspection bureaus in the CSRC's nine regional offices."). *See generally* Matthew Miller, *Zhu Tells Financial Markets to Clean Out Corruption,* S. CHINA MORNING POST, Jan. 17, 2001, at 1 (discussing the fact that Premier Zhou Xiaochuan noted that the Chinese securities market is still plagued by problems like insider trading).

226. *See Revised Law Improves Transparency, supra* note 34 (noting the assessment of the markets by China's auditor-general after a draft amendment was made to China's accounting law); *China's Exchanges Issue New Rules for Listed Firms, supra* note 34, at 17 ("China's decade-old stock market has been plagued by corruption and corporate malfeasance that feed wild boom-and-bust cycles of speculation.").

Although the new Securities Law was intended to be the culminating bedrock of the voluminous regulations that preceded it and that aimed to clarify the Provisional Measures on Prohibiting Securities Fraud in 1993,[227] the new law also seems to demonstrate gaps in its substantive provisions. The need to supplement the new Securities Law is, perhaps, a testament to its comprehensiveness and success, or lack thereof, in deterring corruption.

Conclusion

As the first former non-market economy to embrace capitalism while preserving state control over its economic reforms,[228] China has made great strides toward opening its doors to international commerce and foreign investment.[229] Although the new Securities Law was also a step in the same direction, fundamental flaws in China's social and economic infrastructure persist and thereby provide an unstable foundation for the implementation of the new law. China is in dire need of foreign capital in part to continue operating state owned enterprises which provide employment for many Chinese.[230] But, so long as the State refuses to relinquish some of its controlling ownership interest in the enterprises, investors will be dissuaded from taking on such high risk investments.[231] Investors will also be discouraged by the numerous

227. *See* Vandevelde, *supra* note 13, at 606, 607 (discussing how the Chinese government is aware of the need for comprehensive national securities laws); *see also* Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study,* 5 J. TRANSNAT'L L & POL'Y. 253, 267 (1996) (finding that while investors are worried about the current state of the Chinese market those fears will become less of an issue as securities laws increase); Kevin Murphy, *Lacking Rules, China Plays Difficult Market Game*, INT'L HERALD TRIB., May 28, 1996 (stating that China has been working on the comprehensive National Securities Regulations legislation for a number of years).

228. *See China Goes for Broke*, THE ECONOMIST, July 25, 1992, at 33 (noting that the coastal provinces of China are among Asia's fastest growing economies); *see also* L. Jay Kuo, *Farewell To Jackson-Vanik: The Case For Unconditioned MFN Status for the People's Republic of China,* 1 ASIAN L.J. 85, 104 (1994) (stating that China has drastically changed its economy so that it is less reliant on state controlled enterprises); Di Jiang-Schuerger, *The Most Favored Nation Trade Status And China: The Debate Should Stop Here,* 31 J. MARSHALL L. REV. 1321, 1342 (1998) (finding that as China continues its economic reform it is establishing itself as a market economy).

229. *See* S. Linn Williams, *Protecting Investments In China,* 349 PLI/COMM. 431, 437 (1985) (recognizing that, while China has made great strides in legislation regarding investment, there still is work to be done regarding its legal framework); *see also* Gary J. Dernelle, *Direct Foreign Investment and Contractual Relations in the Peoples Republic of China,* 6 DEPAUL BUS. L.J. 331, 359 (1994) (finding that China's legal framework is moving more toward a market oriented approach rather than its socialistic traditions); Janiece Marshall, *Current Developments in the People's Republic of China: Has China Changed?*, 1 TRANSNAT'L L. 505, 543 (1988) ("Since 1978, China has thrown open its door to welcome foreign investment, the transfer of technology, and foreign trade").

230. *See* Joaquin F. Matias, *From Work-Units to Corporations: The Role of Chinese Corporate Governance in a Transitional Market Economy,* 12 N.Y. INT'L L. REV. 1 n. 48 (1999) (noting that while it is good to have the legal infrastructure there also needs to be a market based on choice rather than coercion to be successful); Sang Bin Xue & George D. Wilson, *Capital And Technology: China Rejoins The Modern Business World—An Analysis Of China's Equity Joint Ventures Law,* 25 U. S. F. L. REV. 511, 514 (1991) (noting China's need for foreign capital and investment if it is going to continue to progress).

231. *See* Robert C. Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People's Republic of China*, 20 YALE J. INT'L L. 273, 283 (1995) (recognizing that while China has changed a lot of its holdings to the corporate form they still hold a majority position while allowing them to raise private capital); *see also* Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model,* 21 BROOK. J. INT'L L. 97, 159 (1995) (noting that Chinese government refuses to relinquish majority state ownership to keep intact their belief of social control).

incidents of insider dealing and under the table transactions involving the CSRC and other regulatory agencies' personnel, thereby exacerbating the lack of investor confidence in China's markets.[232] The dissemination of inside information is commonplace in China, given that cultivating *guanxi* is an ancient cultural practice deeply entrenched in Chinese society.[233] A body of national legislation will not apprehend such cultural norms unless there are comparably better incentives for the investing population to adhere to the rule of law. Therefore, providing aggrieved private plaintiffs with a cause of action for insider trading with possible monetary damages would peak the interests of investors and also give them incentives to self-regulate within the investing community. If confidence in the integrity and fairness of the markets is restored, it translates into increased foreign investments.[234] Further, China also needs to increase its resource allocation to the CSRC in order for the agency to fervently enforce the new law.[235] Without the means to discover and investigate violations of the Securities Law, the heightened criminal penalties for securities fraud would be meaningless and therefor, would not deter future violations.[236]

As China's economy undergoes a transformation along international standards, it remains to be seen whether it will be able to establish a balance between the ideal of a free market economy and centralized state control.

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232. *See* Gu & Art, *supra* note 5, at 137 (discussing the need for China to adopt a better system to alleviate insider trading); Andrew Xuefeng Qian, *Riding Two Horses: Corporatizing Enterprises and the Emerging Securities Regulatory Regime in China*, 12 UCLA PAC. BASIN L.J. 62, 72 (1993) (noting the problem of insider trading in the Chinese markets). *See generally* Vandevelde, *supra* note 13, at 607-09 (discussing insider trading).

233. *See* Vandevelde, *supra* note 13, at 607-08 (noting that "personal relationships (guanxi) encourages insider trading between those persons having connections within the government agencies or issuing joint-stock companies.").

234. *See* Chuang, *supra* note 5, at 511 (discussing how the benefits must outweigh the costs of doing business in China for foreign investors); Tarbutton, *supra* note 48, at 426 (stating that the enactment of the Regulations to decrease corruption will allow for increased capital investment); John Zhengdong Huang, *An Introduction to Foreign Investment Laws in the People's Republic of China*, 28 J. MARSHALL L. REV. 471, 494 (1995) (recognizing that China's economic reforms has allowed investors to become more comfortable).

235. *See* Cohen & Lange, *supra* note 12, at 364 (noting that the limited resources available to the CSRC will place a strain on the development of the China's security market).

236. *See* Cohen & Lange, *supra* note 12, at 364-65 (discussing the necessary foundational requirements to establish a successful security market in China); Zhang, *supra* note 79, at 1010 (questioning "the extensive power of the CSRC to impose various penalties . . . for lack of [a] legal basis"). *See generally* Latimer, *supra* note 11, at 1105-15 (proposing that "China's Current Securities Regulations Fail to Protect Basic Shareholder Rights").

Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction over Internet Activities—Including a Critique of Suggested Approaches

By Asaad Siddiqi*

I. Introduction

Long before the Internet arrived, international law had developed a rich doctrine of law to define prescriptive, adjudicative and enforcement jurisdiction to restrict a sovereign's exercise of power.[1] Traditionally, a sovereign's jurisdictional limit was defined by geography.[2] However, in the virtual context of cyberspace, geography has no real significance.[3] Internet activities can occur anywhere and have unknowingly traversed transnational borders.[4] The question that is often posed is whether it is possible to subject oneself to the jurisdiction of another sovereign based solely upon Internet activities. Surprisingly and in many different circumstances, the answer has been in the affirmative.

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1. *See* David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEG. STUD. 521, 523-24 (1998) (discussing the various schools of thought on a sovereign's exercise of power, including the Realist, Hobbesian and Lockean views); *e.g.*, Richard A. Monette, *Governing Private Property In Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and The General Allotment Act*, 25 N.M.L. REV. 35, 35 (1995) (discussing how the United States jurisprudence deals with the sovereignty and land ownership issues of the Indian tribes). *See generally* Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117 (1997) (discussing limitations of states to exercise authority over jurisdiction matters).

2. *See* David Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-71 (1996) (hereinafter "Law and Borders") (discussing how the lack of geographic restrictions in cyberspace poses problems on state rule making); *see also* Aristotle G. Mirzaian, *Y2K Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts*, 6 RICH. J.L. & TECH. 18, 18 (1999/2000) (discussing the principle of territoriality as allowing the state to exercise control over the actions conducted within the geographic confines). *See generally* Post, *supra* note 1 (discussing how geographically defined territories are factors that comprise the idea of sovereignty).

3. *See* Johnson & Post, *supra* note 2 (explaining that the lack of geographic restrictions and boundaries in cyberspace has an adverse effect on governmental law-making); *see also* Gwenn M. Kalow, *From The Internet To Court: Exercising Jurisdiction Over The World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2242 (1997) (discussing how the diversified group of Internet users face jurisdiction issues due to the lack of "territorial boundaries."). *See generally* Tammy S. Trout-McIntyre, Comment, *Personal Jurisdiction and the Internet: Does the Shoe Fit?*, 21 HAMLINE L. REV. 223, 223 (1997) (discussing how the entire world's use of Internet exposes Internet businesses to more actions).

4. *See* Johnson & Post, *supra* note 2 (stating that physical borders do not act like "signposts" informing people that they have entered a new legal place); *see also* David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 3 (1998) (discussing how information that travels across transnational borders through the Internet is a source of commercial activity). *See generally* Trout-McIntyre, *supra* note 3 (discussing a situation exemplifying how the widespread use and access to the Internet exists across the border use of the of Internet).

* **J.D., 2001, St. John's University School of Law; B.A. in History, Rutgers College, Rutgers University.**

It is well established that posting a Web site or sending an email message in one territory can be received in another.[5] Another often-raised issue is whether it is possible to be held legally responsible in a foreign court for content on a Web site that is legal in the user's "home jurisdiction."[6] While it is true that a particular sovereign may have legitimate interests in regulating what its citizens see and do with respect to that Web site, it is also true that the same interests exist for each sovereign in the world.[7] Analysis of international law indicates that every nation has prescriptive jurisdiction and thus as good a claim to have its own substantive law applied to that Web site as any other sovereign.[8]

Unlike traditional matters, Internet communications also pose difficulty in enforcing a remedy so that there is some meaningful adjudication. Stated differently, would it be economically feasible for a person in New Jersey, who has obtained a default judgment against a German actor, to undertake further expense to hire a German lawyer to enforce the judgment in Germany?

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5. *See* J. Christopher Gooch, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635, 653 (1998) (stating that users of the Internet all over the world can establish contact with one another); *see also* Michele N. Breen, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace Into International Shoe*, 8 SETON HALL CONST. L.J. 763, 772-73 (1998) (discussing how easy it is for a person to exchange information via the Internet and become an Internet user). *See generally* Leslie A. Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN L.J. 151, 151 (1998) (discussing how information is quickly transported from one place to another through the digital Internet era, through various networks and computer systems).

6. *See* Michael S. Rothman, *It's A Small World After All: Personal Jurisdiction, The Internet And the Global Marketplace,* 23 MD. J. INT'L L. & TRADE 127, 127 (1999) (questioning whether or not the rapid popularity of the Internet has resulted in an increased possibility that the courts will exercise personal jurisdiction on a foreign defendant); *e.g.*, Leif Swedlow, *A Symposium On Film and the Law Note: Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 385-87 (1997) (stating that an individual who creates a web page will most likely be held liable only within his home jurisdiction because he is unaware of the Internet users who have potential access to the page). *See generally* Denis T. Rice, *Jurisdiction In Cyberspace: Which Law and Forum Apply to Securities Transactions On The Internet? Appendix*, 21 U. PA. J. INT'L ECON. L. 585, 591 (2000) ("Presumably, large Internet portals and online vendors take the position that all transactions outside their home jurisdiction take place in intrastate commerce, or they claim that they are not engaging in business in any other state.").

7. *See* Timothy S. Wu, *Cyberspace Sovereignty? The Internet and the International* System, 10 HARV. J.L. & TECH. 647, 658 (1997) (asserting that states will regulate the Internet to the extent that it will result in maximizing their own self-interests); *see also* David Wille, *Personal Jurisdiction and the Internet Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 100 (1998/99) (discussing various limitations placed on tort cases within framework of jurisdiction conflicts). *But see Development: VI. Cyberspace Regulation and the Discourse of State Sovereignty*, 112 HARV. L. REV. 1680, 1680-81 (1999) (arguing the viewpoint of many legal scholars who feel that interference with the freedom of Internet use is an example of a burden upon the sovereignty of the state).

8. *See Development: VI. Cyberspace Regulation and the Discourse of State Sovereignty*, *supra* note 7, at 1683 (analyzing the viewpoint usually asserted by states who advocate Internet regulation, primarily that any "restriction of its exclusive jurisdiction within its own territory appears as an illegitimate 'diminution of its sovereignty to the extent of the restriction'."); *see also* Wu, *supra* note 7, at 665 (explaining that intervention and state regulation of the Internet is a prevalent phenomenon in today's society). *See generally* Spencer Kass, *Regulation and the Internet,* 26 S.U. L. REV. 93, 97-98 (1998) (stating that if a web page can be accessed through a state, then this state can exercise jurisdiction over the author of the cite).

Given the emerging economic reliance upon the Internet,[9] many international conventions and symposiums have been attempting to formulate a uniform global approach towards obtaining jurisdiction based upon Internet activities.[10] To better understand the difficulty encountered by these conferences, it is necessary to take a quick overview of the traditional approaches to jurisdiction. Section II will focus on the technical aspects of the Internet, which magnify the potential for jurisdictional conflicts and consider how they affect the ability to obtain jurisdiction. Section III will discuss the various bases of international law under which states may claim jurisdiction, specifically: 1) Jurisdiction to Prescribe; 2) Jurisdiction to Adjudicate; and 3) Jurisdiction to Enforce. Discussion will also focus on and highlight some of the problematic aspects of those starting points in the realm of the Internet. Section IV will consider some recent cases in the United States where these issues have been litigated. Also included is a discussion of cases interpreting New York's Long-arm Statute in the global Internet landscape. Although many of the disputes arising from Internet activity are litigated in America, special attention will also be given to the legislation of jurisdictions within the European Union. Section V will describe the various approaches, which may be taken by courts and different jurisdictions—including denoting a separate "Internet Jurisdiction"—in order to address these jurisdictional problems to create a uniform legal environment for the transaction of business and the ordering of legal liability. Discussion will also focus upon the recent report released by the American Bar Association's Jurisdiction in Cyberspace Project.[11]

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9. *See eMarketer eBusiness Report*, (visited Feb. 13, 2001) <http://www.emarketer.com/estats/sell _econs.html> ("In 1999, retail online commerce is estimated to have reached nearly $15 billion."); *see also* Todd Matthew Phelps, *A Survey of Recent Developments in the Law VIII. Jurisdiction and the Internet*, 25 WM. MITCHELL L. REV. 1135, 1135 (1999) (stating that businesses world-wide are eager to participate in the advertising of commercial goods through the Internet, without taking into the consideration their potential liabilities). *See generally* Michael A. Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 560 (1998) (stating that the Internet is a "catalyst for increased economic activity" in the area of delivery of commercial goods).

10. *See* Veronica M. Sanchez, *Taking a Byte Out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes,* 46 UCLA L. REV. 1671, 1716-17 (1999) (arguing that traditional legal framework of personal jurisdiction should apply to Internet jurisdiction disputes); *see also* Daniela Ivanscanu, *Legal Issues in Electronic Commerce in the Western Hemisphere*, 17 ARIZ. J. INT'L & COMP. LAW 219, 221 (2000) (discussing the need for the formulation of international standards regarding Internet transactions). *See generally* Richard S. Zembeck, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996) (discussing cyberspace and jurisdictional issues).

11. *See* Rice, *supra* note 6, at 585-86 (stating that the American Bar Association suggested that the advent of the Internet has resulted in an increase in the quantity of super consumers in the market); Dawn C. Valdivia, *Report on the E-Commerce Activities of the OAS, ICC, ABA, and Uncitral*, 17 ARIZ. J. INT'L & COMP. L. 109, 116 (2000) (analyzing the points of the cyberspace jurisdiction project, including an emphasis on de-regulation of jurisdictional rules). *See generally* Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L ECON. L. 563, 571 n.34 (2000) (referring to the Jurisdiction in Cyberspace Project and noting the issue of jurisdiction in Internet activities).

II. The Internet

A. Technical Aspects

The Internet is an endless connection of larger networks that link together an unlimited number of smaller networks.[12] The Internet's beginnings stem from an experimental Department of Defense project, known as the Advanced Research Projects Administration Network (ARPANET).[13] The project's goal was to enable remote use of powerful supercomputers through telephone lines by the military, defense contractors and university laboratories conducting research and ensuring the ability to communicate critical information in the event of war.[14] Utilizing the ARPANET, similar networks were developed connecting universities, research facilities and commercial entities.[15] Eventually these faster systems were linked together and the Internet as it is now known was born.[16]

The Internet can be accessed either by using a computer directly linked to the Internet or by using a personal computer with a modem to connect to a larger network of computers that

12. *See* ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (stating how usually the computer is connected to a computer network, which is permanently and directly connected to the Internet); *e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1260 n.2 (6th Cir. 1996) (defining the Internet as "[t]he world's largest computer network, often described as a 'network of networks.'"); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 163 (D. Conn. 1996) (defining "[t]he Internet [as] a global communications network linked principally by modems which transmit electronic data over telephone lines.").

13. *See* Barry M. Leiner, *A Brief History of the Internet,* (last visited Feb. 13, 2001) <http://www.isoc.org/Internet-history/brief.html> (noting that the creation of the Internet is attributed to the Department of Defense's Advanced Research Projects Agency in 1972); *see also* Philip Rollo, *The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift,* 51 FLA. L. REV. 667, 676-77 (1997) (stating that the Internet emerged from the Advanced Research Projects Administration and since then has become the link between all persons and entities around the world). *See generally* Claudia Oliveri, *Congress Wrestles with the Internet: ACLU v. Reno and the Communications Decency Act*, 6 MEDIA L. & POL'Y 12, 12 (1997) (stating that the Internet was born as a result of "an experimental project by the Department of Defense's Advanced Research Projects Administration (ARPA).").

14. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (discussing the way the government sought to create a redundant system of linked computers in an effort to facilitate continuance of communications even if portions of the system were down); *see also* Oliveri, *supra* note 13 (stating that the initial purpose of the Internet, under the instruction of (ARPA), was to provide various military and defense experts the opportunity to operate communications through supercomputers); Rollo, *supra* note 13, at 677-78 (describing information transfers and communication on the Internet).

15. *See* ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (giving examples of these networks); *see also* Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 n.20 (stating that ARPANET was the backbone of the other networks that were formed after). *See generally* Carrie Weinfeld, 23 OHIO N.U. L. REV. 229, 231 (1996) (discussing how the ARPA was the "precursor" to the Internet and worked with the National Science Foundation to help develop the Internet by connecting them to a larger network of computers).

16. *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (describing the development of the World Wide Web); *see also* Weinfeld, *supra* note 15, at 231 ("Consequently, what began as four computers linked to form one network grew by 1994 to 39,977 networks composed of an indeterminate number of computers all over the world. . . . It is now the largest network in the world."). *See generally* Kelly M. Doherty, Comment, *An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 260 (1999) (describing the development of the "giant network of networks" as more computers began connecting to the Internet throughout the 1980s).

is itself directly linked to the Internet.[17] Many universities and other education institutions, as well as businesses, libraries and individual communities maintain the computer networks that are directly connected to the Internet.[18] However, the most common forms of Internet access are provided by Internet Access Providers (IAPs),[19] national commercial online services,[20] bulletin board systems (BBS)[21] and commercial entities.[22]

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17. *See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (describing the way computer systems are connected to the Internet to allow for the transmission of information). *See generally* George K. Walker, *Information Warfare and Neutrality,* 33 VAND. J. TRANSNAT'L L.1079, 1095-96 (2000) (discussing how the Internet can be accessed through an intricate compilation of linked computer systems that provide communication of information); *e.g.,* Robert A. Pikowsky, *Privilege and Confidentiality of Attorney-Client Communication Via E-mail,* 51 BAYLOR L. REV. 483, 486 (1999) (discussing how the Internet provides a link between various computers through 100 different protocols).

18. *See* ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (stating that students and faculty are provided with access to the Internet, often through direct connections in the University's library, offices, computer centers, dorm rooms, as well as through the use of a modem from any location); *see also* Timothy B. Lennon, Comment, *The Fourth Amendments Prohibitions on Encryption Limitation: Will 1995 Be Like 1984?*, 58 ALB. L. REV. 467, 470 n. 11 (1994) (noting that Internet access is available to students at most universities). *See generally* Kenneth D. Suzan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 789 (1995) (discussing the connection of university and business computer networks).

19. *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (stating that some Internet Access Providers are non-profit organizations that provide Internet access either at a very low cost or for free); Raymond Shih Ray Ku, *Open Internet Access And Freedom Of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 103-04 (2000) (arguing that the Internet Access Provider is an "enhanced" Internet service provider, which works closely with telephone companies to provide Internet access to its users). *See generally* Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in the New Frontier*, 59 ALB. L. REV. 1083, 1092-94 (1996) (describing different types of access providers).

20. *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (stating that major service providers such as America Online, CompuServe, the Microsoft Network and Prodigy have almost twelve million subscribers in the United States); *see also* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community,* 30 WAKE FOREST L. REV. 197, n.12 (explaining that for a standard monthly fee subscribers are provided with a local access telephone number and receive basic level access, with additional charges for additional services). *See generally* R. Scott Grierson, *State Taxation of the Information Superhighway: A Proposal for Taxation of Information Services*, 16 LOY. L.A. ENT. L.J. 603, 608-09 (1996) (describing national commercial online services and some of the products they offer to subscribers).

21. *See* ACLU v. Reno, 929 F. Supp. 824, 833-34 (E.D. Pa. 1996) (with a small investment, individuals, non-profit organizations, advocacy groups and businesses can offer a bulletin board service with proprietary content where members, subscribers or customers can exchange information); Zembek, *supra* note 15, at 339 n.24 (describing BBS as "a cross between a billboard and . . . newspaper" with the distinctions that a BBS is usually on one topic); *see also* Byassee, *supra* note 20, at 197 n.13 (asserting that, traditionally entrepreneurs operated BBS as a small business or hobby).

22. *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (describing how individuals can access the Internet by patronizing a "computer coffee shop" where customers can use Internet access provided by the shop for a charge while enjoying a cup of coffee); *see also* Scott A. Shail, *Reno v. ACLU: The First Congressional Attempt to Regulate Pornography on the Internet Fails First Amendment Scrutiny,* 28 U. BALT. L. REV. 273, 293 (1998) (claiming that setting limits on flow of certain information to Internet users is a substantial problem for both individuals and commercial entities). *See generally* Joshua A. Marcus, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 285 (1998) (stating that while many Web sites exist to further the businesses of commercial entities, there are also many non-commercial uses of the Internet as well).

While on the Internet, a user may take advantage of a variety of methods of communications to exchange text, data, computer programs, sound, visual images and moving video images.[23] The main communication method is one-to-one messaging, including electronic mail ("email").[24] The most popular medium on the Internet used to locate and access information is the World Wide Web (WWW).[25] The WWW offers a graphical interface that allows for color presentations, by linking together diversified information using a common information storage format called "Hypertext Markup Language" (HTML)[26] and a common language called "Hypertext Transfer Protocol" (HTTP).[27] A user must have an Internet "browser" that is capable of displaying documents formatted in HTTP.[28] Each document must have an address which determines the server on which it resides, known as a Uniform Resource Locator (URL).[29]

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23. *See* ACLU v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996) (discussing the various ways communications are transmitted); *see also* Marcus, *supra* note 22 (discussing various uses of the Internet including exchanging information through email, chatrooms and bulletin boards). *See generally* Seongkun Oh, *Legal Update: The Digital Performance Rights in Sound Recordings Act of 1995: Exclusive Performance Rights for Digital Transmission of Copyrighted Works,* 2 B.U. J. SCI. & TECH. L. 17, 17 (1996) (discussing how the Internet has become increasingly popular due to a variety of features including photographic and video images, along with sound recordings in cassettes).

24. *See* Kalow, *supra* note 3, at 2244 (stating that approximately 35 million people worldwide use "email"); *see also* Byassee, *supra* note 20, at 197, n.17 (describing how each user of "email" has a unique address which is expressed in a standard format, the part before the symbol representing the user name on the local system and the part after the symbol representing the identity of the computer on the Internet). *See generally* Phil Reiman, *In Congress Electric: The Need for On-Line Parliamentary Procedure*, J. MARSHALL J. COMPUTER & INFO. 963, 963 ("Email messaging, web pages, and chat rooms are all now firmly established in our culture.").

25. *See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (stating that the World Wide Web was originally developed at the European Particle Physics Laboratory (CERN) to allow researchers and engineers throughout the world to communicate and share information and then spread to other areas beyond); Joel Sanders, *The Regulation of Indecent Material Accessible to Children on the Internet: Is it Really Alright to Yell Fire in a Crowded Chat Room?,* 39 CATH. LAW. 125, 128 (1999) (stating that the World Wide Web is the most popular and widely used feature of the Internet); *see also* Perritt, *supra* note 11, at 286-87 (discussing how the World Wide Web has achieved a high level of popularity, using server software and browser software).

26. *See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996) ("HTML is a formatting language."); Kalow, *supra* note 3, at 2246 (discussing the publishing of information such as Web sites); *see also* Byassee, *supra* note 20, at 202 n.22 (noting that the documents displayed on the WWW contain imbedded remote location information to retrieve another document).

27. *See* ACLU v. Reno, 929 F. Supp. 824, 838 (E.D. Pa. 1996) (HTTP is the common language for the exchange of WWW documents); Kalow, *supra* note 3, at 2246 (discussing the publishing of information such as Web sites).

28. *See* Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware,"* 47 A.F. L. REV. 125, 159 (1999) (defining a browser as software that is already installed in one's computer and enables one to navigate the Internet); *see also* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 402 (1993) (discussing the way browsers allow easier access of information on the Internet). *See generally* Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look Into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. LAW 413, 417 (2000) (stating that a browser "acts like a telescope, allowing users an up close view of content on far away servers.").

29. *See* Jack E. Brown, *New Law for the Internet*, 28 ARIZ. ST. L.J. 1243, 1253 (1996) (stating that "[T]here are at least thirty-seven million unique World Wide Web documents (each known as a Uniform Resource Locator ('URL')). . . ."); *see also* Douglas Dangerfield, *Beyond the Quill Web Surfing, or "The Internet for the Uninformed,"* 1996 ABI JNL. LEXIS 496, 5 (1996) ("The address, called the Uniform Resource Locator), (URL) tells the browser where to go to retrieve the document.") *See generally* Kara Beal, Comment, *The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions*, 1998 BYU L. REV. 703, 707 (1998) (describing the parts of a Web site, including the Uniform Resource Locator and its function).

The Internet allows users to travel between sites, possibly located on another server in another jurisdiction simply by pointing and clicking on underlined phrases called "hyperlinks."[30] The ease with which the Internet can be explored, combined with the low entry barriers involved, have made the Internet the choice for global communications, as well as an ideal resource for many who wish to gain access to that information.[31] Many organizations and individuals now publish documents, called "Web sites." Once this information is published, it is accessible to any person or organization with Internet access.[32]

B. Aspects of the Internet Presenting Challenges to Obtaining Jurisdiction

As Internet commerce grows exponentially, legal problems on the Internet continue to develop. These troubles exist because the Internet is comprised of connected networks that lack a centralized storage location, control point or communications channel.[33] It is just not possible for any single entity or group to control the Internet.[34] Furthermore, all communications are "digitized" (*i.e.*, converted to binary ones and zeros) and "packetized" as they are routed from one computer to another computer, across other computers, thereby effectively "masking" the

30. *See* ACLU v. Reno, 929 F. Supp. 824, 837-38 (E.D. Pa. 1996) (explaining that hyperlinks provide Internet users access to variety of different web pages); Michael A. Stoker, *Framed Web Pages: Framing the Derivative Works Doctrine on the World Wide Web*, 67 U. CIN. L. REV. 1301, 1307 (1999) (stating that clicking on a hyperlink allows Web sites to develop by allowing a user to access advertising and promotions, causing them to become common within commercial Web sites); *see also* Mark Sableman, *Link Law: The Emerging Law of Internet Hyperlinks*, 4 COMM. L. & POL'Y 557, 559 (1999) (claiming that hyperlinks expedite the process of moving from one web page to another).

31. *See* ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996) (noting personal computers at a price of $1,500); *e.g.,* Peter G. Drever, III, *The Best of Both Worlds: Financing Software Filters for the Classroom and Avoiding First Amendment Liability*, 16 J. MARSHALL J. COMPUTER & INFO. L. 659, 660-61 (1998) (stating that the Internet is a comprehensive and powerful educational resource to students around the world). *See generally* Beal, *supra* note 30, at 703 ("At the end of 1997, 40 million people were using the Internet; by 1999 that number [was] expected to grow to 200 million.").

32. *See* Steven Betensky, *Jurisdiction and the Internet*, 19 PACE L. REV. 1, 12-13 (1998) (stating that the Internet can be accessed globally, without any sort of local restrictions on access); Sean Selin, *Governing Cyberspace: The Need for an International Solution*, 32 GONZ. L. REV. 365, 365 (1996/1997) (discussing how the Internet has caused global access to information, which has increased the possibility of economic, social, and political problems); *see also* Lea Hall, *The Evolving Law of Personal Jurisdiction for Trademark Infringement on the Internet*, 66 MISS. L.J. 457, 457-58 (1996) (describing how the Internet has taken over many facets of people's lives due to the lack of its geographic boundaries and worldwide access).

33. *See* ACLU v. Reno, 929 F. Supp. 824, 838 (E.D. Pa. 1996) (discussing the fact that the Internet has no centralized control entity that looks over all the various Web sites operating through the Internet). *See generally* James M. McGee, *Recent Development: Burning The Village to Roast the Pig: Congressional Attempt to Regulate "Indecency" on the Internet Rejected In ACLU v. Reno*, 4 J. INTELL. PROP. L. 437, 452-53 (1997) (discussing how the Internet is a "unique medium distinct from existing modes of communication" that lacks a centralized control point that allows thousands of people to communicate at a low cost). *See generally* Selin, *supra* note 32 (discussing legal problems associated with the Internet and suggestions for change).

34. *See*. McGee, *supra* note 33 (discussing the fact that the Internet has no centralized storage location makes it unique); *see also* Jennifer Hamilton, *Playboy Enterprises v. Chuckleberry Publishing: The Southern District Court of New York Separates the "MEN" from the "BOYS" on the Internet*, 5 TUL. J. INT'L & COMP. L. 521, 522 (1997) (stating that the Internet functions independently, without the intervention of any "single entity"). *See generally* Selin, *supra* note 32, at 368 (stating that the Internet is not a single controlled entity).

origin of the transmission.[35] In any event, many of the potential legal problems, since they are interconnected, relate back to these architectural aspects of the Internet.[36] Therefore, this paper deals with these problems *en bloc* and not by trying to dissect them into finer classifications.

It has been suggested that the Internet presents jurisdictional problems, because it enables a person to be "found" in at least three "places" at the same time—the place where his Internet connected computer is; the place where the computer directly linked to the Internet is situated; and the "virtual" territory named "cyberspace."[37] Therefore, it is just as easy to be "found" in different states because of cyberspace activity, as it is to be "found" in different countries.[38] Furthermore, geographical and political boundaries are immaterial on the Internet—a data transmission conducted from New York to Germany is no more difficult to achieve than one from New York to New Jersey.[39] In reality, a user never needs to know the location of the destination computer, since the TCP/IP protocol will determine how each packet of data will be transmit-

35. *See* Keith Kupferschmid, *Lost In Cyberspace: The Digital Demise Of the First Sale Doctrine*, 16 J. MARSHALL J. COMPUTER & INFO. L. 825, 828-29 (1998) (stating that a digitized work can be copied and distributed around the world within seconds); *e.g.*, Adam P. Segal, *Dissemination Of Digitized Music On The Internet: A Challenge To The Copyright Act*, 12 COMPUTER & HIGH TECH. L.J. 97, 100 (1995) (describing the example of access to digitized music through the Internet); Asaad Siddiqi, Comment, *First Prize—2000 Nathan Burkan Memorial Competition, Exempting Deep Pockets: A Criticism of Title II of the Digital Millennium Copyright Act and an Appeal for More Protection*, available at <http://www.ascap.com>, (Aug. 1, 2000) (detailing the inherent anonymous nature of the Internet that frustrates copyright owners trying to locate digital music pirates on the Internet—besides being a shameless self-plug).

36. *See* Johnson & Post, *supra* note 2, at 1372 ("Any effort to control the flow of electronic information across borders is largely a futile effort."); *see also* Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 45 (1998) (discussing how the popular use of the Internet has created several contract, tort, and intellectual property legal issues). *See generally* Betensky, *supra* note 32, at 1-3 (noting the plethora of Internet jurisdiction cases in the Internet's recent history).

37. *See* Byassee, *supra* note 20, at 197 n.5 (giving credit for coining the term cyberspace goes to science fiction author William Gibson); *see also* Edward A. Cavazos & Gavino Morin, *Cyberspace and the Law: Your Rights and Duties in the On-Line World* 1 (1994) (stating that in his book NEUROMANCER, Gibson saw cyberspace as a "'consensual hallucination that felt and looked like physical space but actually was a computer-generated construct representing abstract data.'"). *See generally* Andrew L. Shapiro, *Constitutional Issues Involving Use of the Internet: The Disappearance of Cyberspace and the Rise of Code,* 8 SETON HALL CONST. L.J. 703, 704 (1998) (dispelling the myth that cyberspace is an "autonomous" place).

38. *See* M. Ethan Katsh, *Cybertime, Cyberspace and Cyberlaw,* 1995 J. ONLINE L. art. 1, par. 10 (discussing the relationship between time and cyberspace, Professor Katsh posited that the pervasiveness of one idea in cyberspace, namely that "traditional boundaries, whether they be physical, territorial, or conceptual, are more porous in an age where information is digital in nature."); *see also* Shapiro, *supra* note 37, at 719-20 ("Rather than worrying about how we will regulate cyberspace, then, we should be concerned about how cyberspace will regulate us—our legal principles, our values."). *See generally* Lawrence Lessig, *Surveying Law and Borders: The Zones of Cyberspace,* 48 STAN. L. REV. 1403, 1403 (1996) (discussing how cyberspace will hold its own set of laws and regulations, independent from space law).

39. *See* Joanna Zakalik, *Law Without Borders in Cyberspace*, 43 WAYNE L. REV. 101, 116 (1996) (discussing how the Internet "transcends conventional geographic boundaries."); *see also* Jeffrey M. Ayres, *From the Streets to the Internet: The Cyber-Diffusion of Contention*, 566 ANNALS 132, 138 (1999) (stating how the Internet is a powerful tool that has the capacity to quickly and effectively transport exchanges of information across national and international borders); *e.g.,* Sandi Owen, *State Sales & Use Tax on Internet Transactions*, 51 FED. COMM. L.J. 245, 246 (1998) (discussing how the practice of sales, commerce, and taxation are changing as they are being conducted through the Internet without any geographic framework).

ted inevitably closer (in terms of connectivity and not necessarily geographical proximity) to the destination computer.[40]

Another source of confusion is the domain name system (DNS) which was created to assign addresses built of alphabets because it was realized that names are far more memorable than IP number addresses.[41] The continued use of DNS, however, gave birth to the mistaken notion that geographical locations could potentially be assigned to Web sites.[42] Apart from the generic Top Level Domains (TLDs), there are country TLDs using a two-character country abbreviations, which tends to promote the concept that there is some geographical order in the way things are named.[43] For example, one District Court held a Web site bearing the Uniform Resource Locator address *http://www.playmen.it* to mean that the destination computer was located in Italy.[44] This understanding was wrong since the *.it* TLD only indicates that some authority in Italy should know where to find the computer bearing an *.it* domain name.[45] Not

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40. *See* Rollo, *supra* note 13, at 667 n.120-22 (explaining that the TCP/IP forms are building blocks "higher order data communication that ride on top of TCP/IP to provide application specific functionality. Electronic mail was one of the earliest, most popular, protocols, whereas the HTTP or hypertext transfer protocol is of much more recent vintage."); *see also* Keith E. Witek, *Software Patent Infringement on the Internet and on Modern Computer Systems—Who is Liable for Damages*?, 14 COMPUTER & HIGH TECH. L.J. 303, 384-85 (1998) (explaining the process of a transmission of information from one foreign country to another, and its effect on the TCP/IP Internet protocol). *See generally* Dangerfield, *supra* note 29, at 3 (defining TCP/IP as communications that is available in the public domain).

41. *See* Jonathan Zittrain, *ICANN: Between the Public and the Private—Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1071 (1999) (comparing the Domain Name System to the TCP/IP); *see also* Margaret Jane Radin & R. Polk Wagner, 73 CHI.-KENT. L. REV. 1295, 1295 (1998) (explaining that the Domain Name System was developed in the early to mid 1980s, the demand for which increased in the mid-90s). *See generally* Lisa Katz Jones, *Trademark.com: Trademark Law in Cyberspace* 37 ALBERTA L. REV. 991, 993 (1999) (noting that the Domain Name System is an addressing system in addition to that of the IP numbers).

42. *See* Adam Chase, *A Primer on Recent Domain Name Disputes*, 3 VA. J.L. & TECH. 3, 3 (1998) (stating that the DNS does not draw geographical limits on web pages); *see also* Josh A. Goldfoot, *Anti-Trust Implications of Internet Administration,* 84 VA. L. REV. 909, 935-36 (1998) (discussing DNS within the context of TLD registration and global market allocations). *See generally Trademark.com: Trademark Law in Cyberspace*, 37 ALTA L. REV. 991, 993-95 (1999) (explaining how the DNS system works within the context of information transfers within the web).

43. *See* Betensky, *supra* note 32, at 22 (discussing how traveling to another jurisdiction is not as difficult anymore due to features like a "virtual office"); Jeri Clausing, *New Internet Board Could Shake Up Country Domains*, N.Y. TIMES, Nov. 27, 1998. See *generally* Katz Jones, *supra* note 41, at (1999) (stating that "com" is the most popular commercial TLD).

44. *See* Johnson & Post, *supra* note 2 (discussing how cyberspace and the Internet have no geographic boundaries); *e.g.,* Roger J. Johns, Jr. & Anne Keaty, *Caught in the Web: Websites and Classic Principles of Long-arm Jurisdiction in Trademark Infringement Cases*, 10 ALB. L.J. SCI. & TECH. 65, 90-91 (1999) (discussing a district court holding that a company manifested its intent to "reach" all Internet users by creating a Web site that was accessible to all Internet users). *See generally* Eric Handelman, *Obscenity and the Internet: Does The Current Obscenity Standard Provide Individuals With The Proper Constitutional Safeguards*?, 59 ALB. L. REV. 709, 715 (1995) ("The Internet is a 'virtual community . . . defined not by geography, next-door neighbors, voting precincts or national borders. . . . '").

45. *See* Katz Jones, *supra* note 41, at 994 (stating that many worldwide corporations do not use the TLDs for their particular countries); *see also* Luke A. Walker, *Berkeley Technology Law Journal Annual Review of Law and Technology I. Intellectual Property; Trademark ICANN's Uniform Domain Name Dispute Resolution Policy,* 15 BERKELEY TECH. L.J. 289, 289 (2000) (stating that TLDs have both generic and geographic identifiers). *See generally* Heather N. Mewes, *Intellectual Property: C. Trademark: 1. Domain Name: a) International: Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System*, 13 BERKELEY TECH. L.J. 235, 235 (1998) (stating that non-generic TLDs usually refer to geographic areas, whereas ".com" and ".org" are examples of generic TLDs).

only does the computer not have to be in Italy, even the database established by the Italian authority assigning it does not have to be in Italy.[46]

The complexity and diversity with which domain names can be structured and computers and content providers can be located, is largely responsible for many of the jurisdictional complications associated with the Internet.[47] At one level, these problems can be a source of education—courts that are ill advised as to the technical underpinnings of the Internet may correct their previous decisions based on inaccurate technical assumptions.[48] On another level, it is true that Internet activities—due to the lack of adherence to any geographical location—open up many avenues of applying jurisdiction, which have no correlation in the more familiar "physical" world.[49] In considering whether Internet activities fall within the jurisdiction of any particular forum, it may be useful to consider the physical location of the:

1) Internet user;
2) Content Provider;
3) various communications conduits through which the data must flow en route to the Internet user;
4) computers of the Internet Service Provider through which the Internet user accesses the content;
5) server on which the Content Provider supplies the content;
6) DNS pointing to the Server wherein the Content Provider places the content;

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46. *See* Johnson & Post, *supra* note 2, at 1370 ("Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location."); *see also* George Ponds Kobler, *Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 49 ALA. L. REV. 673, 689 (1998) (discussing the notion that time and geographic boundaries are irrelevant considerations in the process of information exchange on the Internet). *See generally* Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261, 263-64 (2000) ("The Internet recognizes neither national geographical sovereignties nor national boundaries and requires a reexamination of the historical concepts of physical locales as the basis of legal regulation.").

47. *See* Mewes, *supra* note 45, at 239 (discussing jurisdictional concerns that have arisen out of the growing number of domain name disputes); *see also* Ira S. Nathenson, Comment*, Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911, 930 (1997) (discussing the complications associated with the use of domain names and personal jurisdiction).

48. *See, e.g.,* Colum. Comm. Corp. v. Echo Satellite Corp. 2001 U.S. App. LEXIS 1033, *17 (4th Cir. Jan. 25, 2001) (stating that expert testimony is admissible if it provides the court with technical information necessary to properly assess the facts and understand the issue). *See generally* Nathenson, Comment*, Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911, 930 (1997) (stating that "just as the concept of jurisdiction was expanded historically, due to changes in technology and nationwide transactions, so too it must be expanded due to computer technology.").

49. *See* Johnson & Post, *supra* note 2 (discussing the effects of physical boundaries on legal authority). *See generally* Nathenson, *supra* note 47 (explaining that "a cyberspace defendant might be said to be everywhere and nowhere at the same time."); Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier,* 11 HARV. J.L. & TECH. 429, 455 (1998) ("One emergent social movement suggests that the new dominion of cyberspace, a realm of its own, should be free from all governmental rule.").

7) TLD server containing the IP address of the DNS, which know where the servers are for a particular domain name.[50]

It is quite possible for one of the locations identified above to be located outside the jurisdictional long-arms of the forum.[51] Nonetheless, so long as just one of them is within the territorial jurisdiction of the forum, it is possible that that forum's interest will be triggered and the content provider, the user or any of the other intermediaries may be called upon to answer to some regulatory body or be subjected to litigation.[52] This multiplicity of jurisdictional possibilities creates many opportunities for jurisdictional overlap and clashes.[53] As a further complication, if confronted with an "unfavorable" territorial presence within a forum state provided above, a Content Provider could easily change the location of many of the computers and/or infrastructure involved in the distribution of his content on the Internet.[54] It is quite possible to accomplish this change without even the users recognizing that instead of flowing from a neighboring state, data now streams from across the globe.[55]

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50. *See generally* Nathenson, *supra* note 47, at 938-40 (referencing cases that discussed various factors the courts considered when determining whether or not to exercise jurisdiction); Gayle Weiswasser, *Domain Names, the Internet, and Trademarks: Infringement in Cyberspace*, 13 COMPUTER & HIGH TECH. L.J. 137, 178 (1997) (discussing how courts are looking to the principles underlying trademark law for guidance in disputes involving domain names).

51. *See generally* Nathenson, *supra* note 47, at 941 (stating that in *Compuserve Inc. v. Patterson*, the court exercised jurisdiction despite the absence of a long-arm statute); David W. Maher, *A Cyberspace Perspective on Governance, Standards, and Control: Trademark Law on the Internet—Will It Scale? The Challenge to Develop International Trademark Law*, 16 J. MARSHALL COMPUTER & INFO. L. 3, 12 (1997) (explaining that companies doing business in foreign jurisdictions will generally have jurisdiction in their home state).

52. *See generally* Weiswasser, *supra* note 50, at 171-72 (discussing the scope of jurisdiction for cases involving Internet disputes). *But see* Maher, *supra* note 51, at 11-12 (stating that despite the wide span of jurisdictional possibilities in litigation that involves Internet disputes, courts will probably establish jurisdictional limits when the only contact between the foreign entities was the use of a domain name). *See generally* Russel D. Shurtz, Comment, *www.international.shoe.com: Analyzing Weber v. Jolly Hotels' Paradigm for Personal Jurisdiction in Cyberspace*, 1998 BYU L. REV. 1663 (1998) (discussing and suggesting a jurisdictional model for cyberspace).

53. *See* Johnson & Post, *supra* note 2 (discussing Internet addresses and jurisdiction); Maher, *supra* note 51 (discussing the global scope of the Internet and the potential for jurisdictional uncertainties between nations). *See generally* Joseph H. Sommer, *Against Cyberlaw*, BERKELEY TECH. L.J. 1145, 1209 (2000) (stating that forum shopping arises as a problem in international disputes).

54. *See* Johnson & Post, *supra* note 2, at 1371 (noting that machines may be moved without affecting domain names). *But see* Maher, *supra* note 51, at 17 (discussing a registration requirement as a way of addressing current problems that stem from the fact that a user can easily change in order to evade legal consequences). *See generally* Christian M. Rieder & Stacy P. Pappas, *Personal Jurisdiction for Copyright Infringement on the Internet*, 38 SANTA CLARA L. REV. 367 (1998) (discussing the issue of jurisdiction in regard to the Internet and copyrighted works).

55. *See* Johnson & Post, *supra* note 2, at 1371 (noting that "users, generally speaking, are not even aware of the location of the server that stores the content they read."); Weiswasser, *supra* note 50, at 179-80 (asserting that the widespread use of the Internet on a global scale has created a new domain of legal problems); *ABA Group Releases Cyberspace Jurisdiction Draft*, MEALEY'S CYBER TECH LITIGATION REP., Vol. 2, Iss. 5, July 2000, p.5 (explaining that in response to the ease with which one could change a forum by changing their domain name, "self regulatory regimes should be encouraged to forge workable codes of conduct, rules and standards among a broad spectrum of electronic participants.").

III. Traditional Bases for Jurisdiction

Jurisdiction is a term utilized in many different instances. Within this article, it has three different applications. First, it may be used to indicate a sovereign (nation or state). Second, it may be employed to denote the power of a sovereign to regulate activities of its citizens. Third, and most important to this discussion, it specifically refers to the constitutionally (or statutorily) permissible exercise of power by a political entity's courts to render verdicts over matters that affect the rights and interests of the parties litigating before that tribunal.

A. The Exercising of Jurisdiction by Sovereigns

Jurisdiction is defined as the "power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties."[56] Prior to the emergence of the Internet, the law of jurisdiction, in general, had become fairly well developed in the twentieth century.[57] In order for a court of law to be seized with jurisdiction in any given case, such jurisdiction must be found in the court's own legal and constitutional domain, as well as the international legal order.[58] International law purports to enforce certain limits on the extent to which a sovereign may proscribe conduct.[59] These restrictions are premised on comity and the sovereign equality of nations.[60] At the same time, as is often said by those who are skeptical of the existence or usefulness of international law, this

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56. BLACK'S LAW DICTIONARY 853 (6th ed. 1990). *See* RANDOM HOUSE WEBSTER'S DICTIONARY 362 (1st ed. 1993) (defining jurisdiction as the right, power, or authority to administer justice). *See generally* Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMP. L. 91, 94-95 (1999) (discussing *in personam*, *in rem*, and *quasi in rem* as traditional bases for a court to exercise jurisdiction over the subject matter and the parties of a particular lawsuit).

57. *See* Casad, *supra* note 56, at 95 (explaining the significance and the impact of *International Shoe Corp. v. State of Washington* on the law of jurisdiction in the 20th century); Kathleen Patchel, *Software as a Commodity: International Licensing of Intellectual Property: Choice of Law and Software Licenses: A Framework For Discussion*, 26 BROOK. J. INT'L L. 117, 133 (2000) (stating that multilateralism prevailed as the choice-of-law approach in the United States during the 19th century and the first half of the 20th century, and it continues to influence U.S. choice of law even today).

58. *See* Jo Dale Carothers, Note, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient,* 41 ARIZ. L. REV. 937, 937 n.8 (1999) (stating that "cyberspace transactions are no different than any other transactions involving multiple jurisdictions. . . ."); Johnson & Post, *supra* note 2. *See generally* Jack Goldsmith, *Against Cyberanarchy,* 65 U. CHI. L. REV. 1199, 1208 (1998) (explaining that guidelines for jurisdiction include where the transaction occurs, where the effects are felt, where the parties are from, and what the Constitution permits).

59. *See* Johnson & Post, *supra* note 2. *See generally* Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet Is Changing International Law,* 73 CHI.-KENT L. REV. 997, 997 (1998) (explaining how the Internet is changing the traditional sovereignty among states). *But see* Sommer, *supra* note 53, at 1209-10 (referring to the globalization of the world economy as a strain on existing limits to which a sovereign may proscribe conduct).

60. *See* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (discussing the doctrine of comity stating that respect must be afforded for application of foreign law to American transactions). *See generally* Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 374 (1999) (referring to comity as a limit on the exercise judicial power in foreign affairs). *But see* Sommer, *supra* note 53, at 1210 (discussing the effects of an increasingly globalized economy on comity).

body of law is somewhat lacking in effective enforcement mechanisms.[61] This leads to a situation where the limits placed by international law on the power of a sovereign is breached as much as it is observed.[62] In theory, every sovereign "has an obligation to exercise moderation and restraint in invoking jurisdiction over cases that have a foreign element, and should avoid undue encroachment on the jurisdiction of other sovereigns."[63]

In any event, it is useful, for the purpose of analysis, to separate international law on obtaining jurisdiction into three interrelated concepts: (i) the jurisdiction to prescribe; (ii) the jurisdiction to adjudicate; and (iii) the jurisdiction to enforce.[64] Prescriptive jurisdiction limits legislative power; when a sovereign state has jurisdiction to prescribe, it legitimately may apply

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61. *See* Wilske & Schiller, supra note 1, at 132, 171 (noting that a state's enforcement officers may only operate extraterritorially when authorization is given by the state where enforcement is sought); *see also* Salbu, *supra* note 49, at 454 (referring to a lack of effective enforcement mechanisms in actions that involve the Internet); Sommer, *supra* note 53, at 1210 (stating that as a means of improving on enforcement mechanisms, "[t]he strains on comity are being addressed by measures such as the draft Hague Convention, which hopes to enhance enforcement of foreign judgments.").

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 401 *et seq*. (1987). *See, e.g.,* Nathenson, *supra* note 47, at 939 (discussing *Pres-Kap, Inc. v. System One*, where the court upheld the power of a sovereign); Sommer, *supra* note 53, at 1209-1210 (referring to instances in which sovereign power is breached as well as observed).

63. Wilske & Schiller, *supra* note 1, at 126. *See generally* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 549 n.250 (2000) (referring to prescriptive jurisdiction as creating a limit to a territory's exercise of jurisdiction). *But cf.* William Dodge, *Extraterritoriality and Conflict of Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 169 (1998) (discussing two examples of antitrust law, in the United States Supreme Court in *Hartford Fire Ins. Co. v. California* and the European Court of Justice in *In re Wood Pulp Cartel* that have recently adopted the effects principle).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 401 *et seq*. (1987). Section 403, however, precludes assertion of jurisdiction on any basis if its exercise would be "unreasonable," and lists a nonexhaustive list of factors to be considered in reaching that conclusion. Section 403(2) states:

> a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory or has substantial, direct and foreseeable effect upon or in the territory;
>
> b) the connections, such as nationality, residence or economic activity, between the regulating state and the person principally responsible for the activity to be regulated or between that state and those whom the regulation is designed to protect;
>
> c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted;
>
> d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> e) the importance of the regulation to the international political, legal or economic system;
>
> f) the extent to which the regulation is consistent with the traditions of the international system;
>
> g) the extent to which another state may have an interest in regulation the activity; and
>
> h) the likelihood of conflict with regulation by another state.

Id.

its legal norms to conduct.[65] Adjudicative jurisdiction limits judicial power; when a sovereign has jurisdiction to adjudicate, its tribunals may resolve disputes.[66] Enforcement jurisdiction limits executive power; when a sovereign has jurisdiction to enforce, its police and customs authorities may restrict the flow of trade, detain individuals and alter property interests.[67]

B. Jurisdiction to Prescribe

Prescriptive jurisdiction under international law is interrelated with the issue of "choice of law."[68] A sovereign may legislatively prescribe conduct within the sphere of its competence.[69] However, if the interests of other sovereigns are impacted, international law imposes restrictions.[70] The traditional bases for such jurisdiction are the territoriality principle and the

65. *See* Wilske & Schiller, supra note 1, at 126 (noting that for a state to exercise jurisdiction to enforce its legal authority, it must first have jurisdiction to prescribe); *see also* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 239 n.273 (1993) ("describing the 'effects' and conduct tests of prescriptive jurisdiction as placing a maximum limit on the extent of extraterritorial legislation permissible under international law"). *See generally* Dinwoodie, *supra* note 63 (referencing prescriptive jurisdiction as a limit on legislative power).

66. *See* Lea Brilmayer, Jennifer Haverkamp, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 726 (1988) (referring to adjudicative jurisdiction as a means by which a state may assert power); *see also* David MacKusick, Comment, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 757 (1996) (defining adjudicative jurisdiction as "the power of a state to subject some person or thing to the judicial process).

67. *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415 (2000) (explaining that the exercise of jurisdiction involves a State's enforcement of its laws through its courts, and executive, administrative, and police action); Wilske & Schiller, *supra* note 1, at 171 (discussing the various applications of a state's enforcement jurisdiction); *see also* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 291 (1982) (indicating that a state reaps its power to enforce jurisdiction invoking the relevant international law that grants the authority to do so).

68. *See* James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH L. REV. 833, 858 (1994) (noting the similarities in the limits imposed by choice of law to that of prescriptive jurisdiction); *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1609, 1631 n.128 (1991) (explaining that the reasonableness standard for prescriptive jurisdiction is used to evaluate choice of law under the Restatement (Second) of Conflict of Laws); *see also* Henry H. Perritt, Jr., *The Internet and Public International Law: The Internet Is Changing the Public International Legal System*, 88 KY. L.J. 885, 892 n.26 (1999/2000) (using the terms "prescriptive jurisdiction" and "choice of law" interchangeably).

69. *See* Wilske & Schiller, *supra* note 1 (explaining that a states competence extends to both persons and circumstances); Sienho Yee, *Note, The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?*, 93 COLUM. L. REV. 744, 772 (1993) (asserting that when a sovereign has jurisdiction to prescribe conduct, it applies to all conduct going on within the sovereign's territory by a sovereign outside that territory). *See generally* Maureen T. Walsh & Bruce Zagaris, *The United States-Mexico Treaty on the Execution of Penal Sanctions: The Case for Reevaluating the Treaty and Its Policies in View of the NAFTA and Other Developments*, 2 SW. J. L. & TRADE AM. 385, 445-46 (1995) (referring to an instance in which a foreign sovereignty's authority to prescribe conduct within its territory was respected).

70. *See* Wilske & Schiller, *supra* note 1, at 125-26 (discussing the limitations on jurisdiction imposed by international law); Perritt, *supra* note 68, at 892 (referring to "conflict of laws as limitations on the exercise of sovereign power, motivated by the reality that, when one sovereign oversteps its bounds, it encroaches upon the prerogatives of another."); s*ee also Conference on Jurisdiction, Justice, and Choice of Law for the Twentieth Century: Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)*, 29 NEW ENG. L. REV. 577, 623 (1995) (describing prescriptive jurisdiction and the factors to evaluate the reasonableness of regulation, and considers the interests of other states).

nationality principle.[71] Slightly more controversial in their application are the "effects" principle, the "protective" principle and the "universal" principle.[72] Each of these principles of prescriptive jurisdiction is discussed below.

1. Territoriality Principle

A state is sovereign with respect to its territory and this sovereignty exists when a state exercises absolute control within its territory to the exclusion of other states.[73] It follows that a sovereign has the power, within its own territory, to prescribe and to proscribe activities of persons within its territory, whether or not such persons are nationals of that state.[74] When viewed in the framework of the Internet, the frequently asked question is "Where is cyberspace?"[75] This question implicitly accepts cyberspace as a distinct locale that is outside of the territory of any given sovereign, yet this inference is now being challenged.[76] This article takes the view that territoriality will continue to play a critical role to delineate jurisdictional limits in cyberspace. As such, territoriality as applied to the Internet must incorporate the actual location of "atoms"—where the people that offer content and the people that consume this content are located—rather than "bytes" or the intangible and non-corporeal "cyberspace"—as it was fash-

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71. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). This section submits that a state has jurisdiction to prescribe law with respect to:

> (1) (a) a conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

72. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (outlining the effects and protective principles); *see also* Wilske & Schiller, *supra* note 1, at 129, 135 (referring to the protective principle as a means by which a State can protect its own governmental functions).

73. *See* Wilske & Schiller, *supra* note 1, at 129 (explaining that "[s]tates insist . . . on their sovereignty to control activities which happen in their territory. . . ."). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(b) (providing a list of factors for assessing whether a sovereign has power to exercise control).

74. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (defining the territoriality principle); *see also* Wilske & Schiller, *supra* note 1, at 129 (referring to the territoriality principle).

75. *See* Johnson & Post, *supra* note 2, at 1367 (noting that cyberspace requires different regulation in part because it has no physically based boundaries). *See generally* Goldsmith, *supra* note 58 (discussing the regulation of cyberspace); Neil Natanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (discussing computer technology and copyright issues).

76. *See* Wilske & Schiller, *supra* note 1, at 125 (noting that states are not accepting cyberspace as a separate and independent local).

ionable to proclaim in the now disfavored vernacular.[77] As a result, the territoriality principle ostensibly permits sovereigns to regulate Internet content and services offered by persons natural or otherwise, who are within its territory.[78] There will always be a place (or more frequently, places), which will have territorial jurisdiction over any content placed on the Internet, since the Internet thrives upon the unrelenting human spirits of creativity and entrepreneurship.[79]

2. Nationality Principle

Under international law, a sovereign may determine who its nationals are and can control their rights and responsibilities.[80] This includes the power to prescribe the activities of nationals, even when they are outside the sovereign of nationality.[81] The availability of evidence and the difficulty of enforcing rules against persons even as they are outside of a sovereign's territory are separate considerations, which should not detract from the fact that the nationality principle is widely acknowledged and not seriously challenged.[82] When applied to the Internet, it is theoretically possible for sovereigns to proscribe, with respect to its nationals, what they may or may not do, regardless of where they are spatially located.

3. Effects Principle

As a function of the "effects" principle, a sovereign may seek to protect its interests by criminalizing an act that a sovereign considers to be of threat to its national security.[83] This basis for enforcing control extraterritorially can be extremely broad, and literature in international law stresses that sovereigns should exercise discretion out of comity and/or a respect for

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77. *See* Salbu, *supra* note 49 (arguing that "interactive computer networks can and should fit within existing geographic conceptions of law and jurisdiction."). *See generally* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV 121, 158 (1999) (referring to efforts to "tag and trace every bite of information in the digital environment. . . ."). *But see* Zembeck, *supra* note 10, at 342 (stating that "cyberspace . . . does not itself exist in a jurisdiction").

78. *See* Salbu, *supra* note 49 (referring to the need to create physical borders and territorial connections between the courts and the individual litigants). *But see* Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69 (1997/1998) (referring to the fact that territorial limits exist in cyberspace); Zembeck, *supra* note 10, at 342 (explaining that with respect to litigation involving cyberspace, there exists the potential to extend territorial laws beyond proscribed limits).

79. *See* Salbu, *supra* note 49 (asserting that "cyberactivities ultimately affect people in real places, and therefore must be controlled by laws within established legal systems."). *But see* Menthe, *supra* note 78 (stating that applying the territoriality principle in cyberspace is only appropriate in unusual circumstances); Zembeck, *supra* note 10, at 342 (stating that because cyberspace cannot be found in any particular jurisdiction, conventional territorial principles will not apply).

80. *See* Wilske & Schiller, *supra* note 1, at 131 (stating that the "nationality principle" is a relatively uncontroverted manner of obtaining extraterritorial jurisdiction over entities and persons).

81. *See* Wilske & Schiller, *supra* note 1, at 131 (observing that individual state law prohibitions on child sex tourism extends across sovereign boundaries to penalize offenders).

82. *See* Wilske & Schiller, supra note 1, at 132 (stating that the "nationality principle" is a relatively uncontroverted manner of obtaining extraterritorial jurisdiction over entities and persons).

83. *See* Wilske & Schiller, *supra* note 1, at 132 (stating that "jurisdiction is grounded in the fact that the injurious effect, although not the act or omission itself, occurred in the territory of the State.").

fairness.[84] However, in practice, some sovereigns, most noticeably the United States, often apply broad and controversial extraterritorial legislation leading to disputes with other sovereigns.[85] In this regard, one subject receiving especial attention is the extraterritorial application of antitrust laws.[86] It is likely that sovereigns concerned with the risks and undesirable effects that the Internet presents within their territory will expand upon this basis for the invocation of prescriptive jurisdiction even though the content or service is provided by an extraterritorial entity.[87] One clear example of this is that of cyber-casinos and the attempts by some sovereigns to impose restrictions, extraterritorially, on them.[88]

4. Protective Principle

In limited circumstances, a sovereign can legislate against extraterritorial acts committed by non-nationals if its vital interests (*e.g.*, national security or territorial integrity) are threatened.[89] As applied to the Internet, countries that legislate to criminalize "hacking" onslaughts

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84. *See* Wilske & Schiller, *supra* note 1, at 132 (noting that application of the "effects" doctrine becomes somewhat precarious where the conduct producing the harmful effect was lawful under sovereign law of the originating country).

85. *See* Wilske & Schiller, *supra* note 1, at 132 (citing the United States as excessively invoking the "effects principle" of extraterritorial jurisdiction. often to the displeasure of other nations).

86. *See* Tapio Puurunen, *The Legislative Jurisdiction of States Over Transactions in International Electronic Commerce*, 18 J. MARSHALL COMPUTER & INFO. 689, 737-38 (2000) (stating that the "United States faced mounting pressure from a number of States and the international business community as regarding its use of the effects doctrine, especially in the field of anti-trust law."); *see also* Metro Indus. v. Sammi Corp. 82 F.3d 839, 841 n.3 (9th Cir. 1996) (explaining that when "alleged illegal conduct occur[s] in a foreign country, we must examine the impact on commerce in the United States before we can determine that we have subject matter jurisdiction over the claim.").

87. *See* Wilske & Schiller, *supra* note 1, at 132 (noting that although criticized when used to excess, most sovereign nations accept the "effects principle" as a sound basis of establishing extraterritorial jurisdiction); Sean M. Thornton, *State Criminal Laws in Cyberspace: Reconciling Freedom for Users with Effective Law Enforcement*, 4 RICH. L.J. & TECH. 5, (1997) (stating that "the Compuserve affair illustrates that an assertion of prescriptive jurisdiction may be the best catalyst for technological change."). *But see* Menthe, *supra* note 78 (stating that "Minnesota [had] no jurisdiction to prescribe law over objects in cyberspace. . . .").

88. *See* Wilske & Schiller, *supra* note 1, at 132 (citing Florida as an example of states seeking to regulate cyber-casinos); Thornton, *supra* note 87 (discussing Germany's attempts to restrict access to gambling services over the Internet); *see also* Stevie A. Kish, Note, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, 51 FED. COMM. L.J. 449 (1999) (describing the havens as the reason for the lack of control of Internet gambling). *But see* Menthe, *supra* note 78 (stating that laws about gambling fail to meet tests of substantial effect and principles of justice 'generally recognized').

89. *See* Thornton, *supra* note 88 (presenting protection from offensive material such as pornography and gambling as a basis for the exercise of jurisdiction). *See generally* Wilske & Schiller, *supra* note 1, at 135 (stating that "the protective principle found in the Restatement 402(3) . . . allows a State to protect its own governmental functions.").

directed at its critical infrastructure databases may invoke this head of jurisdiction.[90] Existing computer crimes legislation already implicitly invokes this basis for jurisdiction.[91]

5. Universal Jurisdiction

Universal jurisdiction, available to empower all sovereigns to define and prescribe punishment in a limited set of circumstances, includes piracy, slavery, hijacking, genocide, war crimes and the unlawful interference with aircraft.[92] These crimes are regarded as universally denounced so that all sovereigns may adopt legislation and even undertake enforcement action relating to these offenses regardless of where the act is committed and who the victims are.[93] In other words, a sovereign may legislate to give itself the power to arrest, detain, try and convict a person suspected of hijacking an aircraft outside of that sovereign's territory, even in the absence of any other connection (*e.g.*, territoriality, nationality) with that sovereign.[94] It is important to note that this extraordinary use of jurisdiction is only intended for some of the most egregious crimes, which incur international criminal liability.[95] Despite the egregious nature of these crimes, such agreements are hard to come by—for example, even approving a definition of "terrorism" or an accord to combat drug trafficking has proven to be very difficult.[96] Predictably, the

90. *See* Howard L. Steele, Jr., Comment, *The Web That Binds Us All: The Future Legal Environment of the Internet*, 19 HOUS. J. INT'L L. 495, 511 (1997) (referring to the protective principle as one of the means of legislating to criminalize hacking). *See generally* Michael A. Sussman, *The Critical Challenges from International High-Tech and Computer-Related Crime at the Millennium*, 9 DUKE COMP. & INT'L L. 451, 462 (1999) (recognizing the threat computer hacking poses to public safety, and the need for legislation as protection from such threats); Laura J. Nicholson, Tom F. Shebar & Meredith Weinberg, *Computer Crimes*, 37 AM. CRIM. L. REV. 207, 258-59 (2000) (discussing international efforts to take protective measures and invoking legislation that prevents computer crimes).

91. *See* Wilske & Schiller, *supra* note 1, at 142 (observing that under current law, hackers are subject to the jurisdiction of the State affected by the crime); Howard L. Steele, Jr., Comment, *The Web That Binds Us All: The Future Legal Environment of the Internet*, 19 HOUS. J. INT'L L. 495, 511 (1997) (stating that "[T]here are several traditional extraterritoriality principles to exercise jurisdiction when the criminal is not committed within its boundaries . . . [and that] [n]ations have used the . . . protective principle. . . ."). *See generally* Nicholson, Shebar & Weinberg, supra note 90, at 258-59 (noting that "[I]n 1998, Britain, France, Germany, Italy, Japan, Russia, and the United States entered an agreement to work together to coordinate efforts to combat computer crimes.").

92. *See* Wilske & Schiller, *supra* note 1, at 129 (quoting Restatement (Third) of the Foreign Relations Law of the U.S. § 401 (1987)).

93. *See* Wilske & Schiller, *supra* note 1, at 143.

94. *See* U.S. v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993) (providing the U.S. Maritime Drug Enforcement Act, 46 U.S.C. App. § 1903 (1992) as an example interpreted to apply to a stateless vessel's nonresident crew found carrying drugs in international waters with no nexus to the U.S.).

95. *See* Wilske & Schiller, supra note 1, at 143-44 (noting that the commission of such crimes subjects the perpetrator not only to universal jurisdiction, but to the jurisdiction of the United Nations itself).

96. *See* Sandra L. Jamison, *Leonard v. B. Sutton Award Paper: A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 432 (1995) (discussing the power of international criminal courts to act upon "domestic issues of crime committed by foreign individuals."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986) (making criminal a specific set of acts); Wilske & Schiller, *supra* note 1, at 143 (listing various acts which are "criminalize[d]" by Restatement § 404).

dialogue is still primitive where computer and information technology law is concerned.[97] There has been some initial discussion about information warfare, but little progress has been made in reaching an agreement on which Internet activities should attract universal jurisdiction.[98]

C. Jurisdiction to Adjudicate

Although a court may not have the jurisdiction to prescribe, a tribunal may still try a case if it has the jurisdiction to adjudicate.[99] Under international law, jurisdiction to adjudicate serves to establish the threshold limit of a sovereign's tribunals to hear a case.[100] Usually adjudicative jurisdiction is invoked by virtue of having authority over those litigants involved—"personal jurisdiction"—or having authority over the subject matter involved—"subject-matter jurisdiction."[101] The jurisdiction to adjudicate requires a sufficient or reasonable relation with the forum state which is usually satisfied, in criminal cases, by the presence of the accused in a

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97. *See* Vicci L. Marrero, *Symposium Issue: The International Criminal Court: Evolution Of British Jurisprudence in the Extradition of General Augusto Pinochet: Application Of International Human Rights Treaty Trumps Sovereign Immunity*, 8 MSU-DCL J. INT'L L. 119, 136 n. 62 (1999) (listing certain crimes which are of "universal concern"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986) (stating that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present."); Wilske & Schiller, *supra* note 1, at 143 (listing various acts which are "criminalize[d]" by RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986)).

98. *See* Wilske & Schiller, *supra* note 1, at 143 (stating "universality does not require a direct connection such as the place of the offense, the nationality of the offender, or the effects of the offense on the prescribing State."); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988) (noting that the principle of universal jurisdiction allows for "jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended."). *See generally* Russell J. Weintraub, *International Law: Establishing Incredible Events By Credible Evidence: Civil Suits For Atrocities That Violate International Law*, 62 BROOK. L. REV. 753, 770 (1996) (noting that even absent "links of territory" or "nationality of the offender" the assertion of universal jurisdiction is proper).

99. U.S. v. Martinez-Hidalgo, 993 F.2d 1052, 1055 (3d Cir. 1993) (interpreting international law as not requiring a nexus to the U.S.). *See generally* Douglas Kash, *Abductions of Terrorists in International Airspace and on the High Seas*, 8 FLA. J. INT'L L. 65, 73-74 (1993) (noting that signatories to the "Convention on Offenses and Certain Other Acts Committed on Board Aircraft" have the duty to "assert jurisdiction over hijackers, regardless of the nature of the crime."); Marien Nash Leich, *U.S. Practice: Contemporary Practice Of The United States Relating To International Law*, 84 AM. J. INT'L L. 724, 726 (1990) (noting that hijacking is a crime that has been "subjected to universal jurisdiction").

100. *See* Wilske & Schiller, *supra* note 1, at 143 ("Universality provides for jurisdiction over a crime which customary or conventional law labels so egregious as to be of universal concern"); *see also* Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1492 (1994) (noting that universal jurisdiction allows for punishment of the "most egregious crimes for which there is universal condemnation"); Peter Schuyler Black, *Recent Development: Kadic v. Karadzic: Misinterpreting The Alien Tort Claims Act*, 31 GA. L. REV. 281, 308 (1996) (universal jurisdiction is allowed over "a few especially egregious crimes. . . .").

101. *See* Wilske & Schiller, *supra* note 1, at 146 (discussing the different acts that will create subject matter jurisdiction as well as the possible methods by which personal jurisdiction will be established).

particular forum state.[102] Trials *in absentia* are generally frowned upon by international law.[103] The United States, unlike many other sovereigns, also constitutionally accepts and recognizes "tag" jurisdiction—where a defendant who is transiently present within the territory of the United States may be "tagged" (*e.g.*, while in transit).[104] Tag jurisdiction, together with extra-territorial criminal enactments, can potentially lead to complicated problems.[105]

In civil cases, the principle that is easily accepted is actor *sequitur forum rei* (the plaintiff follows the defendant to the latter's forum).[106] However, a few sovereigns have developed a complex set of laws whereby jurisdiction may be exercised against defendants who are not ordinarily within that court's general jurisdiction by virtue of the defendants' residence or domi-

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102. *See generally* Howard W. French, *On the Internet, Most of Africa is Getting Off to a Slow Start*, N.Y. TIMES, Nov. 17, 1995, at A5 (discussing the fact that Africa is "lagging" behind in the effort to get "network connectivity"); Wilske & Schiller, *supra* note 1, at 120 (discussing the difficulty in obtaining a "global Internet"); Eli M. Noam, *An Unfettered Internet? Keep Dreaming*, N.Y. TIMES, July 11, 1997, at A27 (discussing the general controversial issues pertaining to Internet regulation).

103. *See* Article 14(3)(d), International Covenant on Civil and Political Rights, 999 U.N.T.S. 14668 (last visited March 13, 2000) http://www.tufts.edu/fletcher/multi/texts/BH498.txt.

104. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1986) (1) ("A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable."); Wilske & Schiller, *supra* note 1, at 145 (noting that a court may adjudicate matters where "the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable"). *See generally* Frederic L. Kirgis, Jr., Note: *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323 (1988) (noting that there is some level of "confusion" concerning jurisdiction to prescribe and jurisdiction to adjudicate as it relates to the overall concept of universal jurisdiction).

105. *See* Wilske & Schiller, *supra* note 1, at 145-46 (explaining jurisdiction to adjudicate*); see also* Lauren Levy, *Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can It Be Done?*, 6 DICK. J. ENVT'L L. POL. 65, 83 (1997) (noting that jurisdiction to adjudicate is simply the "power of a court to hear a case and render a decision."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1986) (1) and (2) (noting that exercise of jurisdiction must be "reasonable" and listing those items which make jurisdiction "reasonable").

106. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1986) (listing various ways in which personal and subject-matter jurisdiction may be obtained); Wilske & Schiller, *supra* note 1, at 145-46 (listing ways in which personal and subject matter jurisdiction may be asserted). *See generally* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257 (1994) (noting the importance of the directness of defendant's conduct and its location within the United States for the establishment of jurisdiction to adjudicate).

cile.[107] The experience of the United States in its application of adjudicative jurisdiction on the Internet is particularly educational on the international plane and is discussed below.[108]

D. Jurisdiction to Enforce

Jurisdiction to enforce is a limit placed by international law that restricts the use of executive power to enforce a judgment.[109] A judgment rendered by a court of law is of little use unless the litigants can rely on such a judgment being effectively enforced.[110] In a domestic setting, a judgment can be enforced against a judgment debtor simply by employing the services of a sheriff.[111] However, enforcement of a judgment in the international arena is often more difficult because jurisdiction to enforce can only be invoked if the jurisdiction to adjudicate was validly obtained either through *in personam* or *in rem* jurisdiction.[112]

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107. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(a) (1986) ("In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable, if at the time jurisdiction is asserted: (a) the person or thing is present in the territory of the state, other than transitorily."); Wilske & Schiller, *supra* note 1, at 148 ("In international criminal cases, jurisdiction to adjudicate depends almost exclusively on presence of the accused."). *See generally* Analisa W. Scrimger, *United States v. Alvarez-Machain: Forcible Abduction As An Acceptable Alternative Means Of Gaining Jurisdiction*, 7 TEMP. INT'L & COMP. L.J. 369, 374 (1993) (noting that the United States courts consider the "presence of the accused sufficient for jurisdiction to attach.").

108. *See* Pennoyer v. Neff, 95 U.S. 714 (1877) (prior to 1945, the United States adhered quite firmly to the strict confines of *in personam* jurisdiction where jurisdiction was rooted in physical presence); *see also* Theodor Meron, *War Crimes in Yugoslavia and The Development of International Law*, 88 AM. J. INT'L L. 78, 83-84 (1994) (noting that trials *in absentia* are generally opposed by international law because there is a "widespread perception" that it would be inconsistent with "Article 14 of the International Covenant on Civil and Political Rights"); Daniel J. Brown, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763, 781 (1999) (noting that some organizations find trials in absentia "especially troubling").

109. *See* Wilske & Schiller, *supra* note 1, at 146 (noting that "tag" jurisdiction is in "accordance with U.S. law"); *see also* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) ("It cannot seriously be contended that a person moving in interstate commerce is on that account exempt from service of process while in transit, and we think it makes no practical difference whether he is traveling at the time on a plane, or on a bus or train, or in his own car."). *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, (1950) ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.").

110. *See* Wilske & Schiller, *supra* note 1, at 171-72 (discussing the different methods of extraterritorial enforcement).

111. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 401(c) (1987); Wilske & Schiller, *supra* note 1, at 146 (noting that this is a principle that is "accepted everywhere"); *see also* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 91 (1999) ("Actor sequitur forum rei was a Justinian maxim pronouncing that the plaintiff follows the defendant's forum."); Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 534 (1994) (noting that this is the "traditional and still guiding principle on which jurisdiction in the civil law countries of the European Union rests").

112. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 401(c) (1987). *See generally* Wilske & Schiller, *supra* note 1, at 146 (discussing the differences between United States assertion of jurisdiction and what is required in an international arena for the establishment of jurisdiction). *But see* Ronen Sarraf, *The Value of Borrowed Art*, 25 BROOK. J. INT'L L. 729, 751-52 (1999) (noting that some European countries have "given up transitory jurisdiction"); Detlev F. Vagts, *Restitution for Historic Wrongs, the American Courts and International Law*, 92 AM. J. INT'L L. 232, 233 (1998) (noting that the "British gave up transitory jurisdiction").

Important in the analysis of enforcement jurisdiction are the remedies themselves, which are intended to deter further misconduct by the parties.[113] When there is no property found in the jurisdiction, the enforcement can be achieved by using power over a person that has jurisdiction over property at other locations.[114]

The unilateral enforcement of judicial orders or judgments, via "cyberspace," may bring with it novel questions and problems. For instance, would the sovereignty of France be impinged if a United States court orders all Internet Access Providers in the United States to block data from French IP addresses which are routed through equipment and computers within the United States? Analogous situations in the "real world" have indicated that states, zealous to protect its sovereignty, would consider such "enforcement" to be violative of their sovereignty.[115]

IV. The Struggle to Obtain Personal Jurisdiction—Jurisdiction to Adjudicate on the Internet

A. The United States

Due largely to the considerable number of Internet users from the United States,[116] the vast experience of courts litigating the broad range of Internet disputes is immensely valuable to finding a global approach of obtaining jurisdiction over Internet activities.[117] Aspects of the United States further enhancing the probabilities that Internet jurisdictional problems will be

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113. *See* Wille, *supra* note 7, at 181 (noting that deterrence increases as enforcement of remedies increases).

114. *See* Wilske & Schiller, *supra* note 1, at 171 (discussing jurisdiction to enforce); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(c) (1986) (describing jurisdiction to enforce); Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 WASH. & LEE L. REV. 1601, 1629-33 (1997) (discussing jurisdiction to enforce).

115. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(c) (1986) ("Under international law, a state is subject to limitations on jurisdiction to enforce, *i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."); *see also* Eric S. Kobrick, Note*: The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1518 n.23 (1987) (discussing limits on international law). *See, e.g.,* Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967) (noting that a nation does not have "jurisdiction to enforce a rule of law prescribed by it, unless it had jurisdiction to prescribe the rule.").

116. *See* John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 746 n.242 (1993) (discussing the requirement of enforcing judgments in foreign lands, with "no expectation of full faith and credit"); *see also* Felix D. Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT'L & COMP. L.J. 55, 63 (1999) (noting the three basic approaches to determining whether foreign judgments should be "given res judicata locally"); Robert J. Krupka, Philip C. Swain & Russell E. Levine, *Section 337 and the GATT: The Problem or the Solution?*, 42 AM. U. L. REV. 779, 815 (1993) (noting that "enforcement of judgments against foreign defendants can be difficult in district court.").

117. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (1986) (stating that states can "subject persons or things to the process of its courts. . . ." even if the state is not "party to the proceedings"); *see* Rice, *supra* note 6, at 586-87 (discussing jurisdiction to prescribe, adjudicate and enforce as determinative of whether a country has jurisdiction). *See generally* Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (noting that *in rem* proceedings affect the "interests of persons in a thing").

litigated in the U.S. include: i) the federal structure of the United States; ii) the long-enduring interstate jurisdictional issues; and iii) the comparative ease within which litigation across state lines can be initiated, as opposed to international boundaries.[118]

The due process clause of the Constitution's Fourteenth Amendment sets the outermost limits of personal jurisdiction.[119] If a party has substantial systematic and continuous contacts with the forum, a court may exercise jurisdiction over a party for any dispute, even one arising out of conduct unrelated to the forum.[120] Personal jurisdiction can be based on "general jurisdiction" or "specific jurisdiction."[121] General jurisdiction requires a close contact between the person before a court and the ordinary jurisdiction of that court.[122] Clear examples where general jurisdiction can be invoked include residency or domicile within the forum state, physical presence within the forum state when service of process is effected or other significant "continuous and systematic" contact with the forum state.[123]

Specific jurisdiction, on the contrary, is only obtainable when there is sufficient "minimum contacts" with a particular cause of action to seize the courts of the forum state with

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118. *See Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century: Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)*, *supra* note 70, at 579 n.14 (stating that it is "it is a settled principle of international and our domestic law that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity.") (quoting Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 263 (2d Cir.), *mod'd,* 890 F.2d 569 (2d Cir.), *cert. denied*, 492 U.S. 939 (1989). *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (noting that there should be mutual respect among sovereigns); Wilske & Schiller, *supra* note 1, at 173 (discussing various remedies).

119. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property, without due process of law.").

120. *See, e.g.,* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that defendant's contacts with Texas were insufficient to assert general jurisdiction because the contacts did not constitute continuous and systematic activity); Cannistraro v. Cannistraro, 223 N.E.2d 692, 693 (Mass. Sup. Jud. Ct. 1967) (recognizing that "foreign decree is to be given the force of a domestic judgment"); *see also* Julie C. Ferguson & David A. Pearl, *Practicing Law in the Americas: The New Hemispheric Reality: Article: International Litigation in the Hemisphere*, 13 AM. U. INT'L L. REV. 953, 966 (1998) (discussing how one can go about making a foreign judgment as "good as any domestic judgment"). *See generally* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 56-57 (1984) (discussing the fact that some countries feel that "foreign country judgments should be accorded the same res judicata effects as domestic judgments").

121. *See* Betensky, *supra* note 32; *see also* Hughes v. Fetter, 341 U.S. 609 (1951) (demonstrating the disjunction between subject matter jurisdiction and prescriptive jurisdiction, in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)); *see also* George M. Perry, et al., *Personal Jurisdiction in Cyberspace: Where Can You Be Sued and Whose Laws Apply?*, <http://www.llgm.com/FIRM/article14.htm> (discussing personal jurisdiction) (last visited March 24, 2001).

122. *See* George M. Perry, et al., *Personal Jurisdiction in Cyberspace: Where Can You Be Sued and Whose Laws Apply?*, <http://www.llgm.com/FIRM/article14.htm> ("General jurisdiction has historically relied on very close contacts of the person with the state, such as residency or domicile within the state, physical presence in the state at the time of service of process, or some other substantial 'continuous and systematic' contact with the forum state.") (last visited March 24, 2001).

123. *See* George M. Perry, et al., *Personal Jurisdiction in Cyberspace: Where Can You Be Sued and Whose Laws Apply?*, <http://www.llgm.com/FIRM/article14.htm> (last visited March 24, 2001).

jurisdiction.[124] Each state has a "long-arm" statute that provides its courts with jurisdiction over defendants from outside of that state where: i) the requirements of that statute are satisfied, and ii) the availability of jurisdiction so created does not violate either that state's constitution or the United States Constitution.[125] Traditionally, a state could exercise "*in personam* jurisdiction" because of the physical control over the defendant or his property.[126] It could also invoke "*in rem* jurisdiction" because the focus of adjudication is owned, possessed or used within the state and if there was a reasonable connection.[127] However, in *International Shoe v. State of Washington* ("*International Shoe*"),[128] the United States Supreme Court established the following test to alleviate due process concerns:

i) the forum state's long-arm statute must provide for jurisdiction for that specific factual situation;

ii) the defendant must have sufficient "minimum contacts" with the forum state; accordingly, invocation of jurisdiction must be based on "minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (which would violate the requirement for due process).[129]

Additionally, later cases offered examples demonstrating sufficient "minimum contacts" with the forum state, and what traditional notions would not offend "fair play and substantial justice."[130] For example, a court must be satisfied that a defendant "purposefully availed" himself of the "privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws."[131] A plaintiff may not sue a defendant in a jurisdiction foreign to the defendant, unless that defendant has established some relationship with that forum that would lead him to reasonably anticipate being sued there.[132] In addition, it must be foreseeable to the defendant that he "reasonably anticipate being hauled into court" in the forum state.[133] *International Shoe*'s concern with the "fair and orderly administration of the laws" is now said to require that the assertion of jurisdiction be "reasonable."[134]

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124. *See* Johns, Jr. & Keaty, *supra* note 44, at 72 (discussing the three requirements for specific jurisdiction); John A. Lowther IC, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 SAN DIEGO L. REV. 619, 629-30 (1998) (noting that the *Inset* court held that advertising over the Internet satisfied the requirements of specific jurisdiction); *see also* Yvonne Luketich Blauvelt, *Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 49 OHIO ST. L.J. 853, 855 (1988) (discussing the two-step analysis for personal jurisdiction created in *International Shoe*).

125. *See* International Shoe v. State of Washington, 326 U.S. 310 (1945).

126. Pennoyer v. Neff, 95 U.S. 714 (1878).

127. *Id*.

128. 326 U.S. 310 (1945).

129. International Shoe v. State of Washington, 326 U.S. 310 (1945); Asahi Metal Indus. Co. v. Superior Ct. of Cal, 480 U.S. 102 (1987).

130. International Shoe v. State of Washington, 326 U.S. 310 (1945); Asahi Metal Indus. Co. v. Superior Ct. of Cal, 480 U.S. 102 (1987).

131. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

132. Kulko v. Superior Court, 436 U.S. 84, 100-01 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

133. 444 U.S. 286 (1980).

134. Asahi Metal Indus. Co. v. Superior Ct. of Cal, 480 U.S. 102, 122 (1987).

In cases of interstate activity, courts in the United States have relied on distinctions between "targeted" interstate activity that had intended consequences in the forum and "local" activity which has unforeseen, unintended out-of-state consequences.[135] This important paradigm may help a court determine between the different sovereigns that could have potential personal jurisdiction over Internet activities. For example, *World-Wide Volkswagen v. Woodson* ("*World-Wide Volkswagen*")[136] provides a factual situation directly analogous to many Internet activities as compared to *International Shoe* and *Hanson v. Denckla* ("*Hanson*"),[137] where the Court assumed that a defendant had once been physically present in the forum state. In *Volkswagen*, a New York car dealership sold a defective car whose gas tank exploded when rear-ended in Oklahoma.[138] The plaintiffs unsuccessfully tried to subject the dealership to jurisdiction in Oklahoma.[139] The Supreme Court's reasoning hinged primarily on the fact that "local" conduct caused a remote injury that was not intended.[140] As applied to the Internet, similar analysis can be employed to determine if an Internet communication was local but had global consequences or was the actor pursuing interstate activity intending to seek global connections.

Another case that can been successfully adapted to the Internet is *Calder v. Jones* ("*Calder*").[141] The plaintiff alleged that two individual defendants, a newspaper editor and reporter, as well as the newspaper itself, had libeled her.[142] The individual defendants had never been in California, nonetheless, the Court proclaimed that asserting jurisdiction over them was constitutional.[143] The Court focused on the fact that plaintiff's injury was localized in the forum and the intentional nature of defendant's conduct.[144] Consequently, many Internet

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135. *See* Trout-McIntyre, *supra* note 3, at 229 ("For a defendant to have sufficient minimum contacts with the forum state, a court first must consider whether the defendant 'purposefully directed' conduct toward the forum state."); Lowther IV, *supra* note 124, at 619 (noting that in *Inset* the defendant had "purposefully directed its advertising activities toward Connecticut on a continuing basis . . . and could reasonably anticipate the possibility of being hauled into court here."); *see also* Blauvelt, *supra* note 124 (explaining that part of the personal jurisdiction analysis is an inquiry into whether a defendant "purposefully availed himself or herself of the benefits and protection of the forum state.").

136. 444 U.S. 286 (1980).

137. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) (stating the Robinsons purchased a new Audi from Seaway Volkswagen, Inc. and drove it to Arizona, passing through Oklahoma where the accident occurred); Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe v. State of Washington, 326 U.S. 310 (1945).

138. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286 (1980).

139. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286 (1980) ("We find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.").

140. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 315 (1980) (discussing that the dealer should not have been surprised to learn that a car sold by them would have been driven through Oklahoma on a heavily traveled transcontinental highway).

141. 465 U.S. 783 (1984).

142. Calder v. Jones, 465 U.S. 783, 784 (1984).

143. Calder v. Jones, 465 U.S. 783, 786-90 (1984).

144. *See id.* at 787-90 (reasoning that the petitioners' "intentional, and allegedly tortious, action was expressly aimed" at the forum state and they knew the injury to the respondent would occur in the sate where she lived and worked).

jurisdiction cases are usually controlled by *Calder*, including most of those involving intellectual property disputes.[145]

1. The Cases

The Supreme Court has not discussed the impact that Internet technology might have on the analysis of personal jurisdiction. Most lower courts have, however, held that merely creating and hosting a Web site does not subject a person to general jurisdiction everywhere in the United States.[146] However, they diverge widely as to whether the presence of such a site will lead to specific jurisdiction over the party for the purposes of disputes arising from the Web site.[147] Thus far, courts have resisted imposing jurisdiction solely for material accessed within the forum state.[148] This is true even when the plaintiff is a resident of the forum state and run-

145. *See, e.g.,* Roberts-Gordon, LLC v. Superior Radiant Products, Ltd., 85 F.2d 202 (W.D.N.Y. 2000) (harm suffered at plaintiff's principal place of business). *Compare* Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790 (E.D. Tenn. 2000) (noting that plaintiff was a business competitor of the defendants with a global presence, defamation not related to plaintiff's residence insufficient to subject defendant to jurisdiction in state of that residence); Nutrition Physiology Corp. v. Enviros Ltd., 87 F. Supp. 2d 648 (N.D. Tex. 2000) (stating that a passive Web site, absent sales into or advertisements in the forum, insufficient to sustain jurisdiction in the plaintiff's home state in a suit for patent infringement).

146. *See*, *e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (finding personal jurisdiction based on specific jurisdiction but not general jurisdiction because defendant's contacts, while purposeful and having an effect in the forum state, were not systematic and continuous); Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (and cases cited therein) (determining that an Internet Web site is insufficient to confer personal jurisdiction under a general jurisdiction theory when the information provided serves as an advertisement and not as a means of conducting business); *but see* Mieczkowski v. Masco Corp., No. 5:96CV286, 1998 WL 125678, at *6 (E.D. Tex. 1998) (holding that an interactive Web site that responds to consumer product inquires is sufficient without more to establish general jurisdiction).

147. *See* David Bender, *Jurisdiction in Cyberspace,* 590 PRAC. L. INST. 27, 75 (2000) (stating cases often require "something more" than the contact with a passive Web site in order to exercise specific jurisdiction over the Web site host); Brian K. Epps, *Maritz, Inc. v. Cybergold, Inc.: The Expansion of Personal Jurisdiction in the Modern Age of Internet Advertising,* 32 GA. L. REV. 237, 255-56 (1997) (debating whether the exercise of specific jurisdiction is proper when a nonresident defendant posts a Web site without additional activities and no continuous and systematic relations with the forum state); *see also* Yvonne A. Tamayo*, Who? What? When? Where?: Personal Jurisdiction and the World Wide Web*, 4 RICH. J.L. & TECH. 7, 7 (1998) ("Recent court decisions have demonstrated confusion and division in the judiciary's grappling with plaintiffs' attempts to establish personal jurisdiction over a defendant" with regards to the posting of Web sites").

148. *See* Thomas P. Vartanian, *A US Perspective on the Global Jurisdictional Checkpoints in Cyberspace,* <http://www.ilpf.org/confer/present99/vartanianpr.htm> ("Internet users generally do not know the location of the Internet resources that they access, and Internet service providers also cannot be certain from which jurisdiction the resources are accessed.") (last visited March 24, 2001); Rice, *supra* note 6, at 653 (stating that "[p]ersonal . . . jurisdiction should not be asserted based solely on the accessibility in the state of a passive Web site that does not target the state.").

ning a Web site or posting a news message that could well be characterized as global.[149] In one of the earliest Internet jurisdiction decisions, *Inset Systems Inc. v. Instruction Set Inc.* ("*Inset*"),[150] the judge reviewed federal case law and stated that personal jurisdiction on the Internet is an "all or nothing" proposition.[151] Presumably, a company could be liable for its Web site from anywhere in the world if its site is accessible from anywhere.[152] Alternatively, a virtual company may well protect itself from liability if it could "claim it lived" on the Internet but did not have substantial minimum contact with any forum.[153] Nevertheless, the *Inset* court declined jurisdiction holding that the South Carolina Company had not controlled their activities in the Oregon forum.[154] It also held that activities more than a Web site were needed to establish jurisdiction, thereby setting the *raison d'être* for subsequent cases.[155]

a. Liberal

These decisions suggest that a court may obtain personal jurisdiction over a non-resident defendant whose sole contact with the forum state arose through the Internet. Examples of this "liberal" standard include: *CompuServe, Inc. v. Patterson* ("*CompuServe*"),[156] *Zippo Manufacturing v. Zippo Dot Com, Inc.* ("*Zippo*"),[157] *Panavision International, L.P. v. Toeppen* ("*Panavi-*

149. *See* Edberg v. Neogen Corp., 17 F. Supp. 2d 104, 114 (D. Conn. 1998) ("The defendant had maintained a Web site advertising his products; a single sale in Connecticut had infringed the Connecticut plaintiff's patent, yet he was not subject to Connecticut jurisdiction."); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1292 (10th Cir. 1999) (holding that "[defendant's] remaining contacts with Utah consisted of a limited number of faxes and other written communications concerning plaintiff's account" and did not satisfy the "minimum contacts" requirements for specific jurisdiction); Mink v. AAAA Dev. LLC, 190 F.3d 333, 333 (5th Cir. 1999) (holding that defendant corporation's Web site was not subject to personal jurisdiction due to the fact that the "[w]ebsite provides users with a printable mail-in order form, [defendant's] toll-free telephone number, a mailing address and an [e]-[mail] address," but orders were not taken through Web site and this is just a passive advertisement).

150. 937 F. Supp. 161 (D. Conn. 1996).

151. 937 F. Supp. 161, 163-64 (D. Conn. 1996).

152. *See* Tamayo, *supra* note 147, at 11 (according to the *Inset* court, a court may find personal jurisdiction "solely based on maintenance of an Internet webpage."); Lawrence M. Hertz, *Advertising on the Web: Understanding and Managing the Risks,* 587 PRAC. L. INST. 571, 591 (2000) ("The law is presently unclear as to whether a Web site owner can be vicariously liable for material on sites to which its Web site is linked."); *see also Changes to Copyright Law Give All-Round Protection,* THE STRAIT TIMES (SINGAPORE), Jan. 1, 2000 (stating that anyone who wants to harm a Web site owner can complain and get the Web site shut down).

153. *See* Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder,* 107 YALE L.J. 1413, 1433 (1998) (discussing how analysts have predicted the popularity of virtual companies); Tamayo, *supra* note 147 (discussing that the defendant in *Inset* did nothing more than post advertising material and this was not an interactive Web site however personal jurisdiction was found); *see also* Swedlow, *supra* note 6, at 337 ("Legal authors, activists, and congressmen are all expressing their fear that the Internet could either flood courts with lawsuits or be an uncontrollable virtual frontier.").

154. Inset Systems Inc. v. Instruction Set Inc., 937 F. Supp. 161 (D. Conn. 1996).

155. Inset Systems Inc. v. Instruction Set Inc., 937 F. Supp. 161 (D. Conn. 1996).

156. 89 F.3d 1257, 1260 (6th Cir. 1996) (stating the Court "believed that CompuServe made a prima facie showing that the defendant's contacts with Ohio were sufficient to support the exercise of personal jurisdiction.").

157. 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997) (using a three-prong test to determine whether the exercise of specific personal jurisdiction over a defendant is proper).

sion"),[158] and *Maritz, Inc. v. Cybergold* ("*Cybergold*").[159] In each of these cases, Internet contacts with the forum state exceeded those of a passive Web site. Although the court struggled with a seemingly parallel case to *Burger King v. Rudzewicz*,[160] the *CompuServe* court held that since the defendant knew that CompuServe was an Ohio corporation, he therefore had knowingly reached out to and did business with CompuServe.[161] In addition, the dispute arose out of contracts made with a party in the forum state.[162] In *Zippo*, the defendant's site required participants to submit address information in order to receive a news service, therefore, the site operators knowingly transacted business with residents of the forum state, where the plaintiff was headquartered.[163] In *Panavision*, the defendant had set up his Web site as part of a "scam" to make the plaintiff purchase the domain name from him and as such had intentionally directed his actions toward the plaintiff's home state.[164] In *Maritz*, the defendant's site invited users to send and receive information about services it offered and the defendant company had sent information to over 100 users in the forum state.[165] The court stated that "[a]lthough [defendant] characterizes its activity as merely maintaining a 'passive Web site,' its intent is to reach all Internet users, regardless of geographic location."[166]

b. Conservative Standard

Decisions that constitute the conservative standard by not exercising jurisdiction embrace the notion that passive Internet sites are not sufficient to support jurisdiction. In *McDonough v. Fallon McElligott, Inc.* ("*McDonough*"),[167] a Minnesota defendant displayed the plaintiff's photographs on the Internet without plaintiff's consent, in possible violation of California copyright and unfair competition laws.[168] The Southern District of California stated:

158. 938 F. Supp. 616 (C.D. Cal. 1996) *aff'd*, 141 F.3d 1316 (9th Cir. 1998) (holding the defendant subject to personal jurisdiction in California).

159. 947 F. Supp. 1328 (E.D. Mo. 1996).

160. 471 U.S. 462 (1985).

161. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (stating that there was no doubt that Patterson "created a connection with Ohio").

162. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263-68 (6th Cir. 1996) (recognizing that Patterson entered into contracts in order to market his computer software which he knew would be governed by and construed according to Ohio law).

163. Zippo Manufacturing v. Zippo Dot Com, 952 F. Supp. 1119, 1124-28 (W.D. Pa. 1997) (stating that Dot Com knew that the electronic messages being transmitted were going to Pennsylvania).

164. Panavision International, L.P. v. Toeppen, 938 F. Supp. 616, 619-22 (C.D. Cal. 1996) *aff'd*, 141 F.3d 1316 (9th Cir. 1998) ("After Panavision notified Toeppen of its intent to use the "Panavision.com" domain name, Toeppan demanded $13,000 to discontinue use of the domain name).

165. Maritz, Inc. v. Cybergold, 947 F. Supp. 1328, 1329-32 (E.D. Mo. 1996) (stating that CyberGold would provide the users with an electronic mailbox which would allow them to receive advertisements based on their interests).

166. Maritz, Inc. v. Cybergold, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

167. 40 U.S.P.Q.2d (BNA) 1826, 1828 (S.D. Cal. 1996).

168. McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d (BNA) 1826, 1828 (S.D. Cal. Aug. 5, 1996) ("Plaintiff claims that defendants knowingly reproduced the photo for an Nikon camera advertisement, without seeking or obtaining permission").

> Because the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists. . . . Thus, [having] a Web site used by Californians cannot establish jurisdiction by itself.[169]

Similarly, in *Bensusan Restaurant Corp. v. King* ("*Bensusan*"),[170] the Southern District of New York held that the operator of a small Missouri jazz club, called "The Blue Note," did not subject it to New York's trademark laws by merely erecting an advertising site on the Internet.[171] The New York district court's holding in *Bensusan*, however, is directly at odds with the District of Connecticut's holding in *Inset*.[172] In *Inset*, a party utilizing the trademark of another company for its domain name and "800" number was subject to jurisdiction in the home of the party whose mark was infringed.[173] Also, in seeming conflict with *Bensusan* and most other U.S. interstate Internet jurisdiction cases, the Federal Circuit found in *Graphic Controls Corp. v. Utah Medical Prods., Inc.*,[174] that a Utah corporation's activities, which included having an open-access Web site for ordering goods, having an "800" number, having meetings in New York unrelated to the cause of action and sending "cease and desist" letters to party in New York, did not constitute minimum contacts with New York.[175] Finally, the Southern District of New York in *Hearst Corp. v. Goldberger,*[176] held that creating a commercial and interactive (not yet operational at the time of litigation) Web site that was available to and used by, New York residents was not in itself enough contact to subject a publisher to New York jurisdiction.[177] The District Court found that exercising jurisdiction would violate traditional notions of fair play and substantial justice while noting that the site operator did not purposefully direct his activities toward New York.[178]

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169. McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d (BNA) 1826, 1828 (S.D. Cal. Aug. 5, 1996).

170. 937 F. Supp. 295 (S.D.N.Y. 1996).

171. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) ("The Web site is a general access site, which means that it requires no authentication or access code for entry, and is accessible to anyone around the world who has access to the Internet").

172. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Inset Systems Inc. v. Instruction Set Inc., 937 F. Supp. 161 (D. Conn. 1996).

173. Inset Systems Inc. v. Instruction Set Inc., 937 F. Supp. 161 (D. Conn. 1996).

174. 149 F.3d 1382 (Fed. Cir. 1998).

175. *See* Graphic Controls Corp. v. Utah Medical Prods., Inc., 149 F.3d 1382 (Fed. Cir. 1998); Christopher W. Meyer, Note, *World Wide Web Advertising: Personal Jurisdiction Around The Whole Wide World*? 54 WASH. & LEE L. REV. 1269, 1300 (1997) (discussing how the *Graphics* courts decided that World Wide Web advertising contacts alone do not create a substantial connection with a forum and do not support the exercise of specific personal jurisdiction.); *see also* Thomas P. Vartanian, *A US Perspective on the Global Jurisdictional Checkpoints in Cyberspace,* 570 PRAC. L. INST. 861, 881 (1999) ("Most courts follow the reasoning set forth in Bensusan and Zippo and decline to assert jurisdiction based solely on Web site advertising.").

176. No. 96 Civ. 3620, 1997 WL 97097 at *11 (S.D.N.Y. Feb. 26, 1997).

177. Hearst v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 at *11 (S.D.N.Y. Feb. 26, 1997).

178. Hearst v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 at *16 (S.D.N.Y. Feb. 26, 1997).

c. A Closer Look

The cases indicate that a significant amount of uncertainty still exists among the various courts that have encountered Internet jurisdiction. Approaches differ greatly, even among some of the above cases having similar outcomes.[179] For example, the Ninth Circuit in *Cybersell* analogized a Web site with publishing in a widely distributed general-interest magazine.[180] On the other hand, the *CompuServe* court opined that a Web site was similar to putting an item (with the capacity to travel) into the stream of commerce by selling it locally.[181] Since there is no legislated approach to obtaining jurisdiction on the Internet, Judge McLaughlin best summarized the struggle of asserting jurisdiction based on Internet activities in *Zippo*:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.[182]

To this end, courts seem to be gravitating towards the so-called "sliding-scale" test,[183] where the level of interactivity of a Web site will be the determinative aspect—to the extent that personal jurisdiction over out-of-state defendants is concerned.[184] The Ninth Circuit in *Cybersell* held that the mere presence of a passive Web site on the Internet does not constitute the minimum contacts needed to subject a person to the jurisdiction of every court and that

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179. *See, e.g.,* Kalow, *supra* note 3, at 2260-65 (comparing the different approaches and outcomes of various cases). *See generally* Betensky, *supra* note 32, at 20 (discussing how several case address whether personal jurisdiction may be asserted over an international defendant); Rice, *supra* note 6, at 611 ("[S]ubsequent caselaw has shown that most courts are increasingly reluctant to grant jurisdiction merely on the ground that potential customers in the forum jurisdiction may be able to access the passive Web site.").

180. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997) (reasoning that Cybersell's web page is not comparable to a *National Enquirer* story libeling a famous entertainer which was circulated nationwide).

181. CompuServe Inc. v. Patterson, 89 F.3d 1257, 1263 (1996).

182. Zippo Manufacturing v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

183. In particular, the analysis in *Zippo Manufacturing Corporation v. Zippo Dot Com, Inc.* has been cited with increasing frequency and most importantly by the Ninth Circuit in *Cybersell, Inc. v. Cybersell, Inc.* (130 F.3d 414 (9th Cir. 1997)). *See* Marcelo Halpern, *Licensing Content on the Internet,* 620 PRAC. L. INST. 381, 404 (2000) (stating courts have applied the "sliding-scale" test but most still decide whether there is jurisdiction on a case-by-case basis); *see also* Angela R. Probasco, *due process Analysis in Millennium Enterprises, Inc. v. Millennium,* 40 JURIMETRICS J. 457, 463 (2000) (discussing the "sliding scale" test the Court looks to for finding purposeful availment).

184. *See* Zippo Manufacturing v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (where "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.").

"something more," either interactivity or purposeful direction, is needed to justify jurisdiction.[185] It is this "middle ground" that has proven most difficult in ascertaining the constitutional limitations of asserting long-arm jurisdiction.[186] Under the rule set forth in *Cybersell*, a court would decide whether a Web site creates minimum contacts by examining the degree to which the site is commercial and interactive and the degree to which the site is directed at citizens of the forum state.[187] The more interactive a site is (*i.e.*, the more exchange of information is possible between the site and the user) and the more commercial the site's nature, the more likely a court is to find that contact exists between the site owner and the distant user.[188] Similarly, the more the site is directed at an audience in the forum site or designed to harm citizens of the forum state, the more likely a court will be to find that purposeful availment has occurred.[189] The concerns, which may be levied against this trend, are as follows:

(i) on a technical level, an increasing number of Web sites will necessarily adopt more interactive features.

This may include personalization of content depending on the geographical location of a user. Where such personalization requires detailed and attentive responses from its users, it would be reasonable to conclude that the defendant indeed intended to avail itself of the "priv-

185. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-20 (9th Cir. 1997) (concluding that a Florida company's creation of a passive Web site with same name as a company domiciled in Arizona did not constitute purposeful availment of Arizona's laws, however, the court stated that a more active site might have triggered jurisdiction).

186. *See* Ann Alexander, *Forum Non Conveniens In The Absence Of An Alternative Forum,* 86 COLUM. L. REV. 1000, 1010 (1986) ("Legislatures may decline long-arm jurisdiction in some instances when they would be constitutionally permitted to assert it: the Court has explicitly held that no state is required by the due process clause to enact a long-arm statute which reaches to the limits of permissible minimum contacts jurisdiction."); Tu Phan, *Cybersell, Inc. v. Cybersell, Inc,* 14 BERK TECH. L.J. 267, 269 (1999) ("Looking to the applicable Arizona long-arm statute, the Ninth Circuit applied its traditional three-part test for specific jurisdiction."); *see also* Zachary Raimi, *Posting Information On Internet Does Not Establish Personal Jurisdiction,* 10 LOY. CONSUMER L. REV. 215, 216 (1998) (stating that the *Cybersell* court failed to find jurisdiction for a passive homepage).

187. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-20 (9th Cir. 1997); International Shoe v. State of Washington, 326 U.S. 310 at 316 (quoting Milliken v. Meyer, 311 U.S 457, 463 (1940)) (stating "but now . . . due process requires only that . . . if he [the entity over which the state is asserting jurisdiction] be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"). *See generally* Johns, Jr. & Keaty, *supra* note 44, at 69-71 (discussing specific and general jurisdiction in respect to a court's ability to assert jurisdiction over a party).

188. *See* Kevin M. Faulkner, *Personal Jurisdiction in Texas and Internet Web-Sites,* 4 TEXAS WESLEYAN L. REV. 31, 34 (1997) (stating that as the interactive possibilities increase between the user and owner of a Web site, personal jurisdiction will more likely be found); Rice, *supra* note 6, at 611 (stating courts are not likely to find jurisdiction when potential customers are targeted through a passive Web site); *see also Civil Procedure—D.C. Circuit Rejects Sliding Scale Approach to Finding Personal Jurisdiction Based on Internet Contacts—GTE New Media Services Inc. v. Bellsouth Corp., 199 F.3d 1343 (D.C. Cir. 2000),* 113 HARV. L. REV. 2128, 2130 (2000) (discussing the exercise of personal jurisdiction and how it depends upon the "commercial nature and quality of the defendant's Web site").

189. *See* Panavision International, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (stating that defendant's creation of a Web site with the domain name "panavision.com," as part of a plan to make the Panavision company pay for the right to use the domain name, constituted sufficient contacts with California for the purposes of a suit by the Panavision company, whose principal place of business was in California); Epps, *supra* note 147, at 262 (discussing how it is harder to find a defendant "targeted the forum state when the defendant merely posted a Web site online.").

ilege of conducting activities within the forum state."[190] However, if this personalization allows users to take advantage of value added services or so-called "portal sites"[191] providing mundane information like weather forecasts or the latest news, would it be fair to consider that the defendant had acted purposefully to subject himself to the jurisdiction of that forum?

(ii) the interactivity standard is also peculiar since the commercial value of a Web site is not necessarily dependant on such interactivity.

Lost within the interactivity test for Internet jurisdiction is the far-reaching scope of Internet commerce.[192] The still technologically and economically burgeoning Internet commerce encompasses the whole gamut of pre-sales and after-sales business and is not limited to just pre-sales information, warranties, troubleshooting guides, etc.[193] All of which can be said to be geo-

190. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958); Stephen E. Jones, *The Maryland Survey: 1995-1996: Recent Decisions: The United States Court of Appeals for the Fourth Circuit,* 56 MD. L. REV. 1147, 1162 (1997) (noting that "under Hanson, Stover needed to show that O'Connell 'purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"); *see also* Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 197-98 (1998) (stating that an essential element to establish minimum contacts is an act by defendant which avails him of the advantages of conducting activities within the forum state).

191. *See, e.g.*, GTE New Media Servs. v. Ameritech Corp., 21 F. Supp. 2d 27 (D.D.C. 1998) (denying the defendant's motion to dismiss for lack of personal jurisdiction because the continuous contact the defendant's interactive Web sites had with the forum district demonstrated purposeful invoking of the benefits and privileges of conducting activities in the forum district); *see also* Conseco, Inc. v. Hickerson, 698 N.E.2d 816, 820 (Ind. App. Ct. 1998) (holding that the defendant's discussion of the plaintiff organization in his Web site, without any other contacts, was not a minimum contact sufficient to allow the forum state to exercise personal jurisdiction over him); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory,* 88 CALIF. L. REV. 395, 489 (2000) (noting that Cyberians assert there should be a separate jurisdiction over cyberspace, otherwise it results in an imposition over Internet users who are not present within the forum).

192. *See* Frederick H. Bicknese, *Websites and Personal Jurisdiction: When Should A Defendant's Internet Selling Activities Subject it to Suit in a Plaintiff-Buyer's State?*, 73 TEMPLE L. REV. 829, 850 (2000) (noting that a chilling effect on Internet commerce would emerge if jurisdiction can be asserted in online ordering cases); Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, 43 (1997) (noting that the negotiation, payment on-line and delivery of goods contributes to the unique aspect of Internet commerce); *see also* Joanna M. Carlini, *Liability on the Internet: Prescription Drugs and the Virtual Pharmacy,* 2 WHITTIER L. REV. 157, 164 (2000) (speculating that the law is rapidly developing due to the rapid growth of Internet commerce over the past years and already applied to the Internet medium is law regarding contracts, jurisdiction, privacy, defamation, trademarks, and copyrights).

193. *See* George C.C. Chen, *A Cyberspace Perspective on Governance, Standards, and Control: Electronic Commerce on the Internet; Legal Developments in Taiwan*, 16 J. MARSHALL J. COMPUTER & INFO. L. 77, 108 (1997) (noting the importance of not misusing the customer data when used to provide after-sales service); Nancy R. Furnari, *Are Traditional Agency Principles Effective For Internet Transactions, Given the Lack of Personal Interaction?*, 63 ALB. L. REV. 537, 541 (1999) ("Internet commerce includes advertising, trading, and after-sales, as well as online exchange over both private and public networks."); *see also* Arthur J. Cockfield, *Balancing National Interests in the Taxation of Electronic Commerce Business Profits,* 74 TUL. L. REV. 133, 159-60 (1999) (noting that business models include reducing source-country offices necessary for customer support and after-sales services).

graphically neutral and devoid of any real "interactivity"—the point of reference required to orient oneself within the *Zippo* test.[194]

It may also be necessary to modify the test in *Zippo* to ensure that it is in line with the Supreme Court's decisions in *Asahi* and *World-Wide Volkswagen* interpreting Fourteenth Amendment protection of due process.[195] While there have been important developments relating to the multifaceted activities on the Internet and their impact on personal jurisdiction, there is much more that needs to be accomplished before consumers have the benefit of a predictable legal environment.[196] Furthermore, much of the case law of Internet related commercial activities thus far has involved only Web sites.[197] It may become necessary to expand discussion to a broader knowledge of the potential legal problems the Internet can present for businesses, consumers and the layperson, as new commercial prototypes for the Internet are implemented.

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194. *See* Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL'Y 4, 39 (1999) (noting that whether or not an Internet user should expect being brought into the court of another forum is determined by the *Zippo* test); Daniel P. Schafer, *Canada's Approach to Jurisdiction Over Cybertorts: Braintech v. Kostiuk*, 23 FORDHAM INT'L L.J. 1186, 1216 (2000) (stating that the *Zippo* test, which evaluates the contacts between the defendant and the forum, is recognized by many courts but others only find this test helpful when the case fits into one of the extremes of fully interactive or passive Web sites); *see also* Sarah E. Taylor, R.D., M.P.H. & Harold J. Feld, *Promoting Functional Foods and Nutraceuticals on the Internet*, 54 FOOD DRUG L.J. 423, 437 (1999) (noting that the *Zippo* test relieves the fear of being subject to universal jurisdiction for companies that use that Internet for commerce).

195. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (Finding that petitioners had no contacts, ties, or relations with the State of Oklahoma, the court reversed the state supreme court's denial of a writ of prohibition); Asahi v. Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) ("Asahi moved to quash Cheng Shin's service of summons, arguing the state could not exert jurisdiction over it consistent with the due process clause of the Fourteenth Amendment").

196. *See* Shane A. Orians, *Exercising Personal Jurisdiction on the Internet: The Misapplication of the Asahi Metal Decision to "Cyberspace,"* 24 OHIO N.U.L. REV. 843, 844-45 (1998) (noting that those involved in Internet commerce are faced with the uncertainty created by the complex analysis of personal jurisdiction); Pippin, *supra* note 28, at 126-27 (discussing how the uncertainties of how the law applies to Internet commerce results in hesitation of consumers in conducting on-line purchasing); *see also* A. Michael Froomkin, *Innovation and the Information Environment: The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49, 49 (1996) (discussing how Internet commerce risks not being spread until the resolution of uncertainties occurs).

197. *See* David Yan, *Virtual Reality: Can We Ride Trademark Law to Surf Cyberspace?*, 10 FORDHAM I. P., MEDIA & ENT. L.J. 773, 849-50 (2000) (noting that the expanding case law concerning personal jurisdiction issues in Internet cases is based on the degree and type of interactivity of the Web site in question); *see also* Wille, *supra* note 7, at 101 (noting that several cases have dealt with the problem of subjection to personal jurisdiction based on communications, specifically disputes which involve World Wide Web sites); *but see* Millennium Enterprises, Inc. v. Music LP, 33 F. Supp. 2d 907 (D. Ore. 1999) (finding that existence of a Web site does not create general jurisdiction over the defendant and noting an absence of case law supporting such a proposition).

2. New York's Long-Arm Statute

Long-arm statutes vary widely from state to state.[198] New York gives a restricted approach through its statute, which allows personal jurisdiction over those who transact business or commit a tortious act within the state of New York and over those who commit an act outside the state that could reasonably be expected to have a tortious effect within New York.[199]

Under the corporate presence doctrine, personal jurisdiction can be invoked if the defendant is "doing business" on a persistent and regular basis.[200] However, mere solicitation over

198. *See* Michael Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. ENVTL. AFF. L. REV. 297, 397 (1984) (noting that variations among states' long-arm statutes might act as a barrier to obtaining jurisdiction outside of a state's borders); Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts*?, 22 CAMPBELL L. REV. 341, 344 (2000) (recognizing the differences among the long-arm statutes in states); *see also* Edward S. Adams & Rachel E. Iverson, *Personal Jurisdiction in the Bankruptcy Context: A Need For Reform*, 44 CATH. U.L. REV. 1081, 1088-89 (1995) (noting that states' long-arm statutes vary in wording as some extend to constitutional limits while others are more limiting).

199. The New York long-arm statute provides that personal jurisdiction by acts of non-domiciliaries includes:

> a) Acts, which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary or his executor or administrator, who in person or through an agent:
>
> 1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he:
>
> i) regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered, in the state or
>
> ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4) owns, uses or possesses any real property situated within the state.

McKinney's C.P.L.R. § 302 (McKinney 2000).

See E.R. Lanier, *Invisible Barriers in United States Law to the Recognition and Enforcement of International Commercial Arbitral Agreements and Awards: The American Law of Personal Jurisdiction in Application to Judicial Proceedings to Stay Litigation, to Compel Arbitration and to Confirm Arbitral Awards*, 3 CROAT. ARBIT. Y.B. 139, 154 (1996) (noting that New York case law indicates that its long-arm statute only applies to a nonresident if they have personally committed an act within the forum to bring him under the state's jurisdiction); Timothy B. Nagy, *Personal Jurisdiction and Cyberspace: Establishing Precedent in a Borderless Era*, 6 COMMLAW CONSPECTUS 101, 109 (1998) (noting that the *Hearst* court strictly construed New York's long-arm statute so that a tortious act must be committed within the state for jurisdiction to apply).

200. McKinney's C.P.L.R. § 302 (McKinney 2000). *See, e.g.*, Arcata Graphics Corp. v. Murrays Jewelers & Distrib., Inc., 384 F. Supp. 469, 472 (W.D.N.Y. 1974) (finding the defendant Delaware corporation subject to jurisdiction in New York where merchandising association representing defendant acted in New York).

the Internet via a Web site or email is insufficient, even if a contract or sale results.[201] However, under the "transacting business" clause, jurisdiction is obtainable if the defendant transacts any business within the state or contracts anywhere to supply goods or services in the state.[202] Although mere solicitation over the Internet will not suffice, jurisdiction will nevertheless be invoked if additional contacts are demonstrated such as an actual sale or contract.[203] Under C.P.L.R. § 302(a)(2), jurisdiction will be established if a tort is committed within New York and the cause of action is based upon the tort.[204] However, torts committed over the Internet outside New York State will not invoke jurisdiction because "communications from outside New York by mail or telephone are generally not considered an act committed within the state for purposes of C.P.L.R. § 302(a)(2)."[205]

Finally, jurisdiction can be established if a tort is committed over the Internet outside New York State, if the defendant either:

i) regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in the state; or

ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.[206]

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201. *See, e.g.,* Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2d Cir. 1994) ("isolated phone call is an insufficient basis for personal jurisdiction"); Fiedler v. First City Nat'l Bank of Houston, 807 F.2d 315, 316-18 (2d Cir. 1986) (three telephone calls and one mailing into New York not sufficient for personal jurisdiction); Tripmasters, Inc. v. Hyatt Int'l Corp., 696 F. Supp. 925, 938 (S.D.N.Y. 1988) (the "'contacts' of [defendant] with plaintiff in New York by telex and telephone are plainly insufficient to confer jurisdiction," because "'New York courts have consistently refused to sustain § 302(a)(1) jurisdiction solely on the basis of defendant's communications from another locale with a party in New York.'").

202. C.P.L.R. § 302(a)(1) (McKinney 2000). *See* Furnari, *supra* note 193, at 562-63 (noting that the *Hearst* court held that for purposes of the long-arm statute, the defendant was not transacting business because there was not sufficient contacts to permit jurisdiction); *see also* Holly S. Haskew, *Schaffer, Burnham, and New York's Continuing Use of QIR-2 Jurisdiction: A Resurrection of the Power Theory*, 45 EMORY L.J. 239, 240 (1996) (using a hypothetical case to show the contacts with defendant were sufficient to meet in personam jurisdiction under *International Shoe* but were insufficient to meet New York's narrowly tailored "transacting business" prong).

203. C.P.L.R. § 302(a)(1) (McKinney 2000). *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (finding that advertising on the Internet is not transacting business or offering product for sale in New York); s*ee also* Colleen Reilly, *1. Intellectual Property: C. Trademark: 2. Personal Jurisdiction: a) Minimum Contacts: Bensusan Restaurant Corp. v. King*, 13 BERKELEY TECH. L.J. 271, 281 (1998) (discussing how the *Hearst* court held that an offer for sale does not trigger jurisdiction in New York because no sale has occurred).

204. C.P.L.R. § 302(a)(2) (McKinney 2000). *See* William E. Nelson, *Civil Procedure in Twentieth-Century New York,* 41 ST. LOUIS L.J. 1157, 1216 (1997) (noting the New York Court of Appeals' narrow reading to section 302, which gives a state jurisdiction over people committing a tort within a state, by holding that it was inapplicable to a nonresident manufacturer's product gave rise to injury in the state); *see also* George B. Reese, *Conflicts of Law,* 44 SYRACUSE L. REV. 167, 171-72 (1993) (noting that the Lancaster court held that jurisdiction was available through New York's long-arm statute of a foreign corporation which had committed a tort outside of the forum).

205. *See* Naxos Resources (U.S.A.) Ltd. v. Southam, Inc., 24 MEDIA L. REP. 2265 (C.D. Cal. 1996) (stating that publication via the Internet, LEXIS, and WESTLAW should not make a party vulnerable to jurisdiction in every state); *see also* Wilske & Schiller, *supra* note 1, at 150 (noting that in the *Hearst* case, jurisdiction did not exist when a tort was committed outside of New York because they did not derive enough revenue from the state).

206. C.P.L.R. § 302(a)(3) (McKinney 2000).

The first subparagraph requires business activity that is less than that required under the corporate presence doctrine, however similarly an Internet Web site alone cannot subject a person to New York's jurisdiction since commercial activity occurring in cyberspace does not occur in New York.[207] The second subparagraph conferring jurisdiction over an Internet user requires foreseeability and a showing that defendant is substantially involved in interstate commerce.[208] However, like subparagraph (i), minimum contacts may be lacking with respect to federal due process requirements, even if the statutory requirements are satisfied.[209]

Once the foreseeability and commerce requirements are both satisfied, the plaintiff could then assert jurisdiction under subparagraph (ii) of § 302(a)(3).[210] Even if jurisdiction could be established under the New York long-arm statute, however, recent cases have indicated that it may nevertheless violate the due process clause.[211] The conflict between C.P.L.R. § 302(a)(3)(ii) and federal due process requirements arises due to the 1966 New York statute—enacted well before *World-Wide Volkswagen* and *Asahi*, where the Supreme Court took a more restrictive view toward state long-arm jurisdiction than originally thought to exist under *International Shoe*.[212] Although C.P.L.R. § 302(a)(3)(ii) provides that the defendant should reason-

207. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998) (stating "that simply registering someone else's trademark as a domain name and posting a Web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another."); *see also* Terrence Berg, *The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305, 1335-36 (2000) (noting that just maintaining a Web site which is accessible to a forum's residents does not constitute physical presence for jurisdiction but conducting business by selling product over the Internet is sufficient).

208. *See* Rieder & Pappas, *supra* note 54, at 399 (noting that the *Bensusan* court held that the conduct did not fall under its jurisdiction because the defendant did not receive substantial revenue through interstate commerce and there was no assertion that defendant could foresee a possible infringement); *see also* Nagy, *supra* note 199, at 109-10 (noting that the *Bensusan* court held that there was no jurisdiction over the defendant because he did not receive substantial revenue from interstate commerce and the business was mainly local with regard to foreseeability).

209. *See* Coleman v. American Export Isbrandsten Lines, Inc., 405 F.2d 250 (2d Cir. 1968) (noting that the federal rule of civil procedure 4(f) did not authorize the court to exercise jurisdiction over a defendant lacking minimum contacts with the forum, but rather permitted the court to exercise jurisdiction to the extent permitted by due process, not the state's long-arm statute); Gregory M. Bartlett, *Civil Procedure*, 20 N. KY. L. REV. 605, 611 (1993) (citing the holding in *Wright v. Sullivan Payne Co.*, where the corporation did not meet the requirements of the due process clause because there was a lack of minimum contacts and thus personal jurisdiction could not be exercised); *see also* Phyllis F. Cramer, *Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham's Roadblock Via § 1404(a)*, 53 VAND. L. REV. 311, 332-33 (2000) (noting that in *Helicopteros Nacionales de Colombia v. Hall*, the court held that there was a violation of due process by asserting jurisdiction under Texas' long-arm statute because defendant lacked minimum contacts with the forum).

210. *See* Bensusan v. King, 937 F. Supp. 295, 299 (1996) (refusing to authorize jurisdiction on King because he did not "expect or reasonably expect the act to have consequences in the state and derive substantial revenue from interstate commerce.").

211. *See, e.g.,* Bensusan v. King, 937 F. Supp. 295, 297 (1996); Reilly, *supra* note 203, at 276 (noting that the *Bensusan* court held that personal jurisdiction over King would violate due process principles even though the state's long-arm statute could reach the defendant); *see also* Faulkner, *supra* note 188, at 59 (noting same).

212. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984) (considering the restrictive nature of New York's long-arm statute, in finding of personal jurisdiction would probably still have been unlikely); Jay C. Carlisle, *Civil Practice*, 44 SYRACUSE L. REV. 65, 93 (1993) (recognizing that New York's restricted long-arm statute does not go as far as many other states); *see also* Andrew E. Costa, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 472 (1998) (noting that New York gives a restrictive reading to its long-arm statute).

ably expect the act to have consequences in the state and derive substantial revenue from interstate or international commerce, it is very similar to the Oklahoma statute on which jurisdiction was predicated in *Volkswagen*.[213] The Court held that jurisdiction was not obtainable since the dealership did not carry on any business activities by closing sales or performing any services.[214] The Court, therefore, held the defendant had not availed itself to any of the privileges and benefits of Oklahoma law.[215] Consequently, the due process clause barred Oklahoma from exercising jurisdiction even though the defendant was receiving substantial revenue from interstate commerce and it was otherwise foreseeable that his actions could have consequences in Oklahoma.[216] Although C.P.L.R. § 302 has never been challenged before the Supreme Court based on minimum contacts, many New York courts have noted the existence of an inconsistency between the due process clause and subparagraph (ii).[217] For instance, the *Bensusan* court noted:

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213. *See* Phan, *supra* note 186, at 272 (noting that in *Volkswagen*, the court refused to exercise jurisdiction over the defendant because the defendant's contact with the forum only consisted of a car accident in Oklahoma); *see also The Luck of the Law*: *Allusions to Fortuity in Legal Discourse*, 102 HARV. L. REV. 1862, 1873 (1989) (noting that in *Volkswagen*, the court held that an Oklahoma could not exercise jurisdiction over the defendant whose only contact with the forum was taking a car bought into Oklahoma where an accident occurred). *See generally* Counts & Martin, *supra* note 19, at 1129 (discussing *Volkswagen* holding).

214. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286 (1980) (holding that defendant's lack of minimum contacts in Oklahoma renders personal jurisdiction there unjust regardless of the foreseeability that the product would find its way into Oklahoma); Sonia K. Gupta, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. CHI. LEGAL F. 519, 523 (1996) (noting that in Volkswagen, the court held that receipt of revenues for the use of the product in Oklahoma is too attenuated to permit jurisdiction by another forum); *see also* Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 398 (1998) (noting that in Volkswagen, the court held that there was no significant contact to trigger jurisdiction by driving a car into Oklahoma).

215. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (explaining that personal jurisdiction was not properly asserted over defendants whose product finds itself in the forum state, but who have availed themselves of none of the privileges and benefits of the forum state's law); *see also* Berg, *supra* note 207, at 1313 (noting that in Volkswagen, the court held that defendant did not avail himself of the privileges and protections of Oklahoma law).

216. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (rejecting arguments for jurisdiction based on the fact that the defendants obtained financial benefits and earn substantial revenue from cars used in Oklahoma); Gupta, *supra* note 214 (stating that, although in *Volkswagen* the defendant was receiving revenue from interstate commerce, the situation was far too attenuated to exercise jurisdiction); *see also* Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122, 1136 (1993) (although revenue was received from the forum state, this did not constitute jurisdiction).

217. *See* David L. Stott, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819 (1997) (discussing the inconsistent applications of due process on the Internet by citing the inconsistent holdings of CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); and Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)); *see also* Timothy B. Atkeson & Stephen D. Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act*, 79 A.J.I.L. 770, 782 (1985) (noting that the "direct effect" test used for minimum contacts analysis does not seem to be required by due process and is inconsistent with the statute). *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that a state court's exercise of personal jurisdiction over a defendant who lacks certain minimum contacts with the forum state is inconsistent with the due process clause of the Constitution).

> King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nation-wide or even worldwide but, without more, it is not an act purposefully directed toward the forum state [minimum contacts]. . . . [Thus] Bensusan's argument that King should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process.[218]

The *Hearst* court also noted a lack of minimum contacts by stating that:

> [A] finding of personal jurisdiction in New York based on an Internet Web site would mean that there would be nationwide personal jurisdiction over anyone and everyone who establishes an Internet Web site. Such nationwide jurisdiction is neither consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy. . . . [A]llow[ing] personal jurisdiction based on an Internet Web site "would be tantamount to a declaration that this Court and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service."[219]

Thus, if the Supreme Court ever grants *certiorari* to a case involving minimum contacts and the Internet, C.P.L.R. § 302(a)(3)(ii) may be struck down as a violative of federal due process rights.

B. Europe

According to Section 421 of the *Restatement (Third) of the Foreign Relations Law*,[220] the exercise of jurisdiction is generally reasonable if the party is a citizen, resident or domiciliary of the state, or if:

> g) the person, whether natural or personal, has consented to the exercise of jurisdiction;
>
> h) the person, whether natural or juridical, regularly carries on business in the state;
>
> i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
>
> j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct and foreseeable effect within the state, but only in respect of such activity;

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218. Bensusan v. King, 937 F. Supp. 295 (1996).

219. Hearst v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 at *10, 13 (1997).

220. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (2000).

> k) or the thing that is the subject of adjudication is owned, possessed or used in the state, but only in respect of a claim reasonably connected with that thing.[221]

Based on the *Restatement*, it is unlikely that foreign nations will have the sort of long-arm power over citizens of other nations as states have over citizens of other states within the United States.[222] Scholars have suggested that individual persons and small commercial entities, whose only contacts with a nation are on-line, are more insulated from international jurisdiction than they are from interstate jurisdiction.[223] This is largely speculative, however, because international Internet jurisdiction cases have thus far been rare and nations have not hesitated to pass laws conferring global jurisdiction for Internet activities.[224] Therefore, the following conventions are the most important European statements concerning jurisdiction: i) the Lugano Convention;[225] ii) the Brussels Convention;[226] iii) the Rome Convention;[227] and iv) the Hague Convention.[228] The Lugano, Brussels and Rome conventions are European Community (EC) conventions and are therefore enforceable against the members of the EC.[229] The Lugano and the

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221. *Id*.

222. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long-arm of personal jurisdiction over national borders"); Blauvelt, *supra* note 124, at 862 (noting that, in *Asahi*, the defendant would have been compelled to defend against a contract action in a foreign nation if not for the burden of a stretching long-arm statute); *see also* William A. Voxman, *Jurisdiction Over a Parent Corporation in its Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327, 335-36 (1992) (noting that weight must be given in assessing whether or not a foreign nation's long-arm statute should stretch over national borders).

223. *But see* Sheehan, *supra* note 214, at 426 (noting that a defendant may not be insulated from jurisdiction be refusing to close a deal with a person from the forum state who responds to Internet advertisements).

224. *See* Rieder & Pappas, supra note 54, at 380 (recognizing that it is uncommon for a court to extend jurisdiction over a defendant out of the forum except where a business functions exclusively over the Internet); Wilske & Schiller, supra note 1, at 123-24, 147 (discussing the legal uncertainty in cyberspace); see also Carl W. Chamberlin, *To the Millennium: Emerging Issues For the Year 2000 and Cyberspace*, 13 ND J. L. ETHICS & PUB. POL'Y 131, 132 (1999) (noting that people who use the Internet may subject themselves to foreign laws in foreign jurisdictions because the Internet can be accessed anywhere).

225. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, June 19, 1980, 80/934/EEC1980 O.J. (L 266) 1. [hereinafter "Rome Convention"].

226. CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989) [hereinafter "Lugano Convention"].

227. CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in 8 I.L.M. 229 (1969), as amended by 1990 O.J. (C 189) 1, reprinted as amended in 29 I.L.M. 1413 (1990) [hereinafter "Brussels Convention"].

228. CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL SALES OF GOODS, June 15, 1955, 510 U.N.T.S. 147 [hereinafter "Hague Convention"].

229. *See* Volker Behr, *Symposium on U.S.-E.C. Legal Relations: Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 213 (1994) (noting that the Brussels Convention is enforceable among the member states of the EC and the Lugano Convention which is enforceable among EC members and members of the European Free Trade Association); M. Cameron Gilreath, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANK. DEV. J. 399, 411-12 (2000) (noting that the Brussels Convention did not receive overwhelming support because the majority of states that signed were members of the EC and therefore judgments in one country were enforceable in other member states); *see also* Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 60 (1996) (noting that the Brussels and Lugano Conventions are enforceable among members of the EC).

Brussels Conventions are almost identical but differ insofar as the Lugano Convention extends the area of applicability to other European states, which have ratified the convention.[230] It should be noted that the Hague Convention is currently undergoing spirited revision, ostensibly because of the Internet's effects upon the international sale of goods and is not discussed.[231]

1. The Lugano and Brussels Convention

The countries that have signed the Brussels Convention or the Lugano Convention are governed by jurisdictional rules specified in the conventions.[232] According to Article 1 of the Lugano Convention, the Convention applies to civil and commercial matters, except from matters concerning the status or legal capacity of individual persons, heredity issues, bankruptcy, social security and arbitration.[233] Thus, for most electronic commerce over the Internet,

230. *See* Stanley E. Cox, "*Could A Treaty Trump Supreme Court Jurisdictional Doctrine?": Why Properly Construed due process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1182 (1998); Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 68 (1993) (noting that the Lugano Convention was a replica of the Brussels Convention except for a few changes made to update the provisions); *see also* Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems*, 45 KAN. L. REV. 9, 10 (1996) (noting that the Brussels and Lugano Conventions are almost identical and are enforced on the members of the EC).

231. *See* HAGUE CONVENTION ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, <http://www.hcch.net/e/workprog/jdgm.html> (discussing the preliminary document No. 12 on electronic commerce and international jurisdiction) (last visited March 24, 2001); Hon. Choon-ho Park, *Judicial Settlement of International Maritime Disputes—An Overview of the Current System*, 28 STETSON L. REV. 1035, 1035 (1999) (recognizing that The Hague Convention has been undergoing revisions toward settling international disputes); *see also* Diane Madeline Goderre, *Intellectual Property Law For the Twenty-First Century: Comment: International Negotiations Gone Sour: Precontractual Liability Under the United Nations Sales Convention*, 66 U. CIN. L. REV. 257, 258-59 (1997) (noting that, to gain global support of the Hague Convention, there has been an attempt to make revisions in order to create a uniform set of rules for international transactions).

232. *See* Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 121-22 (1998) (stating that, if the United States signed, they would be forced to assume jurisdictional rules of the Brussels and Lugano Conventions); Joachim Zekoll, *"Could A Treaty Trump Supreme Court Jurisdictional Doctrine?": The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1288-89 (1998) (noting that the Lugano and Brussels Conventions both lay down jurisdictional rules which fall into either the white list, which is exhaustive, or the black list which is not exhaustive); *see also* Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT'L L. 75, 80 (1998) (discussing the UK adaptation to the jurisdictional rules of the Brussels and Lugano Conventions which has resulted in international regulation).

233. *See* Lugano Convention at tit. II, § 2, art. 1; Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. And European Perspectives,* 6 ANN. SURV. INT'L & COMP. L. 1, 6 (2000) (providing a list of what actions would come under the Convention); *see also* Herbert Bernstein, *International Contracts in European Courts: Jurisdiction Under Article 5(1) of the Brussels Convention*, 11 TUL. EUR. & CIV. L.F. 31, 31-32 (1996) (noting that there is an application under consideration for recognizing judgments in civil and commercial matters which may apply globally).

the Convention will apply.[234] The main principle of the conventions is that the state—where the person is domiciled—is entitled to assert jurisdiction over that person.[235] The Brussels Convention precludes use of similar logic when the defendant is a consumer, the Brussels Convention prohibits tag jurisdiction.[236] Under the Brussels Convention, specified acts by a domiciliary of a contracting state subject the actor to jurisdiction.[237] In many instances, these actions parallel those upon which a U.S. court would rely to find purposeful availment.[238] Whether the person in question is domiciled within the member state or not will be decided upon according to the internal law of the state where he is sued.[239]

2. The Rome Convention

The main principle of the convention is a contracting party's freedom to choose which law shall apply to the agreement entered between them even if it is a country not bound by the

234. *See* Kevin Bloss, *Raising or Razing the e-Curtain? The EU Directive on the Protection of Personal Data,* 9 MINN. J. GLOBAL TRADE 645, 646 (2000) (explaining that the Directive will not only impact the European community, but also other countries who do business with the European Union); Kai Schadbach, *The Benefits Of Comparative Law: A Continental European View,* 16 B.U. INT'L L.J. 331, 356 (1998) ("[T]he notion of "trade between Member States" in art. 85 of the Treaty of the European Union, was an adaptation of the concept of the Commerce clause of the U.S. Constitution."); *see also* Francois Dessemontet, *The European Approach To Ecommerce And Licensing*, 26 BROOK. J. INT'L L. 59, 71 (2000) (discussing that under Article 5(1) of the Brussels and Lugano Conventions jurisdiction is determined based on the place of performance of the contract).

235. *See* Dessemontet, *supra* note 234 (discussing that under Article 5(1) of the Brussels and Lugano Conventions jurisdiction is determined based on the place of performance of the contract); Walter W. Heiser, *A "Minimum Interest" Approach To Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 940 (2000) (discussing the potential for defendants to be sued in their State of domicile); *see also* Russell, *supra* note 230, at 85 ("Under the domicile rule, a state has jurisdiction when a defendant is domiciled there. . . .").

236. Brussels Convention at tit. II, § 2, art. 13 and 14; Heiser, *supra* note 235, at 945 ("Article 3 prohibits jurisdiction based solely on service of process 'on the defendant during his temporary presence' within the forum."); Russell, *supra* note 230, at 72 (discussing the significance of the removal of tag jurisdiction in light of the enforcement of judgments); *see also* Ronald A. Brand, *Symposium On U.S-E.C. Legal Relations: Enforcement Of Judgments In The United States And Europe*, 13 J.L. & COM. 193, 203 (1994) (explaining that under Article 3 a defendant in a Contracting State cannot be sued in another Contracting State when the jurisdiction is exorbitant).

237. *See* Dessemontet, *supra* note 234 (discussing that under Article 5(1) of the Brussels and Lugano Conventions jurisdiction is determined based on the place of performance of the contract); *see also* Brand, *supra* note 236 (explaining that Title II of the Convention governs when a person living in a Member State is subject to the jurisdiction of another Member State).

238. *See generally* Schlosser, *supra* note 231, at 37 ("American courts are the plaintiff's heaven. In contrast, the European courts, particularly the German courts, are the defendant's heaven."); *but see* Heiser, *supra* note 235, at 941 (arguing that Convention's personal jurisdiction over nonresidents is more broad than the United States); Friedrich Juenger, *Federalism: Judicial Jurisdiction In The United States And In The European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1207 (1984) (discussing the uncertainty in whether foreign corporations are subject to the United States general jurisdiction when they do business with the United States on the local level)

239. Brussels Convention at tit. II, § 2, art. 3; Peter Gottwald, *Principles and Current Problems of Uniform Procedural Law in Europe Under the Brussels Convention*, 1997 St. LOUIS-WARSAW TRANS'L 139, 144 (1997) ("The Convention does not lay down rules by which to determine domicile but provides that the internal law of the respective state is to be applied."); Russell, *supra* note 230 (explaining that the definition of domicile is left to each Contracting State); *see also* Brand, *supra* note 236 (explaining that a judgment in one Member State must be recognized in another Member State).

Rome Convention.[240] This does not mean that contracting parties can avoid the mandatory rules of a country by contracting out of them; mandatory rules will apply if all parts of the contract are closely connected to that country.[241] Furthermore, consumers are excluded from the main principle above; consumers can enter into agreements regarding the choice of law, but likely will not be deprived of the mandatory rights granted by the legal order of the country of his domicile.[242] It is important to note that the Rome Convention may be subverted if the European Union acts through a Directive, asking member states to implement legislation preempting national law and any treaties.[243]

In 1995, the European Union adopted the European Union Data Protection Directive ("Directive").[244] In particular, Article 4 of the Directive governs choice of law rules and does

240. Rome Convention at tit. I, § 3, art. 2; Justin P. Fletcher, *An Argument for Ratification: Some Basic Principles of the 1994 Inter-American Convention on the Law Applicable to International Contracts*, 3 GA. J. INT'L & COMP. L. 477, 483 (1999) (one of the four principle parts of the Rome Convention is "[T]he autonomy of contracting parties to select a law to govern their contracts. . . ."); *see also* H. Matthew Horlacher, Notes: *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations,* 27 CORNELL INT'L L.J. 173, 176 (1994) (explaining that under Article 2 the law of the Convention will apply). *But see* Stephanie Francq, *Content: Conflicts Of Law, Comparative Law And Civil Law: The Impact of EC Legislation for a Service Provider Established in the United States*, 60 LA. L. REV. 1071, 1074 (2000) (explaining that under Article 5 consumers have the right to have a case heard in their own country).

241. Rome Convention at tit. I, § 3, art. 2; Horlacher, *supra* note 240 (explaining that under Article 2 states the law of the Convention will apply); *see also* Fletcher, *supra* note 240 (stating that one of the four principles of the Rome Convention is the "[A]pplicable law based on closest connection of contracts with countries. . . .").

242. Rome Convention at tit. I, § 3, art. 3-4 (mandating use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is effect the performance characteristic of the contract); *see also* Horlacher, *supra* note 240 ("[T]he drafters of the Convention considered buyers the traditionally weaker party and drafted a provision to give consumers the protection afforded by the mandatory rules of their habitual residence."); Fletcher, *supra* note 240, at 499 (Article 5 and 6 were enacted to protect the consumer).

243. *See* Daniel T. Murphy, *Human Rights International Law Symposium: Article: Subsidiarity And/Or Human Rights*, 29 U. RICH. L. REV. 67, 71 (1994) ("The doctrine of subsidiarity comes into play only in the middle position, in the areas of shared or concurrent competence where both the Community and the member states have the right to act."); *see also* Hugh O'Flaherty, Essay: *An Introduction To The Relationship Between European Community Law And National Law In Ireland*, 20 FORDHAM INT'L L.J. 115, 116 (1997) (stating that the power of the Commission to enact legislation is binding on the member states); Gottwald, *supra* note 239 (noting that, although each Member State decides its own procedural laws, they are still bound by the prohibition on exorbitant jurisdiction in Article 3 of the Brussels Convention).

244. *See* Paul M. Schwartz, *Symposium: Data Law And The European Union's Directive: The Challenge For The United States: European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REV. 471, 472 (1995) (describing the European steps taken in the processing of data were designed to ensure privacy on the computer); *see also* Fred H. Cate, Symposium: *Data Protection Law And The European Union's Directive: The Challenge For The United States: The EU Data Protection Directive, Information Privacy, and the Public Interest*, 80 IOWA L. REV. 431, 433 (1995) (discussing the requirement of EU member states to enact legislation for the processing of personal data); Joel R. Reidenberg, Symposium: *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771, 786 (1999) ("The choice of law clause in the European Directive assures that the standards of the local state applies to activities within its jurisdiction and the transborder data flow provision prohibits the transfer of personal information to countries that do not have 'adequate' privacy protection.").

not alter a country's ability to obtain jurisdiction but states what the choice of law will be.[245] According to Article 4 of the Directive, the choice of law will be determined by whether "the processing is carried out in the context of activities of an establishment of the controller on the territory of the Member State."[246] The article defines a "controller" as a person "which alone or jointly with others determines the purpose and the means of the processing of personal data" and "processor" as a natural or legal person "which processes personal data on behalf of the controller."[247] Therefore, depending on where the controller is established and irrespective of where the processing occurs, the law of the Member State where the control is established will apply.[248] If the controller is established in more than one of the Member States, then the controller has to comply with the strictest of the various applicable laws.[249] Where the controller is not established in the Community and the controller is in the Member State for more than mere transit, then the choice of law that governs will be that of the Member State.[250] The

245. *See* Peter Swire, *Of Elephants, Mice and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 995 (explaining that parties are free to decide what law will govern their contract even if the country is not bound by the Rome Convention); *see also* Reidenberg, *supra* note 244, at 786 ("[T]he choice of law clause in the European Directive assures that the standards of the local state applies to activities within its jurisdiction and the transborder data flow provision prohibits the transfer of personal information to countries that do not have 'adequate' privacy protection."); Dessemontet, *supra* note 234, at 74 ("[T]he choice of the law of the performance of the specific obligation under Article 4 of the Rome Convention can be explained by the fact that the provider of services or supplier of goods is organized in a given environment.").

246. *See* Swire, *supra* note 245, at 1006 (discussing the rules for the processing of data); *see also* Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States,* 33 IND. L. REV. 174, 183 (1999) (explaining that controllers must consult their supervisor prior to processing data).

247. *See* Swire*, supra* note 245, at 1006 (explaining the role of a controller); *see also* Nicole M. Buba, Note: *Waging War Against Identity Theft: Should The United States Borrow From The European Union's Battalion?* 23 SUFFOLK TRANSNAT'L L. REV. 633, 654 (2000) ("Those who collect and distribute information (processors) and create personal filing systems must abide by rules throughout the collection, storage, and dissemination process."); Cate, *supra* note 246 ("[U]nder the directive, 'controllers' include not only giant data processing companies, but also individuals who record the names and addresses of business contacts in their data organizers. . . .").

248. *See* Swire*, supra* note 245, at 993-1004 (discussing that where the data processing is carried out is used to determine what law will apply); *see also* Michael P. Roch, *Filling The Void of Data Protection In The United States Following The European Example*, 12 COMPUTER & HIGH TECH. L.J. 71, 81 (1996) (discussing the controller's power to enforce laws); Buba, *supra* note 247, at 653 (discussing the requirement of each Member State to establish the office of the controller).

249. *See* Judy Gladstone, *The Impact Of E-Commerce On The Laws Of Nations Article: The U.S. Privacy Balance And The European Privacy Directive: Reflections On The United States Privacy Policy,* 7 WILLAMETTE J. INT'L L. & DISPUTE RES. 10, 20 (2000) (discussing the hierarchy in the data processing system); Mathew S. Yeo & Marco Berliri*, Conflict Looms Over Choice of Law in Internet Transactions,* ELECTRONIC COM & L. REP. (BNA) No. 4, at 87 (1999) (describing the European approach and noting that it is based on the "country of origin" principle); *see also* Robert M. Gellman, *Can Privacy Be Regulated Effectively On A National Level? Thoughts On The Possible Need For International Privacy Rules*, 41 VILL. L. REV. 129, 145 (1996) ("Conflicts, overlaps and gaps in regulation can also arise within the same level of government because of changes in technology and the way in which laws are drafted."); Jennifer L. Kraus, Note: *On The Regulation Of Personal Data Flows In Europe And The United States*, 1993 COLUM. BUS. L. REV. 59, 64 (1993) (describing German privacy laws as strict).

250. *See* Gladstone, *supra* note 249 (discussing the hierarchy in the data processing system); *see also* Buba, *supra* note 247 ("[T]he distribution of information to third parties in non-member countries carries a specific set of regulations. Governments who wish to acquire personal information raise concerns over the Directive because they also must meet these standards in order to receive information."); Patrick J. Murray, *The Adequacy Standard Under Directive 95/46/EC: Does U.S. Data Protection Meet This Standard?* 21 FORDHAM INT'L L.J. 932, 960 (1998) (discussing the responsibilities of controllers under the Directive).

Directive states that a Member State can apply its own law where "the controller in not established on Community territory and, for the purpose of processing personal data, makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless the said equipment is used only for purposes of transit through the territory of the Community."[251]

It has been proposed that a more ambitious reading of Article 4 may speak to personal jurisdiction as well.[252] Web sites in the United States and anywhere in the world would not be subject to this jurisdiction so long as these Web sites would have no assets in Europe and did not target solicitation of European customers.[253] Otherwise, Article 4 clearly expands the jurisdiction of the European data protection law to those Web sites that under the Directive would be brought under the jurisprudence of the European Law for their data processing activities.[254] The Directive could potentially bring most commercial United States Web sites within the reach of the courts in Europe.[255]

The European Union has also adopted a Distance Selling Directive that comes into effect May 20, 2000 which covers telephone, mail order or Web site sales.[256] The Directive has its

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251. *See* Swire, *supra* note 245, at 1007 (discussing that a Member State's law must be applied when the controller is not established in the Community territory); *see also* Christopher Millard & Robert Carolina, *Commercial Transactions On The Global Information Infrastructure: A European Perspective*, 14 J. MARSHALL J. COMPUTER & INFO. L. 269, 281 (1996) (explaining that the controller while be considered the sender instead of the person providing the transmission service); George B. Trubow, Symposium: *Current Issues In Electronic Data Interchange: The European Harmonization of Data Protection Laws Threatens U.S. Participation in Trans Border Data Flow*, 13 J. INT'L L. BUS. 159 (1992) ("Article 4 provides that a member state's law controls records located within its territory or anyone who uses terminals within the member's territory to access records.").

252. *See* Swire, *supra* note 245, at 1007 (arguing that Article implicates personal jurisdiction); *see also* Fletcher, *supra* note 240, at 508 (explaining that "[T]he most closely connected to the contract" under article 4(2) determines what law is applicable); Heiser, *supra* note 235, at 946 (arguing that the Brussels Convention is "more responsive to the personal jurisdiction needs of modern litigation.").

253. *See* Swire, *supra* note 245, at 1007 (noting that many Web sites will not fall under the jurisdiction of the EU). *But see* Brand, *supra* note 236, at 203 (explaining that no protection against exorbitant jurisdiction is provided to a defendant not domiciled in a Contracting State); Wilske & Schiller, *supra* note 1, at 130 ("No State can seriously be expected to make the application of its penal laws depend on the software of a service provider operating in its territory.").

254. *See* Swire, *supra* note 245, at 1008 (discussing the clarity of when Article 4 would be applicable); *see also* Cate, *supra* note 246, at 180 (noting that if data originate in a Member State the directive is applicable); Gladstone, *supra* note 249, at 18 ("The EU Privacy Directive is designed to allow personal data to be sent or processed on the same terms within the EU with similar or adequate protections on data that is processed throughout the world.").

255. *See* Swire, *supra* note 245, at 1008 (questioning the application of the Directive to U.S. Web sites); *see also* Cate, *supra* note 246, at 179 ("Data ignores national and provincial borders. . . ."); Scott Foster, *Online Profiling Is On The Rise: How Long Until The United States And The European Union Lose Patience With Self-Regulation*, 41 SANTA CLARA L. REV. 255, 257 (2000) (urging the U.S. not to ignore the globalization of e-commerce).

256. *See* John R. Aguilar, *Over the Rainbow and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution*, 4 INT'L J. COMM. L. & POL'Y 1, 23 (2000) (discussing the minimum requirements of the Directives); *see also* Dessemontet, *supra* note 234, at 67 ("The right to rescind a distance sale within seven days will be mostly inapplicable to the on-line licensing under the Directive on Distance Contracts. . . ."); Millard & Carolina, *supra* note 251, at 284 (discussing some of the items covered under the Directive including newspapers and magazines).

own choice of law clause and offers protection for consumers under the EU law despite the fact that the seller may want to contract out of the EU law and instead specify United States or some other non-EU law.[257]

3. Analysis of the Conventions

From the descriptions above, it is obvious that the conventions could be divided into two groups: a) rules regarding transactions between business entities; and b) rules regarding transactions between a consumer and a business entity.[258] Agreements between businesses in the course of carrying out their respective trades have the freedom to contract whatever jurisdiction will hear and whose laws will apply in cases of conflict.[259] As a result, these conventions allow for predictability and legal certainty for those doing business in the EU, even for the potential problems posed by the international character of Internet transactions.[260] Furthermore, when it comes to consumers, EU law protects consumers from potentially abusive jurisdictional and choice of law clauses.[261] This protection also extends to the enforcement of consumer rights, granting consumers the benefit of bringing possible legal proceedings in the courts of their

257. *See* Aguilar, *supra* note 256, at 18 (discussing the need by consumers for legal remedies); *see also* Dessemontet, *supra* note 234, at 71-72 (arguing the seller should be subject to the jurisdiction of the consumer's country); Christopher T. Poggi, Note: *Electronic Commerce Legislation An Analysis of European and American Approaches to Contract Formation*, 41 VA. J. INT'L L. 224, 246 (2000) ("Certain mandatory rules of a nation's substantive law, such as consumer protection rules, may not be opted out of where the contract is connected with only one nation.").

258. *See* Puurunen, *supra* note 86, at 694 ("[T]he difficulty with consumer transactions in many countries concerns their higher degree of dependence on national law and authorities than business-to-business transactions."); *see also* Horlacher, *supra* note 240, at 176 (explaining that the law stated by the Convention will apply); David J. Schwartz, Note: *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, 28 GA. J. INT'L & COMP. L. 527, 533 (2000) (explaining that the intent behind the Injunction Directive is to protection consumers).

259. *See* Aguilar, *supra* note 256 ("[S]ome self-regulation through professional codes of conduct" is permissible); *see also* Isaak I. Dore, *Choice of Law Under The International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 539 (1983) (parties under the Convention are permitted to exclude or change the governing law). *But see* Poggi, *supra* note 257, at 228 (explaining the need for new legislation in order to harmonize national laws).

260. *See* Julia M. Fromholz, *Berkeley Technology Law Journal Annual Review of Law and Technology: VI. Foreign & International Law The European Union Data Privacy Directive*, 15 BERKELEY TECH. L.J. 461, 477-82 (2000) (discussing several ways to ensure that the European requirements are met by non-member states); *but see* Poggi, *supra* note 257, at 228 (explaining the need for new legislation in order to harmonize national laws); Puurunen, *supra* note 86, at 696 (explaining that "[L]egal uncertainty arises from the clash between two or more national laws that do not serve the interests of governments, traders or consumers.").

261. *See* G. Chin Cho, *Conflict of Laws and the International Licensing of Industrial Property in the United States, the European Union and Japan*, 22 N.C.J. INT'L LAW & COM. REG. 147, 155 (1996) (explaining that a consumer is always entitled to the protection by his or her domiciled country even though the parties may have exercised their right to choose the law and forum for the resolution of a disputed claim); Poggi, *supra* note 257, at 236 (arguing that parties should have the right to choose the law and forum for the resolution of a dispute stemming from an electronic contract).

home country and applying the law of that same country.[262] The extraterritorial applicability of these conventions further extends the protection to embrace goods and services sold from outside the EU.[263]

The existing conventions provide an adequate basis for assessing jurisdictional and choice of law questions posed by the Internet due to the simple fact that the conventions merely concern themselves with the physical location of the contracting parties.[264] It should be noted, however, that the conventions only apply directly to the EU countries that have ratified the various conventions.[265] Consequently, this leaves the rest of the world outside the jurisdictional and choice of law solutions envisaged within the EU conventions and directives.[266] Nevertheless, these conventions can serve as a model on which the United States can use to render Internet shopping similar to conventional mail order shopping.[267]

4. Cases and Circumstances

As alluded to above, courts in the United States have bootstrapped Internet cases into the same jurisdictional rules used for non-Internet cases, with the result that U.S. courts lean toward limiting the application of jurisdiction and only regulating sites that intentionally direct

262. *See* Aguilar, *supra* note 256 (discussing the European Union's opposition to the freedom to contract); *see also* Poggi, *supra* note 257, at 236 (arguing that in consumer transactions "[T]he domestic laws that govern electronic commerce should be harmonized."). *But see* Schwartz, *supra* note 258, at 534 (explaining that wrongdoers avoid prosecution by relocating to another member that has more lenient laws).

263. *See* Aguilar, *supra* note 256, at 22 (discussing the implications of the Directive for the United States); *see also* Francq, *supra* note 240 ("Article 5 provides a special protection for consumers which enables them to demand application of the mandatory laws of their country of habitual residence, notwithstanding the law designated in the contract."); Poggi, *supra* note 257, at 229 (discussing the mechanics of an on-line purchase).

264. *See* Heiser, *supra* note 235 (explaining that a defendant may only be sued in their State of domicile); Poggi, *supra* note 257, at 247 (stating that people and legal entities can only be sued in their State of domicile).

265. *See* Jean M. Sera, Note: *The Case For Accession By The European Union To European Convention For The Protection Of Human Rights*, 14 B.U. INT'L L.J. 151 (1996) ("The European Convention and the judgments of the ECHR are binding on all members of the Council of Europe which have ratified the European Convention."); *see also* Heiser, *supra* note 235 (explaining that the Convention is binding on Contracting States and preempts each member state's laws on personal jurisdiction); Thomas C. Vinje, *Symposium On U.S.-E.C. Legal Relations: Recent Development In European Intellectual Property Law: How Will They Affect You And When?* 13 J.L. & COM. 301, 309 (1994) ("The Draft Database Directive limits the protection of the unauthorized extraction right only to databases that are created by nationals or residents of the EU Member States. . . .").

266. *See* Schwartz, *supra* note 258, at 530 (explaining that member states are required to enact legislation to protect consumers); *see also* Millard & Carolina, *supra* note 251, at 277 ("Individuals not habitually resident and firms not established in an EU Member State would not initially, and might never, benefit from the sui generis right."). *But see* Bloss, *supra* note 234 (explaining the effect the Directive will have on nonmember States that want to do business with member States).

267. *See* Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 114 (1996) (arguing for the harmonization of cyberspace laws); *see also* Dan L. Burk, *Trademark Doctrines for Global Electronic Commerce*, 49 S.C. L. REV. 695, 696 (1998) ("Similarly, under a Koffler analysis, the Internet may make U.S. markets part of an online user's natural zone of expansion, much as outlined above for domestic common-law users."). *But see* Joshua B. Konvisser, *Coins, Notes, And Bits: The Case For Legal Tender On The Internet,* 10 HARV. J.L. & TECH. 321, 323 (1997) ("Though these sellers are reaching their customers electronically, their ties to the physical delivery mechanism prevent them from utilizing the full power of the Internet.").

themselves into the U.S. in some way.[268] Other countries have not limited their courts in the same way.[269] Although not many reported decisions are available, a number of lawsuits have arisen in which personal jurisdiction on the Internet has been a peripheral issue.[270]

a. Germany

Germany has passed a sweeping law that subjects any Web site accessible in Germany to German law.[271] An Internet Access Provider may be held liable for violations of German content laws if the providers were aware of the content and were reasonably able to remove the content.[272] This followed the settlement of a well-publicized incident between Germany and CompuServe, in which German authorities threatened to prosecute CompuServe for allegedly pornographic news groups.[273] In late 1995, CompuServe was indicted in Germany for the vio-

268. *See* Berg, *supra* note 207, at 1318-9 (discussing the decision in GTE New Media Services, Inc. v. BellSouth Corp., which held that Internet contacts did not constitute minimum contacts); Shurtz, *supra* note 52, at 1664 (discussing possible liability incurred by Internet users). *See, e.g.,* Playboy Enterprises v. Chuckleberry Publishing, Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (explaining that an Italian company's Web site open to U.S. viewers to download violated injunction against Italian company's publishing in U.S).

269. *See* Heiser, *supra* note 235, at 941 (arguing that the Convention's definition of personal jurisdiction is broader than the United States definition of personal jurisdiction); *see also* Kris Gautier, *Electronic Commerce: Confronting the Legal Challenge of Building E-Dentities in Cyberspace*, 20 MISS. C.L. REV. 117, 130-31 (1999) (the United States played a role in motivating Europe to "work toward" laws for electronic commerce); Gottwald, *supra* note 239 ("The Convention does not lay down rules by which to determine domicile but provides that the internal law of the respective state is to be applied.").

270. *See* Hamilton, *supra* note 34, at 523 ("In the past few years, a number of lawsuits involving the use of the Internet have arisen."); *see also Development: The Law of Cyberspace: VI. Cyberspace Regulation and the Discourse of State Sovereignty, supra* note 7, at 1703 (arguing that the lack of law in cyberspace has some advantages). *But see* Ryan Yagura, *Does Cyberspace Expand The Boundaries Of Personal Jurisdiction?* 38 IDEA 301, 330 (1998) (explaining that while new liability issues have arisen from the regulation of cyberspace, the laws for personal jurisdiction are still applicable to cyberspace).

271. *See* Wendy R. Leibowitz, *National Laws Entangle The 'Net: It's A Small, Small, Litigious Web*, 19 The NAT'L L.J. 44 (1997) (discussing various prosecutions by German authorities); Kristina M. Reed, *From The Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 12 TRANSNAT'L LAW. 543, 547 (1999) ("Current legislation in Germany seems to be at odds with the European view of freedom of speech: 'to protect the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source.' ").

272. *See* The German Teleservices Act, *The Teleservices Data Protection Act was enacted as Art. 2 of the Information and Communication Services Act* (Informations und Kommunikationsdienstegesetz), FEDERAL LAW GAZETTE (BUNDESGESETZBLATT) 1997 I 1870 ("[T]he term providers means natural or legal persons or associations of persons who make available teleservices or who provide access to the use of teleservices."); Kim L. Rappaport, Notes & Comments: *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 793 (1998) (discussing the ramifications for the illegal use of the web including criminal prosecution); Reed, *supra* note 271, at 559 (explaining that if providers know that the law has been violated providers must try to block access to the unlawful information in cyberspace).

273. *See* Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1017 (1998) (noting that "Germany found a temporary solution by forcing CompuServe to block particular sites or face fines and imprisonment."); *see also* Rappaport, *supra* note 272, at 765 (discussing the investigation of CompuServe for violation of Germany's anti-pornography law); Danyll Wills, *Internet Firm Eases Sex Ban*, S. CHINA MORNING POST, May 13, 1997, at 6 ("In attempting to comply with German law, CompuServe blocked the sites for all its subscribers around the world.").

lation of Germany's obscenity laws.[274] Although CompuServe had no physical presence in Germany and jurisdiction was not conclusively established, CompuServe voluntarily blocked access to the alleged offensive material worldwide (due to technological limitations on blocking access only to German subscribers) rather than face prosecution.[275] Later, CompuServe restored access and distributed free software for blocking pornography.[276] This resulted in CompuServe's indictment for aiding in the distribution of pornography and computer games and prosecutors charged that CompuServe did not do enough to block Germans from accessing the material.[277] Eventually, CompuServe again denied access to the pornography to avoid prosecution.[278]

b. United Kingdom

In *Mecklermedia Corp. v. DC Congress*,[279] the High Court of the United Kingdom in the pre-trial stage of an international trademark dispute involving the Internet accepted jurisdiction signifying it as the first decision in the United Kingdom.[280] Mecklermedia, a United States company, ran conferences throughout the World under the name "Internet World" and its Web site gives details of its conferences and publications, which include a magazine called

274. *See* Rappaport, *supra* note 272, at 791 ("German prosecutors argued that because CompuServe had access to screening software, the company had the opportunity to block the offending material, but failed to do so."); *see also* Hanley, *supra* note 273 (Germany's temporary solution to the dissemination of pornographic material by CompuServe was to block CompuServe's site); Wills, *supra* note 273 (discussing CompuServe's block on sexually explicit sites).

275. *See* Mark Konkel, Note*: Internet Indecency, International Censorship, and Service Providers' Liability*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 453, 455 (2000) ("CompuServe USA responded by closing off all access to the newsgroups in question."); *see also* Shamoil Shipchandler, Note*: The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 445 (2000) (discussing how the threat of prison prompted CompuServe to block access to the site); Amber Jene Sayle, Note *Net Nation And The Digital Revolution: Regulation Of Offensive Material For A New Community*, 18 WIS. INT'L L.J. 257, 271 (2000) (discussing the fact that in response to potential prosecution by German officials CompuServe denied access to subscribers on a world-wide level).

276. *See* Sayle, *supra* note 275 (stating that Compuserve provided parents with "installing mechanisms" to prevent children from viewing material considered inappropriate); *see also* Konkel, *supra* note 275, at 459-60 (explaining that in providing blocking software "CompuServe hoped to demonstrate both its willingness to abide by German law and its commitment to providing its users elsewhere with continuing access to its newsgroups."). *But see* Lothar Determann, *Case Update: German CompuServe Director Acquitted on Appeal*, 23 HASTINGS INT'L & COMP. L. REV. 109, 118 (1999) (explaining that blocking is not acceptable when only a few files posted are illegal).

277. *See* Determann, *supra* note 276, at 111 (discussing the fact that under German law the dissemination of pornography over the web is unlawful regardless of whether it is distributed to adults or children); *see also* Konkel, *supra* note 275, at 454 (explaining that the blocking of the CompuServe site was a temporary solution); Shipchandler, *supra* note 275 ("Germany tacitly rejected screening software as a viable means of regulating the Internet.").

278. *See* Wilske & Schiller, *supra* note 1, at 130 (discussing the CompuServe incident in Germany); *see also* Determann, *supra* note 276, at 118 (discussing that when only a few files are illegal blocking is not acceptable); Shipchandler, *supra* note 275 ("Germany tacitly rejected screening software as a viable means of regulating the Internet.").

279. All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997).

280. *See id.* (accepting jurisdiction in the pre-trial states of the dispute); *see also* Donald E. Biederman, Rob Hassett & Jeffrey D. Neuburger, *Counseling Clients in the Entertainment Industry*, 598 PLI/PAT 469, 613 (2000) (discussing how the trial court asserted jurisdiction); Alex Gigante, *Internet Publishing: The Legal and Business Issues as Traditional Publishing*, 601 PLI/PAT 309, 322 (2000) ("The [Mecklermedia trial] court sustained personal jurisdiction over the German defendant.").

Internet World, published in the U.S. and Europe.[281] A rival German company, DC Congress, launched a similar operation, also calling its version "Internet World."[282]

Mecklermedia initiated an action in the English High Court for trademark infringement, arguing that the court had jurisdiction because the defendant had promoted its show in English through mailings to U.K. recipients and on its Web site (whose domain name incorporates the words "Internet World").[283] The defendant argued that the case should be heard in Germany, since its Web site was hosted there, its promotional material had been prepared there and its services had been advertised on the Internet from Germany.[284] The question was whether the action should take place "where the computer activity . . . originated [Germany] or where the allegedly infringing material was received [England]."[285] The Court ruled that the case should be heard in the English court, because "normally the most convenient forum for deciding an English trademark . . . is this court."[286]

c. Sealand

Sealand is a country—or, at least, declares to be one—that proclaims to be a "data haven."[287] This "country" consists of a small concrete platform anchored a few miles off the En-

281. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (stating that Mecklermedia ran conferences under the name "Internet World"); *see also* Noel D. Humphreys, *Jurisdiction Goes Global*, 21-DEC PA. LAW. 59, 59 (1999) (discussing how Mecklermedia sued for the use of the name "Internet World"); David Perkins, David Rosenberg & Clifford Chance, *Discovery in Foreign Jurisdiction: Enforcing Judgments Abroad*, SE32 ALI-ABA 191, 205-06 (1999) (stating that the name "Internet World" was used by Mecklermedia).

282. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (stating that a rival company used the same name when launching a similar program); *see also* Dale M. Cendali, *Personal Jurisdiction and the Internet*, 564 PLI/PAT 79, 101 (1999) (discussing DC Congress's use of the name "Internet World"); Humphreys, *supra* note 281 (stating that the DC Congress used the name on the World Wide Web).

283. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (stating that Mecklermedia started a lawsuit in the English High Court); *see also* Cendali, *supra* note 282 (discussing how Mecklermedia started their action in the United Kingdom); Humphreys, *supra* note 281 (stating that Mecklermedia sued the German corporation in the United Kingdom).

284. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (stating that the Defendant wanted the case to be heard in Germany). *See generally* Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 833 (N.D.Ill. 2000) (stating that an American court should look at the Web site's purposeful availment and minimum contacts when considering whether jurisdictional requirements are met); Miller v. Asensio, 101 F. Supp. 2d 395, 405 (D.S.C. 2000) (finding jurisdictional requirements were not met when defendants only posted information on a site without providing contact information or other information).

285. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (questioning where the lawsuit should take place).

286. *See* All E.R. 148, 1997 WL 1104749 (Ch.1998) (U.K. High Court of Justice, Mar. 6, 1997) (providing that the *Mecklermedia* court found that the case should be heard in the English court).

287. *See* Simson Garfinkel, *Welcome to Sealand. Now Bugger Off*, WIRED <http://www.wired.com/wired/archive/8.07/haven.html> (discussing the plans to turn Sealand into "a fat-pipe Internet server farm and global networking hub. . . .") (last visited Mar. 23, 2001); *see also Around the Legal Web Sites*, 5 NO. 5 INTERNET L. RESEARCHER 8 (2000) (stating that through its agreement with HavenCo, Sealand will become a "data haven" and therefore outside general regulatory controls). *See generally* Samuel Pyeatt Menefee, *"Republics of the Reefs:" Nation-Building on the Continental Shelf and in the World's Oceans*, 25 CAL. W. INT'L L.J. 81, 81 (1994) (questioning Sealand's status as a country because its representatives have no votes in the United Nations).

glish coast.[288] According to the official Web site of the principality of Sealand, the country was created in September of 1967 when an individual occupied the platform and declared it an independent country.[289] The purpose of this "haven" is to house Internet servers that operate beyond the jurisdiction of traditional governments.[290] The intent is that the company's Internet operations hosted on the servers will not be subject to various states' laws.[291] Whether or not this plan will actually work is not the real problem. The fact that it is currently being pursued indicates the wary nature of establishing jurisdiction on the Internet.

V. Choice of Law

Since the inherent nature of the Internet presumably allows several sovereigns to have jurisdiction over the multitude of transactions in their territory, another key question emerges—whose law should be applied?[292] As discussed previously, choice of law is an especially important issue in the case of the Internet because the source of the punishable act may be located in a jurisdiction where the committed activity is legal.[293] This enforcement issue has been traditionally dealt with extradition treaties, where the conduct proscribed is defined and all the signatories have enforced the treaty through their jurisdiction to prescribe in the same

288. *See* Menefee, *supra* note 287, at 109 ("[Sealand is] a former British anti-aircraft platform situated approximately eight nautical miles off the southern coast of Great Britain."); *see also* Monroe Leigh, *Creation of a New State—Requirements Under International Law—Effect of Acquisition of Nationality of New State Purportedly Established on Man-Made Island*, 77 AM. J. INT'L L. 160, 160 (1983) (stating that Sealand was erected by the United Kingdom as an anti-aircraft platform); *Around the Legal Web Sites*, 5 No. 5 INTERNET L. RESEARCHER 8 (2000) (stating that Sealand is a former WWII gun platform).

289. *See* Leigh, *supra* note 288 (stating that Major R.B. took possession of the country in 1967 proclaiming it Sealand); Menefee, *supra* note 287, at 107 (discussing when Sealand was declared to be an Independent Kingdom).

290. *See The Little Data Haven That Could*, (last modified June 5, 2000) <http://civilliberty.miningco.com/newsissues/civilliberty/library/weekly/aa060500a.htm> (last modified June 4, 2000) (discussing how information in Sealand's data haven would be subpoena proof). *See generally* Declan McCullagh, *A Data Sanctuary Is Born,* <http://www.wired.com/news/business/0%2C1367%2C36749%2C00.html> (stating that Sealand's server is more private than anywhere else in the world) (last visited Mar. 23, 2001); Mark Ward, Offshore and Offline, <http://news.bbc.co.uk/hi/english/uk/newsid_778000/778267.stm> (last modified June 5, 2000) ("Sealand has no laws governing data traffic.").

291. *See* David Canton, *Creating a Country to Avoid Jurisdiction* (last modified June 16, 2000) <http://www.globalpolicy.org/nations/sealand.htm>. *See generally About HavenCo,* <http://www.havenco.com/about_havenco/> (stating that user's data is secure from legal action) (last visited Feb. 20, 2001); *Welcome to Sealand. Now Bugger Off,* <http://srd.yahoo.com/goo/sealand+Internet+no+laws/3/*http://www.wired.com/wired/archive/8.07/haven_pr.html> (stating that companies can choose to abide by Sealand's laws) (last visited Feb. 20, 2001).

292. *See* Johnson & Post, *supra* note 2, at 1374-75 (presenting argument asserting a right to regulate whatever a sovereign's citizens may access on the Net).

293. *See* Christopher P. Beall, Comment, *The Scientological Defenestration of Choice-of-Law Doctrines For Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361, 365 (1997) ("Choice-of-law issues arise with respect to torts committed via the Internet because interstate communication is so much more prevalent and effortless in that network of networks."); *see also* Swire, *supra* note 245, at 991 (stating that geography becomes meaningless when considering minimum contacts of the Internet for jurisdictional purposes); American Bar Association, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1873 (2000) ("[A]s with respect to personal jurisdiction, that the Internet's inherently global reach justifies special efforts to reduce uncertainty with respect to choice of law.").

terms.[294] However, a problem arises when there are different standards governing the same activity in different nations.

Whether a court gets the chance to apply its own choice of law rule depends on whether that court has personal jurisdiction.[295] If it adjudicates the case and its choice of law rule rejects application of the substantive law of another sovereign and causes substantive law of the forum sovereign to be applied, the efficacy of that decision depends on whether the court had personal jurisdiction.[296] "If the judgment debtor (usually the defendant) has no assets within the forum sovereign state, the judgment must be enforced in a sovereign state where the judgment debtor does have assets."[297] The courts of that sovereign are "entitled to reassess the question of personal jurisdiction in deciding whether to recognize and then to enforce the first judgment."[298] If the courts in the alternative sovereign determine that the original court lacked personal jurisdiction, the "choice of law made by the first court is defeated."[299]

A good example of choice of law issues on the Internet is hate speech.[300] Under German law, hate speech is prohibited and is so broadly defined that it would encompass speech considered legal and protected by the First Amendment in the United States.[301] If hate speech material displayed on a web server in New York, where the expression is protected, and accessed by a German, which law would apply . . . that of Germany or the United States? Consequently,

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294. *See generally* Jon C. Cowan, Note, *The Omnibus Diplomatic Security and Anti-Terrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice*, 21 CORNELL INT'L L.J. 127, 131 (1988) (stating that most counter-terrorist conventions require signatories to legislate in order to enable their courts to exert jurisdiction over the specific offenses); Michael J. Dinga, Note, *Extradition of RICO Defendants to the United States Under Recent U.S. Extradition Treaties*, 7 B.U. INT'L L.J. 329, 340 (1989) (stating that the process of extradition is becoming more formalized).

295. *See generally* American Bar Association, *supra* note 293 (asserting that it is important to try to clarify the reaches of personal jurisdiction in regards to the Internet which reaches so far); Mirzaian, *supra* note 2, at 103 (stating that no courts can properly claim personal jurisdiction over "cyberspace" until laws regulating such jurisdiction are enacted); Yagura, *supra* note 270, at 301-02 (stating that since Internet sites have no physical location, choice of law questions become a complicated issue).

296. *See* American Bar Association, *supra* note 293 (recognizing that, in the past, courts did not choose the law of their own jurisdiction, rather they used substantive law from the jurisdiction that the cause of action arose).

297. American Bar Association, *supra* note 293, at 1874.

298. *Id*.

299. *Id*.

300. *See* Swire, *supra* note 245, at 1019 (discussing the problems surrounding choice of law issues and hate speech because different countries have different regulatory laws); *see also* Henry H. Perritt, Jr., *Symposium: The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423, 429-30 (1998) (citing the differences between German and U.S. hate speech law which makes choice of law questions complex). *See, e.g.*, Zakalik, *supra* note 39, at 104-6 (providing hypotheticals illustrating the difficulties in establishing the proper forum for bringing suit against an Internet hate speech site).

301. *See* Swire, *supra* note 245, at 993-1004; *see also* Bradley A. Appleman, Note and Comment, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT'L L.J. 422, 422 (1996) (comparing German hate speech law with speech permissible under the U.S. Constitution); Perritt, Jr., *supra* note 300 (stating that German law is much more restrictive of speech than U.S. law).

choice of law will have a profound effect on the outcome.[302] Under the doctrine of "objective territoriality" in international law, the conduct, which has an effect in a certain territory, may be used to determine if the law of that territory applies.[303] Although, the Restatement (Third) of the Foreign Relations Law of the United States requires that the application of jurisdiction be reasonable, proponents for the use of German law, as well as those for the use of American law have an equally good case.[304] In any event, even if a German court did apply German law, the judgment may not be enforced in a court of the United States if it finds the German tribunal lacked personal jurisdiction.

VI. Possible Approaches

Without question, the Internet is redefining the way that business is done worldwide.[305] By offering the ability to communicate effectively, the Internet has created the "virtual storefront."[306] To allow for this "virtual storefront" to continue to evolve profitably and efficiently, it is necessary to make the virtual environment more predictable for all users. It is safe to assume that users would be willing to comply with the law—if only they knew what the law was. Once that concern is alleviated, obtaining jurisdiction based upon specific Internet activities will become foreseeable. To this outcome, many approaches have been suggested to obtain certainty within this field. Some of which are discussed below. It should be pointed out that decreasing legal disputes requiring judicial resolution is the main objective of each proposal.

A. Sovereignty for Cyberspace

Various commentators have recommended that because of the non-corporeal, metaphysical nature of the Internet, transactions on the Internet must be viewed as occurring in its own

302. *See* Swire, *supra* note 245, at 993-1004; *see also* Perritt, *supra* note 300, at 430 ("International law currently provides us with no way to decide whether the American or the German position on the issue deserves deference."); Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 452 (2000) ("The choice-of-law decision is critical because in any case worth talking about it will be outcome-determinative.").

303. *See* Swire, *supra* note 245, at 993-1004. *See generally* J. Thomas Coffin, Note, *The Extraterritorial Application of the Economic Espionage Act of 1996*, 23 HASTINGS INT'L & COMP. L. REV. 527, 539 (2000) (stating that the ideas behind objective territoriality were founded by Justice Holmes and are still followed in U.S. courts today); Jiro Tamura, *U.S. Extraterritorial Application of Antitrust Law to Japanese Keiretsu*, 25 N.Y.U. J. INT'L L. & POL. 385, 395 (1993) ("Determinations of objective territoriality are based upon a continuum of acts commenced outside the host country that have a direct effect upon the host territory.").

304. *See* Swire, *supra* note 245, at 993-1004; *see also* David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 420 (1997) (stating that the Restatement inserted a reasonableness requirement for jurisdiction).

305. *See* American Bar Association, *supra* note 293, at 1807; *see also* Puurunen, *supra* note 86, at 692 (stating that the Internet has changed the business world in that it allows communication throughout the world to take place virtually instantaneously).

306. *See* Walter A. Effross, *The Legal Architecture Of Virtual Stores: World Wide Web Sites And The Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1268 (1997) (discussing the advantages of the commercial availability through use of the World Wide Web); *see also* James West Marcovitz, Note, *Ronald@McDonalds.com—"Owning a Bitchin" Corporate Trademark as an Internet Address—Infringement?*, 17 CARDOZO L. REV. 85, 91 (1995) ("Accessing a site on the Internet is like going into a virtual 'storefront.'"). *See generally* Saba Ashraf, *Virtual Taxation: State Taxation of Internet and On-Line Sales*, 24 FLA. ST. U. L. REV. 605, 607-08 (1997) (discussing the marketplace set up through different web servers on the Internet).

"territory"—a so-called "City of Bytes."[307] Still others have gone as far as declaring "independence" for the Internet.[308] Similarly, others have argued enacting *sui generis* rules for the problems created by the Internet rather than waiting for caselaw and statutes to catch up by incrementally analogizing the Internet to the old principles.[309] This approach is also related to the view that cyberspace should either be unregulated or left alone.[310]

In theory, a "free-market approach" to governing the Internet would result in sensitivity to market forces as exerted by its users.[311] It would also increase innovation and price competition between companies.[312] The United States has implicitly blessed the free-market approach, thus providing it with institutional legitimacy.[313] In addition to the United States, other countries such as those represented by the European Union have also expressed their support for the free-market approach.[314] These countries recognize that the Internet transcends national bound-

307. *See* Johnson & Post, *supra* note 2, at 1368 (discussing cyberspace as its own jurisdiction); *see also VI. Cyberspace Regulation and the Discourse of State Sovereignty, supra* note 7, at 1681 (stating that the Internet takes place in its own "state"); Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1120 (1998) (stating that some Internet commentators refer to the Internet as an "a-geographical place.").

308. *See, e.g.*, The Barlow Declaration of Cyberspace Independence <http://www.eff.org/~barlow/DeclarationFinal.html> (last visited March 24, 2001).

309. *See* Johnson & Post, *supra* note 2 (noting the authors extremely promotion of the separateness of cyberspace and have advocated radical changes and the development of new legal structures to deal with the Internet); *see also* Rollo, *supra* note 13 (reviewing the various cases in which Internet jurisdiction has been encountered, but makes a somewhat unreasoned suggestion that the Internet must be treated as a separate, cyberspace jurisdiction). *See generally* Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. INTELL. PROP. L. 1, 51 (1999) (discussing the three types of sui generis rules for regulating cyberspace); Carlini, Note, *supra* note 192, at 157 (2000) (providing that regulation of the Internet is an "emerging body of law").

310. *See* Johnson & Post, *supra* note 2, at 1387 (questioning the efficacy of a sovereign authority for cyberspace); *see also* Lawrence Lessig, Commentaries, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505 (1999) ("Many believe that cyberspace simply cannot be regulated").

311. *See* Mark J. Maier, *Affordable Internet Access For All Americans*, 6 RICH. J.L. & TECH. 8, 52 (1999) (stating that this approach is not overly intrusive and provides for the majority of Internet service to be supplied by the free market). *See generally* Ira Magaziner, *At the Crossroads of Law and Technology: Keynote Address, October 23, 1999*, 33 LOY. L.A. L. REV. 1165, 1178 (2000) ("So in a variety of ways, we have hopefully launched, on a global scale, a free-market oriented approach to the Internet."); Richard E. Wiley, *Communications Law Overview: Recent Developments in Convergence, Competition and Consolidation*, 597 PLI/PAT 395, 741 (2000) (discussing that the Internet today is a free market).

312. *See* Stephen J. Choi, *Gatekeepers and the Internet: Rethinking the Regulation of Small Business Capital Formation*, 2 JSEBL 27 (1998) ("Through competition, only the most effective and cost-justified means will survive, to the benefit of all market participants."); J. Gregory Sidank & Daniel F. Spulber, *Cyberjam: The Law and Economics of Internet Congestion of the Telephone Network*, 21 HARV. J.L. & PUB. POL'Y 327, 369 (1998) ("[T]he affordability of Internet access should be achieved by competition, not by regulatory price controls."); Wiley, *supra* note 311, at 554 (stating that anything that would stifle the innovation of the Internet must be stopped).

313. *See generally* John F. McGuire, Notes, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 790 (1999) (stating that it seems that the U.S. would support a free-market approach to the Internet).

314. *See* Trevor Cox, *Information and the Internet: Understanding the Emerging Legal Framework for Contract and Copyright Law and Problems with International Enforcement,* 11 TRANSNAT'L LAW. 23, 53 (1998) (discussing the European Union's idea of the free market approach to the Internet); John F. McGuire, *supra* note 313 (stating that Germany and other European Union countries have supported a free market approach); European Initiative in Electronic Commerce at <http://www.ispo.cec.be/ecommerce>.

aries and thus deserve an approach that similarly transcends national boundaries, thus few countries and/or non-governmental organizations, have mounted meaningful challenges to the free-market approach.[315]

The most important aspect of a separate jurisdiction is its superficial appeal. Certainly, there is always a strong attraction towards creating an entirely new landscape for human interaction. However, such an approach requires existing sovereignties to relent and give up whatever control they can muster on more traditional bases. Furthermore, the "secession of cyberspace" from the physical world has acquired a sort of tired rhetoric which may make those arguments far less compelling today than they were two or three years ago. Moreover, it is seems fair to say that many of those commentators had overstated the law's inability to match the changes brought by technology. Indeed, the law has been able to evolve—without vacating statutes or the common law—by analogizing Internet activities with those in the "real world."[316] In fact, the broad language of existing legislation sufficiently encompasses the new communications tools being harnessed by the Internet for familiar acts. Clear examples of the malleability of existing laws and institutions in dealing with the Internet include the Securities and Exchange Commission and the Food and Drug Administration to successfully claiming jurisdiction over parts of the Internet as within their purview.[317] The successful prosecution of defendants for activity perpetuated via the Internet is prima facie evidence to the robustness of the law in dealing with this new medium.[318]

B. Continued Reliance on Territorial Jurisdiction

Adherents to this view point believe that in spite of the "revolutionary" way in which the Internet facilitates communications, the "core ideas of the legal subjects . . . affected by the Internet, remain sound and viable."[319] Many of the conundrums invoked by the cyber-separatists have proven to be solvable, that in reality "the Internet is not so revolutionary that all exist-

315. *See* Johnson & Post, *supra* note 2; s*ee also* Michael J. O'Sullivan, *International Copyright: Protection for Copyright Holders in the Internet Age*, 13 N.Y. INT'L L. REV. 1, 1 (2000) (stating that the Internet transcends national boundaries); Shipchandler, *supra* note 275, at 461 ("By transcending national boundaries, the Internet raises a host of concerns for nations.").

316. *See, e.g.*, Bick, *supra* note 36, at 47-50; Jack Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEG. STUD. 475 (1998).

317. Bick, *supra* note 36, at 47-50; *See generally* Leah Brannon, *Regulating Drug Promotion on the Internet*, 54 FOOD & DRUG L.J. 599, 599 (1999) (discussing the FDA's role in the Internet). *But see* Emile L. Loza, *FDA Regulation of Internet Pharmaceutical Communications: Strategies for Improvement*, 55 FOOD & DRUG L.J. 269, 269 (2000) (stating that the regulation the FDA has over the Internet is ineffective).

318. *See, e.g.*, United States v. Morris, 928 F.2d 504 (2d Cir. 1991); Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 579 PLI/PAT 227, 267 (1999) (discussing the history of prosecution for Internet gambling). *See generally* John T. Soma, Thomas F. Muther, Jr. & Heidi M.L. Brissette, *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 355 (1997) (discussing prosecution of Internet offenses under federal laws).

319. *See* Bick, *supra* note 36, at 47, 50; Salbu, *supra* note 49, at 430 (noting that the Internet substantially increases the rate of the dissemination of information). *But see* David Allweiss, *Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?*, 15 TOURO L. REV. 1005, 1005 (1999) (comparing the Internet to the old western American frontier).

ing legal precepts must be abandoned and replaced with new legal principles in a completely separate Internet jurisdiction."[320] For example, the ethereal nature of Internet transactions—once used to illustrate the difficulty of regulating the Internet—has since been realized to be of little significance since "communications are a matter not just of signals but of people, institutions and physical hardware. . . ."[321]

In essence, it is definitely possible to find a relevant, physical world locale for any Internet transaction, for the purpose of finding applicable law.[322] Indeed, the "upheaval" confronting the legal system does not appear more drastic than that which accompanied telegraph communications.[323] To illustrate the matter, one commentator wrote:

> I don't care really whether it is atoms, or bits; the legitimacy of regulation turns upon effects. . . . If a state has the power to regulate the importation of obscenity, it can't make any difference whether that important is via atoms or bits, at least from the perspective of the justifiability of the regulation. Its justification rests here in effects.[324]

Therefore, it is suggested that courts should continue to look to the physical location of the various parties involved, ignoring as irrelevant the position of communications intermediaries.[325] This suggestion emanates from the fact that ultimately there are answerable "warm bodies" situated within the territories of existing sovereigns and that courts should accept and incorporate into its rulings that Internet routing is too fortuitous and random for any legal liability to at-

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320. *See* Bick, *supra* note 36, at 53 (quoting Wilske & Schiller, *supra* note 1, at 130-33 (discussing how jurisdiction is applied to cases dealing with cyberspace issues). *See, e.g.*, United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996) (discussing the cyberspace case where the effects principle of jurisdiction was invoked).

321. *See* Eli M. Noam, *An Unfettered Internet? Keep Dreaming*, N.Y. TIMES, July 11, 1997, *as cited and quoted in* Wilske & Schiller, supra note 1, at 117 n.37; *see also* Wu, *supra* note 7 (discussing how focusing on the electronic bits, some hope that the Internet is beyond regulation, however, physical elements are still present).

322. *See generally Federal Bill Establishing the General Conditions for Information Services* <http://www.iid.de/rahmen/iukdgebt.html> ("The purpose of this Act is to establish uniform economic conditions for the various applications of electronic information and communication services.") (last visited Feb. 15, 2001); *e.g.,* California Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1361 (1986) (holding that jurisdiction could be based on out-of-state communications made to out-of-state residents when the communications "were expressly calculated to cause injury in California.").

323. *See* Y.B. Smith, *Liability for a Telegraph Company for Transmitting a Defamatory Message,* 20 COLUM. L. REV. 369 (1920); *see also* Bick, *supra* note 36, at 47, 50 n.20 (comparing legal systems dealing with the Internet to similar transitions involving the telegraph, telephone, television, and fax); Henry H. Perritt, LAW AND THE INFORMATION SUPERHIGHWAY 13, 19-21 (1996) (discussing how communication methods change over time).

324. *See* Johnson & Post*, supra* note 2, at 1387-91 (discussing the emergence of cyberlaw as close to a separate sovereignty); Lessig, *supra* note 38, at 1405 (comparing Internet communication to communication through UPS). *But see* I. Trotter Hardy*, The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1051 (1994) (suggesting that cyberspace users should form their own "virtual courts" for international torts).

325. *See* Sommer, *supra* note 53, at 1208 ("[M]ost individuals live in a unique physical location, notwithstanding the jet plane and the Internet."); *see also* Phan*, supra* note 186, at 272 (extending traditional jurisdictional notions of "minimum contacts" to Internet cases). *But see* Stanley Cox, *Symposium: Applying the Best Law,* 52 ARK. L. REV. 9, 32 (1999) (suggesting that many fact patterns raise the possibility of virtual interactions that have no obviously discernible physical location).

tach to those who provide connectivity services.[326] For example, if email from one New Yorker to another is routed via computers located outside of New York before arriving, such unanticipated aspects of Internet routing should not receive legal significance. Although, as would also flow from an argument premised on territoriality, it is nonetheless open for states on whose territory such relaying transmissions take place, to take regulatory steps. However, because the efficacy of such action is doubtful, it seems unlikely that such legislation will be common.[327]

Regulation, insofar as e-commerce is concerned, can be directed specifically at the consumer or at the business entity, similar to the European Conventions discussed above.[328] That is why, in *People v. Lipsitz*,[329] there was no difficulty in prosecuting a scam-artist who duped unsuspecting magazine subscribers via, *inter alia*, Internet direct mail and bulletin boards.[330] Jurisdictional problems did not arise at all because it was possible to take an existing state law and apply it to the Internet.[331] The same approach has been taken in a large variety of situations where Internet-based conduct had to be considered within the context of old law.[332]

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326. *See* Dinwoodie, *supra* note 63, at 557 (discussing how uniformity of treatment is an important part of choice of law analysis); *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS 6 (1971) (discussing the determinative factors in determining applicable law including certainty, predictability and uniformity of result). *See generally* Douglas A. Galbi, *Transforming the Structure of Network Interconnection and Transport*, 8 COMM. LAW CONSPECTUS 203, 204-05 (2000) (discussing connectivity services in terms of its structural limitations).

327. *See* J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data*?, 50 VAND. L. REV. 51, 112 n.279 (1997) (noting that "the Administration's main argument for moving so far and so fast rests largely on the supposed difficulties of enforcing territorially grounded intellectual property rights in cyberspace."); Goldsmith, *supra* note 316, at 484-85 (noting the role of technology in re-establishing borders).

328. *See* Reidenberg, *supra* note 244, at 773 (recognizing the international consensus, in a democratic society, of basic standards of fair information practice and the protection of citizen privacy); *see also* David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 3 (1999) (discussing how the European Conventions have served to extend privacy rights into countries that traditionally have not included this right in their laws); Schafer, *supra* note 194, at 1188-89 (discussing how the long-term international goal of regulation based on territorial notions is unlikely to be completely achieved).

329. 174 Misc. 2d 571 (1997).

330. People v. Lipsitz, 174 Misc. 2d 571, 579 (1997) (discussing how in a Internet fraud claim, the Internet medium was irrelevant, what was important in finding that the court had jurisdiction was that respondent did a sufficient amount of business within the state); *see also* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (discussing that where a person or business conducts business within the forum State by being a subscriber to a local Internet service provider and selling a product through that provider, jurisdiction is proper); *but see* Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1119 (6th Cir.), *cert denied* 513 U.S. 962 (1994) (discussing how the transmission of communications between an out-of-state defendant and a plaintiff within the jurisdiction does not, by itself, constitute the transaction of business in the forum state).

331. People v. Kevin Jay Lipsitz, 174 Misc. 2d 571 (1997) ("Respondent does business in New York and the acts complained of physically occurred in New York."); *see also* N.Y. GEN. BUS. LAW §§ 349, 350 (McKinney, 1984) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.").

332. *See* Goldsmith, *supra* note 307, at 1126 (discussing regulation through in-state hardware and software through which Internet transmissions are received, Internet access providers, and local financial intermediaries that facilitate Internet transactions); *e.g.*, Jack Goldsmith, *What Internet Gambling Legislation Teaches About Internet Regulation*, 32 INT'L LAW. 1115, 1115 (1998) (discussing how Congress in 1998 proposed to authorize federal and state officials to order Internet service providers to shut down illegal Internet gambling sites). *See generally* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 202-04 (1997) (discussing efforts to set up software blockades and proxy servers to control Internet content flows).

1. Choice of Law Clauses Within "Click-Wrap" Agreements

It is possible that the pervasive use of choice of law clauses on Internet Web sites will defuse some of the jurisdictional minefields, which can be unleashed by the participation of a business entity in the dot-com mania.[333] Many commentators suggest associating choice of law clauses in subscriber agreements with Internet Access Providers so that the law chosen in the standard form service agreement also governs inter-user disputes.[334] There may be an ability to have IAPs operate as proxies to effect multinational choice of law arrangements via these "click-wrap" agreements.[335]

"Click-wrap" agreements will generally require Web sites to go beyond merely providing "informational" links to the legal terms and conditions that govern access to a particular Web site.[336] Instead, Web sites should make good use of cookies and encryption to ensure that each visitor to the Web site enters into a "click-wrap" agreement requiring the user to accept a particular governing law.[337] Digital signatures offer the possibility of ensuring non-repudiation and authentication when the user clicks on "I agree."[338] Widespread adoption of verifiable

333. *See* Trout-McIntyre, *supra* note 3, at 224 (using a reasonableness standard in the application of a choice of law clause). *See, e.g.,* Cox, *supra* note 314 (discussing a hypothetical situation whereby the use a choice of law clause which makes the laws of the United States applicable is helpful in an international context).

334. *See* Kevin K. Ban, *Does the Internet Warrant a Twenty-Seventh Amendment to the United States Constitution*?, 23 IOWA J. CORP. L. 521, 530 (1998) (discussing the economic impact of service providers adding choice of law clauses to subscriber agreements); *e.g.,* Yagura, *supra* note 270, at 319 (discussing how America Online's Terms of Service Agreement contains both forum selection and choice of law clauses to handle disputes between America Online and its clients).

335. *See* Ted Janger, *Software as a Commodity: International Licensing of Intellectual Property: The Public Choice of Choice of Law in Software Transactions: Jurisdictional Competition and the Dim Prospects for Uniformity*, 26 BROOK. J. INT'L L. 187, 194 (2000) (discussing choice of law rules in the absence of an enforceable choice-of-law clause); Michael Korybut, *Online Auctions of Repossessed Collateral Under Article 9*, 31 RUTGERS L.J. 29, 126 n.383 (1999) (discussing whether "clickwrap" contracts are unenforceable as contracts of adhesion).

336. *See* Caspi v. The Microsoft Network, 732 A.2d 528 (N.J. Super. Ct. App. Div., July 2, 1999) (upholding forum selection clause in ISP membership agreement, treating it in the same manner as a similar clause in a paper contract); Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM I. P., MEDIA & ENT. L.J. 907, 910 (1998) ("[A] typical click-wrap license comes in the form of a notice appearing on a user's screen during the installation process that posts the terms and conditions under which the product is offered, and enables the user to click on either accept or decline.").

337. *See* Kristin B. Keltner, Note, *Networked Health Information: Assuring Quality Control on the Internet*, 50 FED. COM. L.J. 417, 427-28 (1998) (discussing how encryption programs and disclaimers serve as protections); *see also* Netanel, *supra* note 191, at 434 (discussing how encryption increasingly governs the terms for gaining access to Internet programs). *See generally* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1244-45 (discussing encryption technologies).

338. *See* Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 245 (1996) (discussing how a digital signature works); *see also* Click-wrap License Agreements <http://www.ljx.com/Internet/0811clickwrap.html> (discussing the digital signature as means for authenticating the work) (last visited Feb. 17, 2001); Law Journal Extra! Law of the Internet (visited Feb. 17, 2001) <http://www.ljx.com/Internet/ir<uscore>ucc.html> (providing hyperlinks to articles that discuss click-wrap issues such as the enforceability of click-wrap agreements).

acceptance of "click-wrap" agreements may also lead to a greater degree of predictability as to the forum available to adjudicate a matter.[339]

2. Alternative Dispute Resolution

While regular courts may be the proper setting for many Internet-related disputes, some commentators have advocated other methods, namely alternative dispute resolution (ADR) and a single court presiding over cyberspace disputes.[340] For any adjudicator to resolve a dispute in a binding way, it must have both personal and subject matter jurisdiction.[341] When jurisdiction and procedural compliance exist, decisions of public tribunals are enforceable in other states via the full faith and credit clause of the Constitution,[342] and in other nations through the international law doctrine of comity.[343]

Recent online experiments have brought alternative dispute resolution to the Internet.[344] Furthermore, personal jurisdiction does not matter in mediation and the ombudsman process

339. *See* Harrison, *supra* note 336 (discussing courts reluctance to enforce a forum selection clause in a click-wrap agreement); *e.g.,* Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc. 41 U.S.P.Q.2d 1850, 1853 (N.D. Cal. 1997) (discussing the district court which stated that shrink-wrap agreements may be enforceable in limited cases). *Compare,* Rice, *supra* note 6, at 646 (discussing how jurisdiction is determined in the absence of a click-wrap agreement).

340. *See* Henry H. Perritt, Jr., *Electronic Dispute Resolution an NCAIR Conference* (May 22, 1996) (discussing different methods of electronic dispute resolution); Johnson & Post, *supra* note 2 (discussing the idea of a sovereign cyberspace jurisdiction). *See generally* Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFFALO L. REV. 975, 984-86 (1997) (advocating ADR methods on the basis of traditional advantages).

341. *See* Perritt, Jr., *supra* note 340 (making distinction between subject matter jurisdiction and personal jurisdiction); *see also* Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 781 (2000) (discussing how arbitration awards are only binding after judgment is entered in a court of competent jurisdiction); Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 676 (2000) ("Traditional dispute resolution machinery depends upon localization to determine jurisdiction.").

342. U.S. CONST. art. IV, § 1. (stating the "Full Faith and Credit" clause). *See, e.g.*, Zembek, *supra* note 15, at 370 (discussing a hypothetical where a Tennessee company is sued by a New York plaintiff triggering the full faith and credit clause). *But see* Traynor, *supra* note 233, at 4 ("Although the Full Faith and Credit clause of the U.S. Constitution applies to recognition and enforcement of judgments among the sister states, it does not apply to judgments rendered in foreign countries.").

343. *See* Perritt, Jr., *supra* note 340; Johnson & Post, *supra* note 2, at 1391-92 ("In general, comity reflects the view that the jurisdiction with the greatest interest in the outcome should adjudicate a given dispute."); *e.g.*, Mark A. Warner, *Decisions of Foreign Courts*, 88 A.J.I.L. 532, 535 (1994) ("Chief Justice Esson of the British Columbia Supreme Court held that the doctrine of comity required the court not to compel the circumvention of the law of another jurisdiction.").

344. *See* Perritt, Jr., *supra* note 340 (discussing different methods of electronic dispute resolution). *See* The Virtual Magistrate Project Concept Paper, <http://www.virtualmagistrate.com>, (outlining the project); *see also* George F. Friedman, *Internet & Alternative Dispute Resolution: A Match Made in Cyberspace*, 2 No. 9 MULTIMEDIA STRATEGIST 6 (1996).

because sovereignty plays no role in resolving disputes through ADR.[345] Arbitration is different because arbitration awards are binding and may require coercive powers.[346] While coercion is available at the end of arbitration, it is not available at the initial stage because jurisdiction in arbitration is obtained by consent.[347]

3. Treaties: The Inevitable Solution?

One method, traditionally used to vitiate jurisdictional conflicts and conflicts of law, is treaties and conventions.[348] Although treaties are not always effective at curbing behavior, they have been a somewhat effective means of establishing a baseline of agreement between nations and thus they may still play a role in Internet sovereignty.[349] Treaties are appealing as a method of Internet governance and nations may be prepared to consider treaties brokered by the United Nations more readily than dramatic and confusing technological "solutions."[350] Treaties also create binding laws that enable all people to be aware of the laws governing them and, there-

345. *See* Cona, *supra* note 340, at 981 (discussing how enforcement not only by the sovereign that created the tribunal, but also by other sovereigns is possible when personal jurisdiction is valid); Perritt, *supra* note 59, at 1004 (discussing how a foreign court requires adjudicatory jurisdiction over the parties in order to maintain personal jurisdiction).

346. *See* Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46*, 9 AM. REV. INT'L ARB. 155, 162 (1998) (discussing the lack of coercive power in some arbiter awards); *see also* J. B. Ruhl, *Alternative Dispute Resolution Symposium: Thinking of Mediation As a Complex Adaptive System,* 1997 B.Y.U.L. REV. 777, 778 n.6 (1997) (quoting Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 115 (1976)) (discussing the use of third-party enforcement)).

347. *See* David D. Caron, *The Hague Peace Conferences: War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 A.J.I.L. 4, 11 (2000) (discussing a case where the mutual consent of two or more contending nations was required before arbitration); *see also* Amar A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 436 (2000) (discussing the secrecy within which meetings take place and how awards may not be published without consent).

348. *See* Cox, *supra* note 230 (discussing how conflicts between Constitutional restraints and treaties are resolved); *see also* Clermont, *supra* note 111, at 89 ("The envisaged treaty would ensure mutual respect of judgments among contracting countries, but it would also require agreement on a sensible scheme of jurisdiction."). *See generally* Roger H. Trangsrud*, The Federal Common Law of Personal Jurisdiction,* 57 GEO. WASH. L. REV. 849, 852 (1989) (discussing Congress's powers as a treaty maker).

349. *See* Cox, *supra* note 230, at 1179 (discussing circumstances where conflicts between treaties and the Constitution exist and how they are resolved); *see also* Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World,* 39 HOW. L.J. 477, 503 (1996) (discussing a need for a systemic approach to the tradeoffs in intellectual property laws and international treaties).

350. *See* Cox, *supra* note 230, at 1177 (discussing how both treaties and the Constitution can be effective in determining jurisdiction); *see also* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?,* 93 A.J.I.L. 596, 601 (1999) (discussing how technological solutions have practical applications); Assafa Endeshaw*, A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 299 (1996) (discussing how more than national laws and treaty obligations will be required to handle problems associated with new technology).

fore, eliminate or alleviate jurisdictional battles by containing jurisdiction clauses or by conforming laws enough that jurisdiction will not have an effect on the outcome of a dispute.[351]

Treaties can serve as an effective measure, but to propose that they can be considered a panacea for all that ills the Internet is imprudent.[352] Treaties do have other significant shortcomings such as the length of time it takes to create and ratify a treaty.[353] Similarly, treaties are extremely difficult to create because it is often impossible to reach accord among the many sovereigns.[354] For this reason, treaties may be a better solution for moderate- to low-controversy issues than for ones that are more controversial. Gambling, for example, is unlikely to be resolved by creating a treaty, because of deep-set and fundamental philosophical differences between nations on whether or not Internet gambling should be legal.[355] Especially on the Internet, nations who choose not to sign a treaty may become "havens" for illegal activity and can completely undermine the objectives of any treaty.[356]

C. The ABA's Jurisdiction Project

On July 10, 2000, the American Bar Association's Section of Business Law Global Cyberspace Jurisdiction Project released a report, titled "*Achieving Legal and Business Order in Cyber-*

351. *See* Cox, *supra* note 230, at 1177 (discussing how jurisdiction battles can be resolved through the powers of the U.S. Constitution and subsequent treaties); *see also* Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 195 (2000) (discussing how an international consensus "becomes binding law not only through treaties but also through customary international law"). *See generally* Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and AdHoc Compromise*, 18 BERKELEY J. INT'L LAW 1 (2000) (discussing the European Community are an example where binding law enables correct enforcement and application).

352. *See* Zekoll, *supra* note 232, at 1296 n.71 (discussing whether treaties may cause due process problems); *see also* Panel Discussion*: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 235 (1999) (discussing a problem applying the Genocide Convention).

353. *See* Stacey L. Lowder, *A State's International Legal Role: From the Earth to the Moon,* 7 TULSA J. COMP. & INT'L L. 253, 266 (1999) (discussing how long it takes parties to a treaty to come to agreement); *see also* Pam Slater, *Environmental Law in Third World Countries: Can It Be Enforced by Other Countries*?, 5 ILSA J. INT'L & COMP. L. 519, 521 (1999) (discussing the length of time treaties take to be implemented).

354. *See* Mihaly Ficsor, *The Spring 1997 Horace S. Manges Lecture—Copyright for the Digital Era: The WIPO "Internet" Treaties*, 21 COLUM.-VLA J.L. & ARTS 197 (1997); American Bar Association Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, located at ABA Jurisdiction in Cyberspace Project, *Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction,* <http://www.kentlaw.edu/cyberlaw> (last visited Mar. 23, 2001).

355. *See* Karadbil, *supra* note 28 (discussing how laws in Antigua and the U.S. regarding gambling are inconsistent); *see also* Sommer, *supra* note 53, at 1210 (discussing how absent a treaty, jurisdictional and extraditing problems are prevalent). *See generally* Beth Berselli, *Gamblers Play the Odds Online*, WASH. POST, Aug. 19, 1997, at A1 (discussing the proliferation of Internet gambling casinos).

356. *See* Joel C. Mandelman, *Lest We Walk Into the Well: Guarding the Keys—Encrypting the Constitution: To Speak, Search & Seize in Cyberspace*, 8 ALB. L.J. SCI. & TECH. 227, 244 (1998) (discussing how organized terrorists, international drug traffickers and other criminals can readily hide and mask their illegal activities using new technologies); *see also* Sen. John F. Kerry, *Organized Crime Goes Global While the U.S. Stays Home,* WASH. POST, May 11, 1997, at C1 (describing the use of encryption by organized crimes); Q&A*: Fighting Global Organized Crime Means Tougher Bank Security Measures*, 162 AM. BANKR 1, 4 (1997) (discussing money laundering and encryption).

space: A Report on Global Jurisdiction Issues Created by the Internet," ("Report").[357] The Report was the result of a comprehensive two-year effort involving Internet law luminaries from around the world and the study identifies a menu of possible solutions to jurisdictional challenges, including:

1) establishing a multinational "Global Online Standards Commission" to help develop uniform principles and global protocol standards;

2) developing new online forms of dispute resolution;

3) employing programmable electronic agents ("bots") to protect consumers during Internet transactions from Web sites that do not meet their personal standards.[358]

The Report presupposes that one sovereign cannot resolve the legal issues and disputes raised by the Internet.[359] Nonetheless, for such a grand undertaking—involving over 100 lawyers from more than 20 countries—the report fails to provide any groundbreaking recommendations. One suggestion—that buyers and sellers be able to identify the state in which they are transacting from—clearly has its genesis from the European conventions discussed above.[360] As envisioned, the proposed multinational "Global Online Standards Commission" would serve as the Internet's version of the "United Nations" yet it will more likely resemble the "League of Nations" for its probable lack of influence upon sovereigns.[361] Although this may be the best-case scenario, the Report fails to recognize that it is, at its core, utopian. For numerous reasons, most notably the panel's imprudent desire to recommend a geocentric approach, it is hard to believe that sovereigns would work together to form a common bond over the Internet. A better approach would have been organized around the inherent self-serving nature that sovereignty plays within International law. The first step in this direction could have been as easy as suggesting that each country begin to educate its Internet users that they may be subject to the laws of other jurisdictions and therefore be found liable—criminally or civilly.

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357. *See* The American Bar Association Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, located at ABA Jurisdiction in Cyberspace Project, *Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction* <http://www.kentlaw.edu/cyberlaw> (last visited Mar. 23, 2001). The House of Delegates or the Board of Governors of the American Bar Association has not adopted the report. *Id.*

358. ABA Jurisdictional Project <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (entitled "Achieving Legal and Business Order in Cyberspace: Jurisdictional Issues Created by the Internet") (last visited Mar. 23, 2001).

359. ABA Jurisdiction Project, <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>. ABA Jurisdictional Project <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (the report approaches the problems from both a U.S. and European perspective) (visited Mar. 23, 2001).

360. *See* Elizabeth F. Defeis*, Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HAMLINE J. PUB. L. & POL'Y 291, 311 (1999) (discussing the importance of maintaining identities to facilitate reciprocal protection of the equality); *see also* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 538 (1996) (discussing how the European Union became its own identity, separate from individual nations which comprised it).

361. *See* Rice, *supra* note 6, at 655 (discussing the precepts that the "Global Online Standards Commission" follows).

VII. Conclusion

The goal of this paper was not to offer one faultless resolution to the jurisdictional problems posed by the Internet. Instead, it attempted to consider a multiplicity of dynamics that affect Internet governance. Although not intuitive, it is important to recognize that the problem of Internet jurisdiction does not originate solely from the multitude of different sovereigns' laws that users may be exposed to. In fact, it is the user's unawareness—that different social norms still exist within the virtual environment—that essentially plays the leading role. The legal conclusion is that while there are still areas of uncertainty, there is also great resilience on the part of the law, which allows it to flexibly engage and deal with the Internet. More to the point, the traditional territorial jurisdiction approaches will indeed survive the Internet's exponential growth, in spite of its imperfections. The "net" effect would appear to be that jurisdictional problems are surmountable and that the Internet brings with it evolutionary, rather than revolutionary shifts in the law. The best approach is one that allows the law to adapt with time instead of sweeping revisions that will lead to a cycle of endless transformations after each "revolution" like the Internet.

The Convention on International Trade in Endangered Species: The Difficulty in Enforcing CITES and the United States Solution to Hindering the Illegal Trade of Endangered Species

By Randi E. Alarcón*

The trade in species for pets, trinkets, clothing and other products has led to the continued exploitation and extinction of many species.[1] Nations that engage in the trade in endangered and threatened species contribute to the destruction of the global environment.[2] Consequently, international law has developed a forum for cooperation among nations that agree to take part in the regulation of international trade and preservation of species.[3] The Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES")[4] was adopted almost 30 years ago in an effort to enact the necessary trade-related measures to regulate the international trade of wildlife and preserve species.[5]

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1. *See* Michael J. Glennon, *Has International Law Failed the Elephant?,* 84 A.J.I.L. 1, 4 (1990) (discussing the fact that elephants have been exploited due, in part, to the ivory market); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 867-68, 873 (1996) (discussing the role that trade has played in "driving" many species towards extinction); *see also* David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment,* 19 MICH. J. INT'L L. 497, 506-07 (1998) (discussing the exploitation of marine species and the lack of sufficient international safeguards).

2. Charlene D. Daniel, *United States v. Smithfield Foods, Inc.: Note: Evaluating U.S. Endangered Species Legislation—The Endangered Species Act as an International Example: Can This Be Pulled Off? The Case of the Rhinoceros and Tiger,* 23 WM. & MARY ENVTL. L. & POL'Y REV. 683, 690 (1999) (discussing the CITES Convention's purpose of preserving the global ecosystems by evaluating the status of endangered species).

3. *See* Daniel, *supra* note 2, at 685-86 (discussing the fact that CITES was created as "an international forum for cooperation among nations who agree to take part in the regulation of international trade of endangered species"); Michelle Ann Peters, Comment, *The Convention on International Trade in Endangered Species: An Answer to the Call of the Wild?*, 10 CONN. J. INT'L L. 169, 175 (1994) ("CITES, which became effective on July 1, 1975, recognized that international cooperation is essential for the urgent protection of wild fauna and flora from over-exploitation through trade.").

4. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 8, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, [hereinafter "CITES"].

5. *See* ANTHONY D'AMATO & KIRSTEN ENGEL, INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 230 (1996) (CITES was signed in Washington, D.C. on March 6, 1973 and entered into force on July 1, 1975); Shennie Patel, Comment, *The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn,* 18 HOUS. J. INT'L L. 157, 161 (1995) ("CITES attempts to protect endangered species from the over-exploitation caused by unregulated international wildlife trade by establishing a compromise between the profitable wildlife business and the disappearing resources"); Wold, *supra* note 1, at 867-68 n.193 ("The effectiveness of CITES trade restrictions has been responsible for the survival and recovery of some species. . . .").

* **J.D. 2001, St. John's University School of Law. B.A., Emory University, 1998.** **The author would like to thank Professor Charles Biblowit of St. John's University School of Law for his editorial advice.**

Environmental laws, however, work together at the international and domestic level to form the overall legal framework for protecting the environment.[6] The success of CITES in protecting endangered and threatened species is dependent upon how effectively it is enforced at both levels.[7] Although customary international law provides that states must take responsibility for the environmental damage caused to other nations,[8] there has been difficulty in motivating world leaders to consider the environmental consequences in their decision-making at the domestic level.[9]

This article will give a brief overview of CITES and the requirements it imposes on member nations at both the international and domestic levels. A consideration will follow as to the difficulty in enforcing CITES due to the inherent nature of international law. This article will conclude with a discussion of how the United States has chosen to respond to the requirements set forth in CITES that demands member nations enact domestic legislation to enforce the provisions of the treaty.

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6. *See* Catharine L. Krieps, Comment, *Sustainable Use of Endangered Species Under CITES: Is It A Sustainable Alternative?,* 17 U. PA. J. INT'L ECON. L. 461, 484 (1996) (discussing the fact that conservation plans which are supported on the domestic level are more successful than plans that are imposed upon developing nations by international environmental pressures); *see also* Ardia, *supra* note 1, at 497-98 (noting that "[b]ecause ecosystems, individual species, and pollution do not respect political boundaries, there is a growing necessity for international environmental agreements"); *compare* Jennifer A. Bernazani, Note, *The Eagle, The Turtle, The Shrimp and the WTO: Implications for the Future of Environmental Trade Measures,* 15 CONN. J. INT'L L. 207, 210 (2000) (noting that when one nation institutes measures to protected endangered wildlife, such measures may be "perceived as an infringement of the principles of sovereignty").

7. *See* Daniel, *supra* note 2, at 688 ("The success of CITES depends on the national and political will of each party because the treaty is enforced by its individual members"); Glennon, *supra* note 1, at 12-13 ("CITES requires each party to 'take appropriate measures to enforce' the Convention, both by imposing penalties and by confiscating illegal specimens"); Peters, *supra* note 3, at 179 ("CITES requires that participants take appropriate measures to penalize trade in or possession of species listed in the appendices").

8. *See* Ardia, *supra* note 1, at 499 ("Historically, customary international law has provided that a sovereign state has jurisdiction to prescribe and enforce its laws only within its territorial borders"); Joanna E. Arlow, Note, *The Utility of the ATLA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93, 129 (2000) (discussing the "golden rule" of environmental protection on the international level is to "ensure that activities within their jurisdiction *or control* do not cause damage to the environment or other states . . . "); *see also* Daniel, *supra* note 2, at 687 (noting that CITES imposes "on each individual party the responsibility of enacting domestic legislation to implement the Convention's terms"); Glennon, *supra* note 1, at 10 (stating that "customary international law now requires states to protect endangered species . . . ").

9. *See* Michael Robins, *The North American Free Trade Agreement: The Integration of Free Trade and the Environment*, 7 TEMP. INT'L & COMP. L.J. 123, 130-33 (1993) (discussing how the failure of the United Nations' efforts to develop principles for protecting the environment prompted the adoption of several multilateral treaties in an attempt to define environmental standards and development of enforcement mechanisms); Patel, *supra* note 5, at 169 (discussing how many states would not have created wildlife protection programs without the institution of CITES); Elizabeth Granadillo, Note*, Regulation Of The International Trade of Endangered Species By The World Trade Organization,* 32 GEO. WASH. J. INT'L L. & ECON. 437, 440 (2000) (noting that on an international level, "there are inherent conflicts between free trade and the protection of endangered species").

I. CITES

CITES is "probably the single most important agreement now in existence" for the protection of wildlife.[10] It directs member nations to minimize the risk of injury, damage to health or cruel treatment to animals.[11] CITES is also the only global treaty whose focus is the protection of plant and animal species from unregulated international trade.[12] CITES' statements of purpose appear in the preamble and the treaty embraces two different environmental philosophies.[13] CITES takes a preservationist standpoint in Paragraph one of the preamble as it seeks

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10. Thomas E. Skilton, *GATT and The Environment in Conflict: The Tuna-Dolphin Dispute and the Quest For An International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 479 n.162 (1993). *See* Michael J. Hickey, *Acceptance of Sustainable Use Within the CITES Community,* 23 VT. L. REV. 861, 862 (1999) ("CITES' success over the past twenty-five years is attributable to its laudable overall purpose of protecting wild plants and animals through measures generally accepted by most countries."); Scott Hitch, *Losing the Elephant Wars: CITES and the "Ivory Ban,"* 27 GA. J. INT'L & COMP. L. 167, 168 (1998*)* (noting that since its inception in the 1970s, CITES has been the dominant international treaty on trade and the preservation of endangered species); *see also* U.S. Fish & Wildlife Service, *What is CITES?,* (visited Feb. 5, 2001) <http://international.fws.gov/facts/citesnew.html> (noting that CITES is "the only global treaty whose focus is the protection of plant and animal species from unregulated international trade.") [hereinafter "*What is CITES?"*].

11. *See* Steve Charnovitz, *The Moral Exception In Trade Policy*, 38 VA. J. INT'L L. 689, 697 (1998) (discussing CITES as a morality-based trade ban and how U.S. law has prohibited the importation of animals under inhumane or unhealthful conditions since 1949); Daniel, *supra* note 2, at 685-86 (discussing how each member nation is charged with the responsibility of protecting endangered species).

12. *See* SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 240 (1985); *see also* Granadillo, *supra* note 9, at 438 ("CITES regulates the international trade of endangered species in such a way that effectively prohibits trade in certain species"); Joonmoo Lee, Comment, *Poachers, Tigers and Bears... Oh My! Asia's Illegal Wildlife Trade,* 16 J. INT'L L. BUS. 497, 502 (1996) (discussing how CITES "prohibits international trade in species listed in the appendices without a prior grant of a CITES permit"); Patel, *supra* note 5, at 161 ("CITES attempts to protect endangered species from the over-exploitation caused by unregulated international wildlife trade by establishing a compromise between the profitable wildlife business and the disappearing resources."); *What is CITES?, supra* note 10, at June 13, 2000 (discussing how CITES is considered a "trading treaty" because it seeks to preserve controlled international trade in species whose survival is not yet threatened).

13. CITES, *supra* note 4, at 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243. The preamble to CITES states:

> The Contracting States,
>
> Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and generations to come;
>
> Conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;
>
> Recognizing that people and States are and should be the best protectors of their own wild fauna and flora;
>
> Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora over-exploitation through international trade; Convinced of the urgency of taking appropriate measures to this end. . . .

Id.

See Brad L. Bacon, *Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading Through the Murk*, 12 GEO. INT'L ENVTL. L. REV. 331, 343 (1999) (noting how CITES embraces various environmental principles); Krieps, *supra* note 6, at 468-69 ("[I]t appears that no single environmental philosophy underlies CITES.").

to protect species simply for their aesthetic value.[14] CITES also takes a conservationist standpoint in Paragraphs three and four of the preamble: it provides that people and nations must assume an active, ongoing role in protecting and regulating wildlife.[15] CITES exhibits this interest in conservation by progressively withdrawing a species from trade as it becomes more endangered.[16]

A. Three-Tier Structure and Listing of Species

CITES regulates trade in species that are either threatened with extinction or at risk of becoming endangered if conservation efforts to maintain them are not undertaken.[17] CITES will regulate the trade of any listed species and wildlife products of listed species unless a scientific finding is made that the trade does not threaten the viability of the species.[18] CITES utilizes a straightforward, three-tiered structure where levels of protection are a function of the

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14. *See* CITES, *supra* note 4, at preamble; *see also* LYSTER, *supra* note 12, at 240; Glennon, *supra* note 1, at 7 (1990) ("Many naturalists have espoused the view that nature is intrinsically valuable because it is beautiful"); Krieps, *supra* note 6, at 469 (a preservationist protects species for their aesthetic value).

15. *See* CITES, *supra* note 4, at preamble; *see also* Bacon, *supra* note 13, at 343 (noting how CITES embraces various environmental principles); Krieps, *supra* note 6, at 469 (discussing a conservationist active and ongoing role in the protection and regulation of wildlife); Peters, *supra* note 3, 175-76 (noting that the preamble to CITES characterizes wildlife as "an 'irreplaceable part of the . . . earth which must be protected for this and generations to come,' and by acknowledging the ever-growing value of wildlife from 'aesthetic, scientific, cultural, recreational and economic points of view'").

16. *See* CITES, *supra* note 4, at 27 U.S.T. 1087, 993 U.N.T.S. 243; *see also* DAVID HARLAND, KILLING GAME 73 (1994); Book Review, *Harland, David, Killing Game: International Law and the African Elephant,* 17 HOUS. J. INT'L L 201, 201 (1994) (noting the pros and cons of the ban on ivory as a means of conserving the elephant population) [hereinafter "Harland Book Review"].

17. *See* CITES *supra* note 4, at art. II(1) (stating that there is no definition of 'threatened' or 'extinction' within the treaty, but an animal will be listed once they reach a certain level of vulnerability); *see also* John L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use,* 12 PACE ENVTL. L. REV. 301, 312 n.37 (1994) (discussing how a "species is threatened with extinction depends on the rate of a species' decline and the potential for its extinction" even though the treaty does not define "threatened" or "extinction"); Julie B. Master, *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles Are "Sacrificed on the Altar of Free Trade,"* 12 TEMP. INT'L & COMP. L.J. 423, 447 n.247 (1998) ("CITES provides methods for regulating international trade in species that are either on the brink of extinction or risk becoming endangered if not protected from trade."); Patel, *supra* note 5, at 161 (discussing CITES as a conservationist treaty for highly endangered species and how the continued trade in wildlife and wildlife products will likely lead to the wholesale destruction of entire groups of species if enforcement of CITES is lacking).

18. *See* CITES *supra* note 4, at arts. III(2)(a)-(3)(a), IV(a) (listing preconditions to transactions being authorized under CITES); *see also* Janet McDonald, *Trade and the Environment: Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 455 (1992) (discussing CITES as the mechanism for listing species as threatened or endangered upon extensive scientific research); Patel, *supra* note 5, at 165 (noting that under CITES Appendix I, trade in certain endangered species may be permitted in limited situations).

degree of threat to the survival of a particular species.[19] The first three appendices of CITES establish this hierarchy of endangered species predicated upon the probability of imminent extinction.[20]

Appendix I to CITES provides the highest level of protection: by forbidding the international commercial trade of all listed species.[21] Appendix I lists any living species "threatened with extinction that are or may be affected by trade."[22] Factors to determine whether an Appendix I species is 'threatened with extinction' include population size, geographic range and potential causes of extinction.[23] In addition, species under Appendix I are defined as any "living or dead animal or plant and certain readily recognizable parts and derivatives of species."[24]

Appendix II provides an intermediate level of protection as it subjects the trade of listed species to a number of regulations.[25] Appendix II includes species that are "not necessarily threatened with extinction but may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."[26] This includes the protection of look-alike species.[27] Appendix II includes this provision because it is

19. *See* CITES, *supra* note 4, at arts. I-III; *see also* D'AMATO & ENGEL, *supra* note 5, at 470-71 ("CITES functions by implementing a three-tiered structure prohibiting nearly all trade in species threatened with extinction and by limiting commercial trade in species that might become threatened with extinction to a level that is not detrimental to their survival."); Lee, *supra* note 12, at 502 (discussing that with a few exceptions, CITES prohibits international trade in species listed in the appendices without a prior grant of a CITES permit); Patel, *supra* note 5, at 163-64 (noting how CITES protects the trade of listed species in direct proportion to the present dangers threatening their sustainability).

20. *See* CITES, *supra* note 4, at art. II; *see also* Patel, *supra* note 5, at 165 (discussing the fact that the appendices to CITES reflect the "varying degrees of extinction vulnerability which a species may or may not face"); Peters, *supra* note 3, at 177 ("Standards for granting export permits for Appendix III species are less stringent than those governing Appendices I and II").

21. *See* CITES, *supra* note 4, at art. II (1)–(4) (discussing the fundamental principles of CITES, including the hierarchy of endangered species regulation in Appendices I through III); *see also* D'AMATO & ENGEL, *supra* note 5, at 462 (noting that CITES Appendix I "affords to endangered wildlife the highest possible level of protection against the threat of international trade").

22. *See* CITES, *supra* note 4, at art. II(1); *see also* Lee, *supra* note 12, at 503 (noting that commercial trade in these species is prohibited).

23. CITES, *supra* note 4, at art. III. *See also* Granadillo, *supra* note 9, at 441 ("Species are categorized based on the following criteria: (1) biological factors related to a species' status in the wild; (2) the purposes for which the species is traded; and (3) the conditions of transport").

24. *See* CITES, *supra* note 4, at art. I(a); *see also* D'AMATO & ENGEL, *supra* note 5, at 230 (discussing how Appendix I protects listed species whether or not they are alive when traded); Patel, *supra* note 5, at 165 (noting that CITES permits for trade of endangered species "apply to specimens alive or dead, or to 'any readily recognizable part or derivative thereof' ").

25. *See* CITES, *supra* note 4, at art. IV; *see also* D'AMATO & ENGEL, *supra* note 5, at 230 (1996); Glennon, *supra* note 1, at 11 (noting that tens of thousands of species are covered in Appendix II).

26. CITES, *supra* note 4, at art. II(2); *see* Daniel, *supra* note 2, at 686 (describing Appendix II species as not yet subject to extinction, but face demise without regulation); Lee, *supra* note 12, at 503 ("Appendix II includes species that are not currently threatened with extinction but may become threatened unless trade in these species is strictly controlled").

27. *See* CITES, *supra* note 4, at art. II(2); *see also* Garrison, *supra* note 17, at 310 (defining look-alike species as "species which are similar in appearance to other threatened species . . . "); Lee, *supra* note 12, at 503.

possible for look-alike species to be hunted or smuggled out of a country if it is physically similar to a threatened species.[28] Trade in species found in Appendix II is therefore permitted by CITES, but regulated by necessity.[29]

Appendix III provides the least protection to listed species of all three appendices.[30] Appendix III provides a mechanism for a member of CITES to seek international help in enforcing its domestic legislation that prevents or restricts the exploitation of a particular species not listed in Appendix I or II.[31] Appendix III, therefore, provides the opportunity for a nation to request the cooperation of other nations in controlling trade.[32] CITES permits every member nation to list any species that are already subject to regulation within its own jurisdiction under Appendix III.[33]

B. Permit Requirements

CITES implements an import and export system to regulate the trade of species listed in the first three appendices.[34] This system is central to CITES's ability to prevent the loss of species due to commercial trade.[35] The import and export restrictions placed on species also vary according to the appendix in which the traded species is listed.[36]

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28. See CITES, *supra* note 4, at art. II(2)(b); *see also* Lee, *supra* note 12, at 503 ("[I]f Species A is threatened by trade and Species B is not but both are physically similar enough that Species A could be smuggled out of a country under the guise of being Species B, both species will be listed under Appendix II. Such similarities may also lead to extended and threatening hunting of the Species B.").

29. *See* Glennon, *supra* note 1, at 11 (noting that Appendix I regulations regarding exportation are more demanding than Appendix II importation regulations).

30. *See* D'AMATO & ENGEL, *supra* note 5; *see generally* Glennon, *supra* note 1, at 11 (noting the limitations of Appendix III).

31. *See* CITES, *supra* note 4, at arts. II(3), V; *see also* Lee, *supra* note 12, at 511 (noting the availability of international help through Appendix III).

32. *See* CITES, *supra* note 4, at arts. II(3), V; *see also* D'AMATO & ENGEL, *supra* note 5, at 230; Lee *supra* note 12, at 503 (noting that Appendix III lists certain species for which the cooperation of other nations is necessary in order to "control[] trade").

33. *See* Glennon, *supra* note 1, at 10-11; Wold, *supra* note 1, at 872 n.229 ("Species are listed in Appendix III solely on the basis of a decision by the country of origin."); *see generally* Krieps, *supra* note 6, at 470 n.43 (discussing how Appendix III gives parties the option of listing native species already protected within their own borders).

34. CITES, *supra* note 4, at arts. III-V.

35. *See* Skilton, *supra* note 10, at 479 n.165 (noting that "trade is regulated through a system of import and export permits"); Wold, *supra* note 1, at 870 n. 218 (noting that CITES' ability to curtail the loss of species due to commercial trade is dependent upon the permit system).

36. *See* Daniel, *supra* note 2, at 686-87 (discussing the listing of endangered species in CITES appendices and the permit system); Patel, *supra* note 5, at 165 (discussing the hierarchy of endangered species established in the CITES appendices).

The permit system strikes a balance, allowing trade in species to continue, while ensuring that this trade would not reduce chances for the species' survival.[37] CITES, however, lays down strict conditions that must be satisfied before a permit is granted.[38] First, the treaty requires every member nation to establish one or more Management and Scientific Authorities.[39] The Management and Scientific Authorities established by each nation are responsible for regulating trade by implementing the permit system.[40] These Management and Scientific Authorities are responsible for ensuring that certain conditions and requirements are met before permits are issued to potential importers and exporters.[41] Every party to CITES is therefore responsible, through the exercise of its customs and controls, for ensuring that listed species are covered by the appropriate permits when imported *or* exported.[42]

Export permits must accompany each export of an Appendix I or Appendix II species, but permit requirements vary depending upon the Appendix in which the species is listed.[43] While

37. *See* Wold, *supra* note 1, at 870-71 (discussing how CITES allows the importation and exportation of endangered species as long as the survival of the species which is being traded is not in jeopardy); Krieps, *supra* note 6, at 469-70 (noting same).

38. *See* Daniel, *supra* note 2, at 686-87 (discussing the operations of the permit system); *see generally* Granadillo, *supra* note 9, at 441-42 (discussing the permit system).

39. *See* CITES, *supra* note 4, at arts. IX(1); *see also* LYSTER *supra* note 12, at 240-41.

40. *See* CITES, *supra* note 4, at arts. IV-VI, IX(1); *see also* LYSTER, *supra* note 12, at 240-41 (discussing how every member nation is obligated to establish a Management and Scientific Authority which, between them, are responsible for regulating trade by ensuring that the conditions have been satisfied and, if they have been, for granting a permit); Daniel, *supra* note 2, at 686-87) (discussing how it is the responsibility of each member nation to implement this permit system through the functions of a Management Authority and Scientific Authority and describing the responsibilities of both officials); Krieps, *supra* note 6, at 471 n.50.

41. *See* Krieps, *supra* note 6, at 471 (discussing the requirements needed to obtain both an import and an export permit); Master, *supra* note 17, at 447 (asserting that the Management and Scientific Authorities must adhere to all requirements listed under Articles VIII through Article X of CITES); *see also* Lee, *supra* note 12, at 502-03 ("There is also a Secretariat in Switzerland whose function is to oversee the permit system on the international level.").

42. See CITES, *supra* note 4, at 27 U.S.T. 1087, 993 U.N.T.S. 1103-04, 993 U.N.T.S. 251; PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 477 (1992); Krieps, *supra* note 6, at 471 ("Management and Scientific Authorities established in each CITES member country regulate this trade through a system of permits.)

43. CITES, *supra* note 4, at arts. III(2), IV(2). Article III(2) of CITES states:

> An export permit shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
>
> (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for protection of fauna and flora;
>
> (c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
>
> (d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

Id.

CITES, *supra* note 4, at art. III(2) (an export permit for Appendix II species will be granted under Article IV(2) of CITES which excludes the requirements listed under Article III(2) (d)); *see also* Wold, *supra* note 1, at 877-78 nn.237 & 268 (discussing how CITES requires exporters to ensure that live specimens are shipped as in a manner as to minimize the risk of injury, damage to health or cruel treatment').

imports of Appendix I and Appendix II species also require permits,[44] the limitations governing import permits for Appendix II species are far less rigorous.[45] For example, an importing country must determine that the import will not be used for "primarily commercial purposes" prior to issuing an import permit for an Appendix I species.[46] Furthermore, the importing country must grant an import permit before the exporting country grants an export permit for Appendix I species.[47] Appendix II permits the trade of listed species for commercial use.[48] This allows for import permits for Appendix II species to be granted more often than permits for Appendix I species.[49]

C. Other Special Provisions

CITES further requires its signatories to meet every two years and to enforce the provisions of CITES "without consideration for whether or not a particular species' country of origin or destination is party to the Convention."[50] The Secretariat of CITES, provided by the Executive Director of the United Nations Environment Programme,[51] is responsible for arranging these meetings of all parties.[52] A central function of the biennial meetings is to review the species listed in each appendix and to determine whether additions, deletions or transfers of species from one appendix to another should be made.[53] The Secretariat is authorized under Article XII to ensure that any additions, deletions or transfers are successfully completed.[54]

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44. CITES, *supra* note 4, at art. III(2) (d). The requirements listed under Article III(3) applies to Appendix I species and states:

> An import permit shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
>
> (b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
>
> (c) a Management Authority of the State of import is satisfied that the specimen is not used for primarily commercial purposes.

Id.

45. CITES, *supra* note 4, at art. IV(4) ("The import of any specimens of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.").

46. CITES, *supra* note 4, at art. III(3)(C).

47. CITES, *supra* note 4, at art. III(4)(C).

48. CITES, *supra* note 4, at art. II(2)(A) ("Appendix II shall include all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."); CITES, *supra* note 4, at art. II(2)(B) ("Appendix II shall include other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (A) of this paragraph may be brought under effective control.").

49. CITES, *supra* note 4, at art. IV.

50. CITES, *supra* note 4, at art. XI(2); *see* Skilton, *supra* note 10, at 479 n.166.

51. *See* CITES, *supra* note 4, at art. XII(1) ("Upon entry into force of the present Convention, a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme.")

52. *See* CITES, *supra* note 4, at art. XII.

53. *See* CITES, *supra* note 4, at arts. XI(3), XV-XVII.

54. *See* CITES, *supra* note 4, at arts. XII, XV-XVI; Glennon, *supra* note 1, at 12 nn.93-94 ("Such amendments require the approval of a two-thirds majority of those parties present and voting. The amendment enters into force 90 days after the meeting.").

D. Enforcement of the Treaty

CITES also imposes on every member nation, under Article VIII, the responsibility of enacting domestic legislation to implement the terms of the treaty.[55] Domestic legislation includes, for example, assessing penalties on violating parties, confiscating illegally traded species or specimens and imposing fines for the costs incurred from the confiscation of illegal trade.[56] CITES also permits member nations to adopt domestic measures stricter than those listed in CITES regarding the trade, taking, or transport of listed species under Article XIV.[57]

II. The Shortcomings of CITES

CITES has been praised over the years for protecting dozens of near-extinct species, including wild crocodiles, African elephants, rhinoceroses and Asian tigers.[58] CITES is also considered a success because it is in force in over 152 states[59] and there has been solidarity amongst the international community in enforcing CITES' recent prohibition of ivory trad-

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55. *See* CITES, *supra* note 4, at art. VIII. Article VIII(1) of CITES states:

> The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. There shall include measures:
>
> (a) to penalize trade in, or possession of, such specimens, or both; and
>
> (b) to provide for the confiscation or return to the State of export of such specimens.

CITES, *supra* note 4, at art. VIII(1)(a)-(b); *see* also LYSTER, *supra* note 12, at 264.

56. *See* CITES, *supra* note 4, at art. VIII; *see also* Bacon, *supra* note 13, at 343 n.86-87; Daniel, *supra* note 2, at 687 n.37 ("Considered 'the transition between international obligations of States to the criminal laws and regulations that govern the conduct of individual humans,' this provision binds the *citizens* of each party to the domestic legislation they enact to implement the treaty."); Glennon, *supra* note 1, at 13 nn.98-99 (noting same).

57. CITES, *supra* note 4, at art. XIV(1). Article XIV(1) of CITES states:

> The provisions of the present Convention shall in no way affect the right of Parties to adopt:
>
> (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
>
> (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

Id.

See Lee, *supra* note 12, at 512 ("[C]onservation efforts must be taken through voluntary domestic measures."); Master, *supra* note 17, at 447 (noting that the Convention shall not affect a party's obligations under another treaty or international agreement regarding trade or regulating external customs).

58. *See* Bacon, *supra* note 13, at 345 (recognizing that CITES has been praised for protecting dozens of near-extinct animals from extinction); Lee, *supra* note 12, at 503 n.43 (noting that CITES has resulted in an increase in the number of certain endangered wild crocodiles and the reduction in the numbers of African elephants killed for their ivory).

59. U.S. Fish & Wildlife Service, AIA, *CITES List of Party Countries,* (visited March 23, 2001) <http://international.fws.gov/cites/citeslop.html> (showing that there are 152 party countries to CITES as of October 2, 2000) [hereinafter "*CITES List of Party Countries*"].

ing.[60] Despite the many accomplishments of CITES, however, there are numerous reasons why CITES is not considered a powerful international treaty.[61]

A. Shortcomings of the Text

While CITES begins to address the problems of international wildlife trade, major loopholes involving enforcement exist.[62] Although Article VIII authorizes party members to assess penalties on those who engage in trade in violation of CITES, it does not provide specifics on how to implement such an enforcement program.[63] Therefore, each participating country is permitted to implement its own set of policies with respect to the regulation of the international trade of endangered species.[64] With no penalty specified or endorsed within CITES, inconsistent sentences and inadequate financial penalties have been implemented by nations interpreting this provision.[65] Violations of CITES often occur as a result of this lack of uniformity because "illegal trade in one country may face severe consequences if discovered, while in another country, the penalties for the same activity may be practically nonexistent."[66]

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60. *See* Bacon, *supra* note 13, at 345 n.105; *see also* Fred L. Smith, Jr., *Sustainable Development—A Free-Market Perspective: The 1993 National Conference on Sustainable Solutions—Population, Consumption and Culture*, 21 B.C. ENVTL. AFF. L. REV 297, 307 (1994) (noting the economic impact on Africa due to the CITES ban on international ivory trade). *But see* Glennon, *supra* note 1, at 20 (questioning the success of CITES in light of the booming poaching industry in East Africa).

61. *See* Bacon, *supra* note 13, at 343-45 (noting that the CITES treaty has many problems due to its self enforcement mechanisms making it a less powerful treaty); *see also* William C. Burns, *CITES and the Regulation of the International Trade in Endangering Species of Flora: A Critical Appraisal,* 8 DICK. J. INT'L L. 203, 211-15 (1990) (discussing options employable in order to strengthen the efficacy of CITES in protecting flora). *See generally* Daniel, *supra* note 2, at 688 (stating that since the domestic laws of the parties to the treaty are so different, the effectiveness of the treaty varies).

62. *See* Symposium, *Law, War and Human Rights: International Courts and the Legacy of Nuremberg: Connecticut Compendium of International and Comparative Legal Scholarship*, 12 CONN. J. INT'L L. 265, 290 (1997) ("While CITES begins to address the problem, major loopholes involving enforcement exist").

63. *See* CITES*, supra* note 4, at 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243; Daniel, *supra* note 2, at 695 ("Article VIII(1) (a) of the Convention authorizes party members to take steps in assessing penalties on those who engage in trade that violates CITES provisions, but provides no specifics on how to implement such as an enforcement program").

64. *See* Master, *supra* note 17, at 447 n.252 (noting that the United States has implemented its own set of policies through the "TED Requirements"); *see also* Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 286 (1995) (noting the "fact that each country must establish management and scientific authorities to fulfill the objectives of CITES" the result has lead to "each country having its own unique set of policies").

65. *See* Bacon, *supra* note 13, at 344 (noting how CITES gives no guidance as to the levels of punishment that a party should impose on persons convicted of illegally trading endangered or threatened species); Daniel, *supra* note 2, at 686 (discussing how criminal sentences and civil fines are small in comparison to the value of the endangered species on the black market).

66. *See* Bacon, *supra* note 13, at 344 (discussing how a penalty imposed by one party to CITES may be considered only a 'slap on the wrist' by another party to CITES); Patel, *supra* note 5, at 188 (discussing the implications of "ineffective communication" between members of CITES).

A difficulty in enforcing CITES also arises due to the lack of a central enforcement mechanism behind this international environmental treaty.[67] The Secretariat of CITES, acting as the central authority of the treaty, is not delegated any enforcement power by the treaty.[68] The Secretariat is, instead, forced to rely on the persuasive tactics to convince parties to comply with the treaty or persuade other parties to call for international sanctions on parties who fail to comply.[69] CITES is further considered, in the international context, a voluntary convention because it lacks provisions for remedies against non-complying member states.[70] CITES also has no bearing on countries that do not wish to assume the obligations of its provisions.[71]

B. The International Context

International environmental laws are imposed upon sovereign nations who have the capability to enforce a political regime and economic system within their territorial borders without interference from other nations.[72] This tension between state sovereignty and the need for international environmental initiatives is often a barrier to enforcement of international envi-

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67. *See* Kevin C. Kennedy, *Reforming U.S. Trade Policy To Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 228 n.202 (1994) (discussing how multilateral environmental conventions such as CITES typically contain weak and ineffective enforcement mechanisms). *See generally* Brad Knickerbocker, *Illegal Trafficking In Wildlife Persists*, THE CHRISTIAN SCIENCE MONITOR, Mar. 8, 1993, at 15 (noting the problems with the "lack of commitment of some CITES nations").

68. *See* CITES, *supra* note 4, at art. IV (noting that the Secretariat is provided by the Executive Director of the United Nations Environment Programme); *see also* Patel, *supra* note 5, at 170 (finding no enforcement powers delegated to the Secretariat in Article VII of CITES).

69. *See* Ardia, *supra* note 1, at 511-12 ("[I]nternational environmental treaties often lack domestic enforcement mechanisms precisely because environmental agreements are put into effect by secretariats, international organizations, and other international bodies that lack 'international jurisdiction'."); Bacon, *supra* note 13, at 343 (noting how the Secretariat, under Article XIII, may bring non-compliance matters to the attention of the parties involved when the Secretariat is convinced that treaty provisions have not been effectively implemented); Patel, *supra* note 5, at 171 (noting same).

70. *See* D'AMATO & ENGEL, *supra* note 5, at 242; *see also* Lee, *supra* note 12, at 512 (noting that there are "no self-executing penalties for violations of [CITES] resolutions"); Patel, *supra* note 5, at 171 n.85 (discussing how the parties to CITES are ultimately responsible for policing themselves because they are given the power to stop illegal trading).

71. *See* D'AMATO & ENGEL, *supra* note 5, at 242; Master, *supra* note 17, at 447 ("[T]here is no mandate that the United States impose trade sanctions on countries not following environmental ideals."); *but see* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 568-69 (1998) (noting how the Security Council of the United Nations Charter approves measures against non-member states).

72. *See* Ardia, *supra* note 1, at 499 ("[I]nternational environmental treaties often lack domestic enforcement mechanisms precisely because environmental agreements are put into effect by secretariats, international organizations, and other international bodies that lack 'international jurisdiction'."); Daniel, *supra* note 2, at 688 ("Historically, states were sovereign bodies dependent only upon themselves for the implementation of their laws and regulations."); Elizabeth A. Ellis, *Bordering On Disaster: A New Attempt To Control The Transboundary Effects of Maquiladora Pollution*, 30 VAL. U.L. REV. 621, 633 n.89 (1996) ("State autonomy suggests that a state is not subject to any external authority unless it has voluntarily consented to such authority.") David Farve, *Third Annual Conference on Animals and the Law*, 15 PACE ENVTL. L. REV. 467, 471 (1998) (discussing the key concept of sovereignty basically instructing countries to stay out of the international affairs of other countries).

ronmental laws.[73] There is no question that international environmental agreements, such as CITES, need extensive monitoring over large geographic areas because ecosystems and individual species have no concept of political boundaries.[74] Although every party to an international treaty, such as CITES, is required to enforce the provisions of the treaty,[75] the success of CITES is dependent upon whether or not the member states doing their part to abide by the provisions they have agreed to within their own borders.[76]

Every member nation to CITES, however, has its own reasons or motivations for wanting to participate in this international environmental treaty.[77] International agreements such as CITES, nevertheless, generally have the potential for ineffectiveness because "party countries have diverse and often contradictory objectives."[78] As a result, individual states are not likely to voluntarily comply with provisions of international environmental laws or treaties that "may not be in tune with their primary political objectives."[79] For instance, developing nations pri-

73. *See* Ardia, *supra* note 1, at 508-09; Edward D. McCutcheon, Note, *Think Globally, (En) Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395, 430 (1998) (discussing how strong forces of sovereignty and self-determination pull developing nations away from integration with an international order); *see also* D'AMATO & ENGEL, *supra* note 5, at 234 ("International law has been moving steadily to protect wider humanitarian interests and to prevent environmental degradation, even at the cost of eroding state sovereignty.").

74. *See* Ardia, *supra* note 1, at 499 ("[B]ecause a large portion of the Earth's surface is 'open ocean', there is plainly a need for the rule of law to extend beyond traditional state borders."); Patel, *supra* note 5, at 185.

75. *See* CITES, *supra* note 4, at art. XI(2); *see also* Skilton, *supra* note 10, at 479 n.166 ("CITES requires its signatories to enforce these provisions without consideration for whether or not a particular species' country of origin or destination is party to the Convention").

76. *See* Ardia, *supra* note 1, at 510 (recognizing that most environmental agreements are only "morally binding" so for them to be successful each country must abide by and enforce the provisions they have put into place); Krieps, *supra* note 6, at 473 ("[I]ts provisions are effective only to the degree that customs officials require compliance."); Wold, *supra* note 1, at 843 ("[I]nternational traffic in endangered species . . . cannot be resolved without the participation of many countries."); *see also* Farve, *supra* note 72, at 471 ("The success of CITES arises out of the fact that countries including the United States and most of Europe have stated that you cannot import into the United States unless you agree to be bound by the provisions of this treaty.").

77. *See* Daniel, *supra* note 2, at 688 ("The success of CITES depends on the national and political will of each party because the treaty is enforced by its individual members."); Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, *supra* note 11, at 494 (noting that many countries have banned the import of ivory, because of concerns about the elephants extinction, however, some countries are not concerned about this animal's extinction); Patel, *supra* note 5, at 185 (discussing the various political and ideological reasons each member state may have in becoming members of the treaty).

78. *See* Jarred Kassenoff, *Treaties in the Mist,* 7 CARDOZO J. INT'L & COMP. L. 359, 366 (1999) (stating that each nation that is a member of CITES can choose not to recognize an animal as protectable); Patel, *supra* note 5, at 185 (observing that "[e]ach member state has its own reasons or motivations for wanting to participate in one of the world's most important wildlife treaties."); Robins, *supra* note 9, at 132-33 ("A byproduct of trying to accommodate the diverse objectives of many nations is that the standards and institutions created by such agreements are often not as strong as they could be.").

79. *See* Kassenoff, *supra* note 78, at 368 (observing that many countries lack the motivation to comply with CITES, for example Rwanda, Uganda and Zaire are more concerned with their civil wars than the objectives of CITES); Glennon, *supra* note 1, at 17 (noting that many South African states have refused to stop the very profitable sale of ivory which comes from elephants that have been listed on Appendix I); Robins, *supra* note 9, at 132 ("A byproduct of trying to accommodate the diverse objectives of many nations is that the standards and institutions created by such agreements are often not as strong as they could be.").

marily concerned with economic growth and industrialization are not likely to voluntarily impose environmental protection laws if it jeopardizes their economic policies.[80] The combination of severe poverty with the potential to make vast profits by trading products made from endangered species has instead prompted many government officials to look the other way rather than enforcing the provisions of CITES.[81] Furthermore, the majority of listed species protected by CITES inhabit developing countries typically plagued with poor economies, low agricultural production and rural poverty.[82] If there is an increasing demand for a particular species in the global market, it is likely that countries having a supply of the particular species will ignore CITES when plagued with economic problems.[83] It is unreasonable to expect that impoverished countries will neglect an available source of food or profit all for the purposes of preservation and conservation.[84]

C. Hopes for the Future

In order for the international arena to move closer towards resolution of international environmental problems, member nations must be prepared to enforce the provisions of CITES as a commitment extending beyond their territorial borders.[85] All parties must

80. *See* Ardia, *supra* note 1, at 510 ("[W]hen a particular commitment becomes contrary to a State's interests-either sociopolitical or economic-it is less likely that the commitment will be honored."); Sudhir K. Chopra, *International Trade in Endangered Species: A Guide to CITES. By David S. Favre,* 87 A.J.I.L. 491, 491 (1995) (book review) (noting that endangered animals found in developing countries produce products that are in demand which deters these countries from enforcing protective regulations); Robins, *supra* note 9, at 132 ("A byproduct of trying to accommodate the diverse objectives of many nations is that the standards and institutions created by such agreements are often not as strong as they could be."); Sudhir K. Chopra, *International Trade in Endangered Species: A Guide to CITES. By David S. Favre,* 87 A.J.I.L. 491, 491 (1995) (book review) (stating that endangered animals found in developing countries produce products that are in demand which deters these countries from enforcing protective regulations).

81. *See* Bernazani, *supra* note 6, at 229-30 (discussing how close to 5,000 sea turtle carcasses washed up on India's coast in 1999 whose death was attributable to shrimp trawlers who failed to use because India has failed to enforce the mandatory use of turtle excluder devices while trawling in this region—India is known to have a corruptive bureaucracy); Glennon, *supra* note 1, at 20 (explaining why the ivory trade flourished under CITES and how parties to the treaty failed to combat the illegal trade of ivory tusks for many years); Krieps, *supra* note 6, at 483 n.122 (asserting that the booming economies in Southeast Asia, has caused prices for tiger and rhino derivatives to soar, leading to rampant poaching and corruption at even the highest levels in the exporting countries' governments).

82. *See* D'AMATO & ENGEL, *supra* note 5, at 237; Chopra, *supra* note 80, at 491 ("Most of the wild flora and fauna inhabit the developing countries. Yet these countries, for economic reasons, have avoided enforcing the measures to protect their resources."); Kassenoff, *supra* note 78, at 361 ("These problems are often exacerbated when dealing with environmental treaties since countries which need the most preservation usually lack the necessary resources to supply it.").

83. *See* D'AMATO & ENGEL, *supra* note 5, at 232; Kassenoff, *supra* note 78, at 365 (discussing the black markets dealing in animal hides and how economic considerations often impact preservation).

84. *See* D'AMATO & ENGEL, *supra* note 5, at 237; Glennon, *supra* note 1, at 17 (many South African states have refused to stop the very profitable sale of ivory which comes from elephants); *see also* Harland Book Review, *supra* note 16, at 201 (discussing the pros and cons of the ban of ivory as a method of conserving the elephant population).

85. *See* Ardia, *supra* note 1, at 497 n.2, 498; Ardia, *supra* note 1, at 498 (noting that to be an effective environmental agreement the problem of states not making a commitment which extends beyond their territorial borders must be addressed); Daniel, *supra* note 2, at 704 (suggesting that the way to improve international environmental problems and goals recognized by CITES, member nations must enforce policies in their own country and work together with other countries); Robins, *supra* note 9, at 133 ("Such local environmental laws must approach environmental problems with an eye towards the international nature of the issue.").

acknowledge that CITES will not be seen as a powerful force in the international context unless every party to the treaty relinquishes some sovereignty notwithstanding the varied political and ideological interests stimulating membership.[86]

Sovereign nations, however, have come to realize that to operate within the world economic system, they must have economic relations with other countries and therefore concede to some limitations.[87] Consequently, international treaties such as CITES are written in the hope that an increasing number of nations will continue to become morally bound by the environmental principles at stake and sacrifice some of their sovereignty in the international context.[88]

III. Enforcement of CITES in the United States

Considering that there are presently 152 parties to CITES,[89] it is reasonable to expect that complying member nations will enact domestic wildlife laws that will vary significantly in scope, content and effectiveness.[90] The United States recognizes that environmental protection and international trade policy are "inextricably linked"[91] and has greatly affected endangered species protection on an international level through its domestic wildlife laws.[92]

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86. *See* Ardia, *supra* note 1, at 508 n.52 ("States often vigorously defend their sovereignty because they consider their physical integrity and political identity as important elements in their foreign policies."); Daniel, *supra* note 2, at 688 ("Becoming a member of any international agreement results in the partial relinquishment of that sovereignty."); Ellis, *supra* note 72, at 633 n.89 ("Recently, the traditional notions of sovereignty have been reexamined. In today's world, where international cooperation has become increasingly important, states may be called upon to sacrifice some of their sovereignty."). *See generally* Joseph J. Urgese, *Dolphin Protection and the Mammal Protection Act Have Met Their Match: The General Agreement on Tariffs and Trade,* 31 AKRON L. REV. 457, 458 n.4 (1998) (discussing how developing countries view trade as perhaps more vital than their status in the international community).

87. *See* Chopra, *supra* note 80, at 492 (CITES may imply that member nations have realized that the problem is global and not confined to each region resulting in the necessity of countries viewing the problem as an ethical one); Farve, *supra* note 72, at 471 (recognizing that due to the growing economy of the world, in order to comply with other countries one must agree to certain limitations).

88. *See* Ardia, *supra* note 1, at 510 (discussing the effectiveness of CITES as hinging on voluntary governmental compliance); Ellis, *supra* note 72, at 633 n.89 (noting that in some areas of particular importance states may be asked to give up some of their sovereignty); Robins, *supra* note 9, at 131-32 nn.103 & 111 (discussing how multilateral agreements such as CITES are morally binding and its success depends on individual state enforcement).

89. *CITES List of Party Countries, supra* note 59, at March 23, 2001 (there are 152 party countries to CITES as of Oct. 2, 2000).

90. *See* Patel, *supra* note 5, at 168 (discussing how the resources of each country will impact the "scope, content and effectiveness" of the wildlife laws adopted); *see also* Julie Cheung, *Implementation and Enforcement of CITES: An Assessment of Tiger and Rhinoceros Conservation Policy in Asia,* 5 PAC. RIM. L. & POL'Y J. 125, 139 (1995) (stating that wildlife legislation enacted by each country "may vary considerably in terms of comprehensiveness and scope").

91. *See* Skilton, *supra* note 10, at 455 (discussing how international agreements have long utilized trade measures to protect endangered species).

92. *See* Daniel, *supra* note 2, at 684 (asserting that of the signatories to the treaty the United States has the most complex "implementation programs"); Lee, *supra* note 12, at 512 (stating that "whether or not a nation is a Party to CITES, conservation efforts must be taken through voluntary domestic measures"); 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, 257-58 (1996) (noting that the Clinton Administration had imposed sanctions on Taiwan, through its domestic powers, for failing to limit the smuggling of rhino horns and tiger parts).

A. The Endangered Species Act

The United States is an original party member to CITES[93] and is known to have one of the most sophisticated CITES implementation programs of all parties to the treaty.[94] The United States is not only the world's largest importer of wildlife and wildlife products and consumer of internationally traded wildlife goods,[95] but also accounts for one-fifth of the trade in the wildlife market.[96] Furthermore, the United States contributes 20 percent of CITES' annual funding, prompting the question of how large a role the United States may have in species protection on an international level.[97]

The United States adopted its principal measures concerning the international trade in endangered species through the Endangered Species Act (hereinafter "ESA").[98] The ESA illus-

93. CITES, *supra* note 4, at 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 (the United States hosted the signing of CITES in 1973); Jonathan P. Kazmar, Article, *The International Illegal Plant and Wildlife Trade: Biological Genocide?*, 6 U.C. DAVIS J. INT'L L. & POL'Y 105, 110 (2000) (noting that "the original nine signatory nations were the United States, Nigeria, Switzerland, Tunisia, Sweden, Cyprus, Ecuador, Chile, and Uruguay"); Krieps, *supra* note 6, at 465-66 n.24 ("The United States hosted the international conference of sovereign states that drafted the final language of the Conference, and has been a party to CITES since it took effect of July 1, 1975").

94. *See* Daniel, *supra* note 2, at 683-84 (noting that the United States is the world's largest importer of wildlife and wildlife products); Lee, *supra* note 12, at 497 (noting same); Robert McClure, *12-Day Conference to Combat Trade in Endangered Species*, SUN-SENTINEL, Nov. 6, 1994, at 1A (noting that "protected plants and animals are second only to drugs among illegal items smuggled into the United States.").

95. Bacon, *supra* note 13, at 334 (noting that the United States "has a vital interest in staying informed about financial issues relating to the trade aspect of international wildlife" because the United States "is the world's largest importer of wildlife and wildlife products."); Lee, *supra* note 12, at 497 ("In the United States, the world's largest importer of wildlife and wildlife products, protected plants and animals are second only to drugs among illegal items smuggled into the country.")

96. *See* Daniel, *supra* note 2, at 683-84 nn.6-8. (noting that the United States is responsible for one-fifth of the wildlife trade market); Patel, *supra* note 5, at 159 n.6 (citing Laura H. Kosloff & Mark C. Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick*?, 17 ENVTL. L. REP. 10, 222, 10, 223 n.9 (1987)) (stating that "the U.S. market accounts for up to one third of the five billion dollar business"); *see generally* Wold, *supra* note 1, at 867-68 n.193 (noting that there is approximately from $100 million to $250 million illegal trade with the United States annually).

97. *See* Daniel, *supra* note 2, at 683-84 n.9 (noting that 20 percent of CITES' annual funding comes from the United States); *see generally* Kazmar, *supra* note 93, at 115-19 (discussing U.S. efforts to enforce CITES); Krieps, *supra* note 6, at 465-66 n24 (noting that the United States contributed "more than twice the amount contributed by Japan, the next highest contributor").

98. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* (2000) [hereinafter "ESA"]; *see also* Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 128 (1994) ("[T]he Act establishes as a high priority one of the principal purposes of the wildlife reserve networks—prevention of species extinction."); Symposium, *supra* note 62, at 290 (discussing how the United States' Endangered Species Act attempts to address the problems of international wildlife trade). The Endangered Species Act states:

> The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2000).

trates the desire to "provide a means by which endangered species could be protected and tasks all federal departments and agencies to assist in this effort"[99] and also represents the United States' official implementation of CITES.[100] Although the ESA will not eliminate all extinction, it serves as the United States' tool to reduce wildlife exploitation through importation, exportation, sale or transportation of species in violation of CITES.[101]

In addition to implementing CITES in the United States, Section 9 of the ESA prohibits the shipping, sales, or offer for sale in interstate or foreign commerce of any endangered species taken in violation of ESA standards.[102] The ESA permits the President of the United States to enter into conservation agreements with other countries, provide assistance in program administration and funding, conduct enforcement investigations abroad and to appropriate funds for research on the future preservation of endangered species.[103] The ESA also designates the Secretary of the Department of the Interior (hereinafter "Secretary of the Interior"), acting through the U.S. Fish and Wildlife Service (hereinafter "FWS"), as both the Scientific and Management Authority for the United States under CITES.[104]

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99. *See* Terence P. Stewart and Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 109, 114 (1998).

100. *See* ESA, *supra* note 98, at §§ 1531-44 *et seq*. The Endangered Species Act states:

> The United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to . . . (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora. . . .

Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(4) (2000); *see* Skilton, *supra* note 10, at 479 n.159 ("The United States implemented its obligations under CITES in the Endangered Species Act of 1973."); Patel, *supra* note 5, at 173; *see* Daniel, *supra* note 2, at 683 ("[A]lthough the implementation of CITES in the United States did not begin until after ratification, the United States can legitimately claim to have implemented CITES longer than any of the other member-parties."); *CITES List of Party Countries*, *supra* note 59, at last modified June 12, 2000)

101. *See* Daniel, *supra* note 2, at 683-684 n.16 (discussing the Endangered Species Act as an important precedent for other countries to follow in the implementation of domestic species protection programs); Valerie Karno, *Protection of Endangered Gorillas and Chimpanzees in International Trade: Can CITES Help*?, 14 HASTINGS INT'L & COMP. L. REV. 989, 997 (1991) (examining the importation of endangered gorillas by the United States government); Patel, *supra* note 5, at 176 (describing the Endangered Species Act as an innovative piece of legislation that has become the "pit bull" of environmental statutes).

102. *See* ESA, *supra* note 98, at § 1531(a)(1); *see also* Glennon, s*upra* note 1, at 13 n.106 ("[T]he ESA prohibits the importation into the United States of endangered species that are listed in the ESA."); Julianne Kurdila, Comment, *The Introduction of Exotic Species Into the United States: There Goes the Neighborhood!*, 16 B.C. ENVTL. AFF. L. REV. 95, 106 (1988) ("[T]he Act prohibits the import, export, sale, shipment and possession of designated threatened and endangered species' ecosystems."); Amy E. Vulpio, Note, *From the Forests of Asia to the Pharmacies of New York City: Searching for a Safe Haven for Rhinos and Tigers*, 11 Geo. Int'l Envtl. L. Rev. 463, 470 (1999) ("Section 9 prohibits the shipping, selling, or offering of endangered species for sale in interstate or foreign commerce").

103. *See* ESA, *supra* note 98, at § 1537(a); *see also* Patel, *supra* note 5, at 174.

104. *See* ESA, *supra* note 98, at § 1537(a); *see also* Daniel, *supra* note 2, at 687 n.34 ("In the United States, the functions of the Management Authority and the Scientific Authority are carried out by the Fish and Wildlife Service."); Patel, *supra* note 5, at 173-174 (1995) (noting how the U.S Fish & Wildlife Service, within the Department of the Interior, executes the representative functions of authority for the Endangered Species Act of 1973).

The Secretary of the Interior implements CITES and is directed "to issue such regulations as he deems necessary and advisable" to provide for the protection of species.[105] The Secretary of the Interior also acts in conjunction with the Secretary of the Department of Commerce to determine whether to list species as 'endangered' or 'threatened.'[106] The ESA defines endangered species as one "that is in danger of extinction throughout all or a significant portion of its range" and threatened species as "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[107]

B. Enforcing CITES Through the Endangered Species Act

Importers and exporters of fish, wildlife or plants are required to receive permission for their actions from the Secretary of the Interior under the ESA.[108] The Secretary of the Interior may impose penalties upon individuals for failure to comply with the requirements under the ESA including the revocation of import and export licenses or permits,[109] confiscation of ille-

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105. *See* ESA, *supra* note 98, at § 1537(a); *see also* Glennon, *supra* note 1, at 13 ("[T]he ESA prohibits the importation into the United States of endangered species that are listed in the ESA."); Patel, *supra* note 5, at 173 (stating that the purpose of the Secretary of the Interior is to implement CITES and the U.S. Fish and Wildlife Service, within the same department, is in charge of executing the functions of authority).

106. *See* Marlo Pfister Caduddu, Note, *Turtles in the Soup? An Analysis of the GATT Challenge to the United States Endangered Species Act Section 609 Shrimp Harvesting Nation Certification Program for the Conservation of Turtles*, 11 GEO. INT'L ENVTL. L. REV. 179, 180 (1998) (explaining the factors that will determine whether a particular species may be listed as endangered or threatened under the Endangered Species Act); *see also* Patel, *supra* note 5, at 175 n.117 (1995) (discussing the criteria for determining whether or not an animal is endangered).

107. ESA, *supra* note 98, at § 1532(6), (20). Whether a species is listed as endangered or threatened depends on numerous factors including:

> (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) Overutilization, for commercial, recreational, scientific, or educational purposes;
>
> (C) Disease or predation;
>
> (D) The inadequacy of existing regulatory mechanisms; or
>
> (E) Other natural manmade factors affecting its continued existence.

Endangered Species Act of 1973, 16 U.S.C. § 1533(a)(1)(A)-(E) (2000).

108. *See* ESA, *supra* note 98, at § 1538(d)(1); Kurdila, *supra* note 102, at 106 (noting that there are criminal and civil penalties for not first receiving permission).

109. *See* Steve Charnovitz, *Recent Developments: Environmental Trade Sanctions and the Gatt: An Analysis of the Pelly Amendment on Environmental Practices,* 9 AM U.J. INT'L & POL'Y 751, 770 (1994) (stating that "concurrently with the CITES meeting, the Secretary of the Interior certified China and Taiwan for trade in both rhino horns and tiger bones, . . . [but indicated that] both countries fell short of international conservation standards) [hereinafter *Environmental Trade Sanctions*]; Jack I. Garvey, *Article: AFTA After NAFTA*: *Regional Trade Blocs and the Propagation of Environmental Labor Standards*, 15 BERK INT'L LAW 245, 270 (1997) (asserting that the "United States has enacted criminal penalties in such areas as commercial trade in rhinoceros and tigers, whose parts are used in traditional Asian medicines, and has used trade sanctions to this end); Leah Kukowski, *Land and Resource Management: Canada's Lack of Federal Endangered Species Legislation Attraction Attention from the United States,* 1999 COLO. J. INT'L & POL'Y 89, 95 (1999) (discussing the imposition of trade sanctions on wildlife products from Taiwan).

gally imported animal products and the imposition of civil and criminal penalties.[110] The Secretary of the Interior is not limited to sanctioning illegal imports and exports, but may also sanction the actual possession of any animal or any of its subsequent parts in direct violation of the ESA as well.[111]

C. The United States as a Role Model

The United States has fulfilled its obligations under Article VIII of CITES with respect to domestic enforcement of CITES as it has enacted trade measures in various forms including standards, import and export restrictions, tariffs and sanctions.[112] Although CITES does not mandate that any participating country must impose sanctions on countries that do not follow the environmental ideals of the treaty,[113] the United States has chosen to adopt domestic legislation to sanction all illegal trading of listed species that is stricter than CITES.[114] The United States has even considered imposing sanctions on nations who continue to supply the trade of a particular endangered species regardless of whether they are parties to the international treaty.[115]

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110. *See* ESA, *supra* note 98, at § 1540(a)(1), (b)(1) (allowing a maximum civil penalty of $25,000 to be imposed for knowing violators of the acts prohibited in Section 9, a maximum of $12,000 for violations of other sections while criminal violations have a maximum penalty of $50,000 or a year imprisonment or both); *see also* Daniel, *supra* note 2, at 691 (noting the various civil and criminal penalties available under the ESA to punish violators of the Act); Vulpio, *supra* note 102, at 470 ("Penalties for violating the ESA include confiscation of illegally imported animal products, imposition of fines, and revocation of trade licenses, permits, and the like.").

111. *See* ESA, *supra* note 98, at § 1538(d); *see also* U.S. Fish and Wildlife Serv. v. Goel, DOI Dkt No. Boston 79-7 (ALJ ID, June 13, 1979) (holding that inquiries into the Customs Service office was not enough effort in the determination of a wildlife product's suitability for import); RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 6 (1992); Daniel, *supra* note 2, at 691 ("[H]unters were also targeted by Congress because endangered species cannot lawfully be imported into the United States although they may have been lawfully acquired.").

112. *See generally* Bernazani, *supra* note 6, at 209 (discussing the characteristics of standards, tariffs and regulatory sanctions with respect to international trade and environmental protection).

113. *See* Urgese, *supra* note 86, at 499 (discussing the Secretariat's approach on the use of subsidies as "carrots" rather than the use of trade sanctions as "sticks"); *see also* Marian Nash, *Contemporary Practice of the United States Relating to International Law,* 92 A.J.I.L. 734, 744 (1998) ("Article XVI requires that the Parties settle disputes that may arise under the Convention by peaceful means, but does not mandate recourse to any particular dispute settlement mechanism or forum.").

114. *See* CITES, *supra* note 4, at art. XIV(1); *see also* D'AMATO & ENGEL, *supra* note 5, at 243 ("One of the primary reasons that countries adopt stricter domestic measures is the failure of CITES to adequately deal with a problem.").

115. *See* D'AMATO & ENGEL, *supra* note 5, 243 (noting that countries must enact stricter measures to sufficiently deal with the endangered species problem); Lee, *supra* note 12, at 512 ("The United States must also consider the imposition of sanctions on other nations that may not be consumers of tiger products, but continue to supply the trade with poached tigers."); Yeh, *supra* note 92, at 257-58 (discussing how CITES sanctions taught Taiwan that it could be subject to international environmental laws which it neither signed nor participated in drafting for smuggling rhino horns and tiger parts).

D. Concerns Associated with International Trade Sanctions

The imposition of international trade sanctions is a mechanism of choice for the United States in responding to acts by other countries that threaten the global environment and violate CITES.[116] International trade sanctions are generally peaceful in nature and "potentially carry great symbolic importance."[117] International trade sanctions do not generally involve or threaten the use of armed force,[118] therefore, making it easier to implement and initiate as opposed to deploying troops abroad.[119] Beyond the general peaceful and symbolic nature of international trade measures, however, "sanctions must serve as an effective tool for achieving environmental ends in order to justify the potentially crippling impact of trade barriers on the world economy."[120] A combination of legitimate environmental concerns with strong protectionist trade pressures could lead to a discriminatory and undisciplined use of trade sanctions: the efficiency of trade sanctions ought to be of utmost importance for the United States in order to achieve the desired environmental ends.[121]

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116. Kennedy, *supra* note 67, at 187 (noting that international trade measures are the mechanism of choice for responding to behavior by other countries threatening national security and human rights as well); *see generally* David M. Driesen, *The Congressional Role in International Environmental Law and Its Implications for Statutory Interpretation*, 19 B.C. ENVTL. AFF. L. REV. 287, 306-07 (1991) (discussing how sanctions force a country to internalize the costs of environmentally destructive practices as opposed to externalizing the costs upon other countries); Lee, *supra* note 12, at 514 (asserting that harsher penalties of imprisonment should be enforced against those who trade endangered species' parts).

117. *See* Kevin C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes,* 22 WM. & MARY ENVTL. L. & POL'Y REV. 375, 381, 503-04 (1998) (presenting trade sanctions as high profile and of great symbolic value) [hereinafter "*Illegality of Unilateral Trade Measures*"]; *see also* Kennedy, *supra* note 67, at 187 ("trade sanctions are conspicuous measures and, therefore, potentially carry great symbolic importance"); Lee, *supra* note 12, at 499-500 (explaining how the United States considered harsh sanctions on Taiwan for allowing illegal poaching of tigers, but elected to impose only limited sanctions).

118. *See* Kennedy, *supra* note 67, at 187 (claiming that trade measures usually do not require the use of armed force); *see also* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime,* 75 CALIF. L. REV. 1159, 1163 (1987) (stating "sanctions do not involve the violence and destruction of armed force"); *compare with* Matthew W. Cheney, *Trading with the Dragon, A Critique of the Use of Sanctions by the United States Against China,* 6 J. INT'L L. & PRAC. 1, 3 (1997) (stating that if sanctions are no longer "viable options" for world leaders it may be necessary to resort to armed conflict).

119. *See* Kennedy, *supra* note 67, at 187 (noting that it is easier to implement sanctions that it is to deploy troops); *Illegality of Unilateral Trade Measures, supra* note 117, at 503 (discussing how countries rarely deploy troops or threaten the use of armed force while imposing trade sanctions).

120. *See* Kennedy, *supra* note 67, at 187-88 (noting that although trade sanctions can be effective, they should be used sparingly in the environmental arena due to the potential of a severe adverse impact on the international economy); *Illegality of Unilateral Trade Measures, supra* note 117, at 503-04 (concluding that a combination of environmental and protectionism can lead to an undisciplined use of trade sanctions); Leah Kulowski, *Canada's Lack of Federal Endangered Species Legislation Attracting Attention from the United States*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 89, 101 (1999) (suggesting that pressure from certification without sanctions can achieve the desired results while promoting the world economy).

121. *See* Kennedy, *supra* note 67, at 188 (considering the potential discriminatory uses of trade sanctions and stating that they must be used in a disciplinary fashion); *Illegality of Unilateral Trade Measures, supra* note 117, at 503-04 (suggesting that the effectiveness of trade sanctions ought to be the initial focus because trade sanctions imposed purely on environmental or protectionist grounds has the potential to deliver a crippling blow to the world economy); *see generally* C. 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, 19 n.73 (1994) (discussing protectionism as a trade policy that considers exports good and imports bad and pursues a policy of closing imports out of a market with high tariffs).

E. The Pelly Amendment

The United States also fulfilled its obligations under Article VIII of CITES by enacting the Pelly Amendment to the Fisherman's Protective Act of 1967.[122] The Pelly Amendment allows the President to block the importation of products from any country that is diminishing "the effectiveness of any international program for endangered or threatened species"[123] or failing to observe international treaties protecting wildlife.[124] The Pelly Amendment requires the Secretary of the Interior to certify to the President when countries are engaging in illegal trade.[125] The President is then granted the authority to embargo all fish or wildlife products from the country in question "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned. . . ."[126] The President must, however, notify Congress of any actions taken against countries engaging in illegal trade.[127]

Pelly certifications and the threat of sanctions have been effective negotiating and diplomatic tools for the United States.[128] A President has never had to actually impose an embargo

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122. 22 U.S.C. § 1978(c) (2000); *see* Joseph Robert Berger, Note, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the GATT In the WTO Sea Turtle Cas*e, 24 COLUM. J. ENVTL. L. 355, 393 (1999) ("Pelly, named for the Congressman who proposed the law, amended the Fishermen's Protective Act of 1967.").

123. Naomi B. Lefkovitz & William J. Snape, III, *Searching For GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?,"* 27 CORNELL INT'L L.J. 777, 805 n.167 (1994); *see Environmental Trade Sanctions, supra* note 109, at 766 (noting that the threat of certification is often used in conjunction with diplomatic leverage to achieve the desired goals); Kukowski, *supra* note 109, at 95 (noting that the economic impact of wildlife trade sanctions on Taiwan amounted to $20 million in 1994).

124. 22 U.S.C. § 1978(c) (2000); *see* Lavonne R. Dye, *The Marine Mammal Protection Act: Maintaining the Commitment to Marine Mammal Conservation,* 43 CASE W. RES. 1411, 1427 (1993) (noting that the *Pelly* Amendment was enacted to facilitate "compliance with international conservation program[s]"); McDonald, *supra* note 18, at 458 (discussing the implications of unilaterally imposed trade sanctions by the United States under the Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. § 1978 (2000); *but see* Berger, *supra* note 122, at 393 (noting that a country can object to the certification under *Pelly* and effectively exempt itself "from the treaty requirements relating to any particular species).

125. *See* 22 U.S.C. § 1978 (2000); *see also* Vulpio, *supra* note 102, at 479 n.130 (stating that 'certification' is a preliminary step in imposing Pelly sanctions as it identifies the certified country as engaging in activities that diminish the effectiveness of international conservation measures).

126. *See* 22 U.S.C. § 1978(a)(4) (2000); Skilton, *supra* note 10, at 460 n.32.

127. *See* 22 U.S.C. § 1978 (2000); *see also* Rita Beamish, *Tiger, Rhino Sanctions Urged Against Taiwan*, J. COM., Apr. 8, 1994, at 5A.

128. *See* Berger, *supra* note 122, at 411 (discussing ways of achieving intended conservationist results through Pelly certification); *see also Environmental Trade Sanctions, supra* note 109, at 766 (noting that the threat of certification is often used in conjunction with diplomatic leverage to achieve the desired goals); Driesen, *supra* note 116, at 307 (noting that consistent application of sanctions "will make the threat of the sanction more credible"); Kukowski, *supra* note 109, at 95 (noting that the economic impact of wildlife trade sanctions on Taiwan amounted to $20 million in 1994).

under the Pelly Amendment.[129] Recently, however, the United States successfully imposed Pelly certifications against Thailand and Singapore by threatening to impose a moratorium on all trade until both nations complied with the provisions of CITES.[130]

F. Recent Actions by the United States

So far, the United States' actions against Taiwan in 1994 remains the sole instance of trade sanctions imposed upon a nation for CITES violations.[131] The Secretary of the Interior acted in response to recommendations made by the CITES Standing Committee to consider enforcing strict measures against China and Taiwan for trading rhinoceros and tiger products.[132] The Secretary of the Interior certified both countries under the Pelly Amendment, effectively giving notice that trade measures might follow unless CITES enforcement improved.[133] After the

129. *See* Kukowski, *supra* note 109, at COLO. J. INT'L ENVTL. L. & POL'Y 89, 94 ("Since the adoption of the Pelly Amendment, the President has only imposed sanctions against a country on one occasion, although there have been over thirty certifications."); Lefkovitz, *supra* note 123, at 815 n.167 ("The U.S. Pelly Amendment, 22 U.S.C. 1978, allows the President to block the importation of any product from a country that is diminishing 'the effectiveness of any international program for endangered or threatened species.' President Clinton recently imposed trade sanctions on wildlife products against Taiwan for that country's persistent trade in rhino and tiger parts in contravention of CITES."). *See generally, Trade Sanctions, supra* note 109, at 775 (discussing the Pelly Amendment and whether it is appropriate to use trade sanctions to achieve goals).

130. *See* Farve, *supra* note 72, at 476 (noting that the threat of imposing a moratorium on trade of species with Thailand and Singapore unless they complied with CITES was successful for the United States); *but see Environmental Trade Sanctions, supra* note 109, at 775 (discussing whether trade sanctions should be implemented to achieve environmental goals). *See generally* Berger, *supra* note 122, at 393-96 (discussing generally how Pelly certifications help achieve the conservation goals of the United States).

131. *See* Steven Greenhouse, *U.S. Lifting Trade Penalties on Taiwan*, N.Y. TIMES, July 1, 1995, § 1, at 4 ("When Mr. Clinton imposed sanctions in April 1994, it was the first time a President had used such penalties to protect endangered species."); Berger, *supra* note 122, at 396 (discussing how President Clinton imposed sanctions in 1994 on fish and wildlife products from Taiwan, in an effort to restrain its trade in products made from endangered rhinos and tigers, mostly horn and bone, used in traditional Asian medicines); Vulpio, *supra* note 102, at 479 (noting that the United States' 1994 action against Taiwan "remains the sole experiment of trade sanctions imposed for CITES violations").

132. *See* Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal For the New WTO Committee on Trade and Environment* 15 STAN. ENVTL. L.J. 61, 69-70 (1996) (discussing the recommendations of the CITES Standing Committee as to the trade of rhinoceroses and tigers); *Environmental Trade Sanctions*, *supra* note 109, at 769-70 (describing the decision of the CITES Standing Committee regarding China and Taiwan's actions); Vulpio, *supra* note 102, at 479 nn. 128 & 135 ("A Standing Committee resolution merely authorizes, but does not require, CITES signatories to take a recommended action.").

133. *See Environmental Trade Sanctions, supra* note 109, at 770 (describing the certification which stated that "both countries fell short of international conservation standards"); Thomas L. Friedman, *Taiwan's Wildlife Trade Draws Call For Sanctions*, N.Y. TIMES, Apr. 6, 1994, at D2 (providing an example of the use of threatened sanctions as punishment for violative behavior). *See generally* Daniel C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Participation in International Environmental Law Treaties*, 14 STAN. ENVTL. L.J. 256 (1995) (discussing generally Taiwan's participation in the area of international environmental law).

United States explored imposing sanctions against both China and Taiwan,[134] the Clinton Administration proceeded with sanctions against Taiwan alone.[135] Although the United States acted in "the spirit of international consensus," it was somehow the only nation to impose sanctions upon Taiwan.[136]

IV. Conclusion

The United States has been faced with allegations of "environmental imperialism"[137] because it has the power to impose trade sanctions and other penalties against developing nations who do not have the economic power to retaliate.[138] The United States, however, is merely acting in accordance with the provisions of CITES as it has been committed to this international environmental treaty for almost three decades.[139] The United States, however, should not hesitate to act unilaterally in imposing trade measures against foreign nations for purposes of environmental conservation when it is necessary. Unilateral action by the United States serves as an example to the world that environmental protection must start at the domes-

134. *See Environmental Trade Sanctions, supra* note 109, at 769 (Two environmental groups petitioned the Secretary of the Interior in November 1992, in an effort to invoke the Pelly Amendment against Taiwan, China, South Korea and the Republic of Yemen for continuing to engage in the trading of rhinoceros horns); *Administration Moves to Halt International Trade in Tiger and Rhino Parts*, U.S. NEWSWIRE, (June 9, 1993) (LEXIS, Arcnws Library) (noting that the Clinton Administration took steps "intended to halt the international trade of tiger bone and rhinoceros horn").

135. *See* Kukowski, *supra* note 109, at 94-95 (noting that both Taiwan and China were certified, and in 1994 the United States imposed trade sanctions on Taiwan); Patel, *supra* note 5, at 199 ("Taiwanese officials did not appreciate being singled out as the 'global culprit behind the demise of the world's tigers and rhinos.'"); Vulpio, *supra* note 102, at 479-80 n.133 (discussing how China took steps to curtail illegal trade of endangered and threatened species after the CITES Standing Committee recommended that stricter measures should be taken against China and Taiwan in November 1993).

136. *See* Greenhouse, *supra* note 131, at 4 (discussing pressures put on nations to "crack down" on smugglers); *see also* Blank, *supra* note 132, at 67 (noting that while the "international community recommended strict measures against Taiwan, including import prohibitions" the United States alone acted in this manner); Vulpio, *supra* note 102, at 480 (noting that in regard to the trade sanctions against Taiwan, while the United States acted "in the spirit of international consensus, it acted alone").

137. *See* Suzanne Pyatt, *International Law: International Tribunals: The WTO Sea Turtle Decision*, 26 ECOLOGY L.Q. 815, 825 (1999).

138. *See* Pyatt, *supra* note 137, at 824-25 (stating that the United States trade sanctions affect developing nations who argue that the United States' unilateral measures are a "thinly disguised attempt at protectionism"); *see also* Blank, *supra* note 132, at 63 (noting that some commentators have described the United States sanctions against Taiwan as "tantamount to 'eco-imperialism'"); Joshua R. Floum, *Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic*, 10 GEO. INT'L ENVTL. L. REV. 943, 955 (1998) (discussing how the use of domestic market coercion and import embargoes brought immediate and dramatic results to the United States but developing nations have begun to complain of "economic imperialism").

139. *See* Daniel, *supra* note 2, at 697 (emphasizing that CITES nations "have set the goal of protecting species for this generation and the generations to come"); Jay E. Carey, Note, *Improving the Efficacy of CITES By Providing the Proper Incentives to Protect Endangered Species*, 77 WASH. U. L.Q. 1291, 1291-93 (1999) (describing the purpose of CITES and the ideologies of certain CITES nations including the United States); Barnabas Dickson, *Land and Resource Management: CITES in Harare: A Review of the Tenth Conference of the Parties*, 1997 COLO. J. INT'L ENVTL. L. & POL'Y 55, 55 (1997) (stating that the United States signed CITES in 1973).

tic level to achieve success for international treaties.[140] The United States remains a role model to all parties and non-parties to CITES as the ESA strictly enforces the provisions of CITES. The United States is achieving the goals of CITES through its enactment of the ESA and has legitimized the potential to make CITES a stronger international environmental treaty despite its inherent enforcement problems in the international context.[141]

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140. Daniel, *supra* note 2, at 683 ("The United States has a great ability to affect endangered species protection on an international level").

141. Daniel, *supra* note 2, at 684 ("In light of the fact that the United States has one of the most sophisticated CITES implementation programs of all the signatories to the treaty 10—the Endangered Species Act of 1973 11—the potential role of the United States is considerable").

The Hague Convention on the Civil Aspect of International Child Abduction: An Analysis of the Grave Risk of Harm Defense

Theresa A. Spinillo*

Introduction

The kidnapping of a child is plausibly a parent's worst nightmare. Surprisingly, the vast majority of child kidnapping cases in the United States are comprised of abductions by family members.[1] Some parents will even go so far as to abduct their children across international borders.[2] A parent may abduct his or her own child for love of the child or to gain sole possession and control over the child.[3] The abducted child is apt to suffer much emotional harm as the result of being separated by a parent, especially when the child is taken to a foreign country.[4] From the 1970s through the mid-1990s, approximately 10,000 cases of international child abduction were brought in United States courts.[5]

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1. *See* Cara L. Finan, *Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction*, 34 SANTA CLARA L. REV. 1007, 1007-08 (1994) (discussing the growing number of cases involving parent abductors taking the child to their country of origin); *see also* Antoinette Passanante, *Note, International Parental Kidnapping: The Call for an Increased Federal Response*, 34 COLUM. J. TRANSNAT'L L. 677, 677 (1996) (noting that most children are abducted by family members). *See generally* Jan Rewers McMillan, *Current International and Domestic Issues Affecting Children: Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AM. ACAD. MATRIMONIAL L. 99, 99 (1997) (discussing the implications of international family practice cases and the emotion associated with parental abduction of minor children).

2. *See* Thomas O. Harper, *The Limitations of the Hague Convention and Alternative Remedies for A Parent Including Re-Abduction,* 9 EMORY INT'L L. REV. 257, 257-58 (1995) (providing that the dilemma of international child abduction is being further frustrated by the increases of international travel and an increased number of marriages between citizens of different countries). *See generally* Passanante, *supra* note 1, at 686-87 (discussing efforts to reduce international abductions through legislation); Peter D. Trooboff, *Book Note, United Kingdom Case Note: Treaties—Hague Convention on Child Abduction—Wrongful Removal—Grave Risk of Harm to Child,* 83 AM. J. INT'L L. 586, 588 (1989) (discussing the impact of the Hague Convention on the prevention of international child abduction).

3. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791, 806 (1998) (discussing the culture clashes that surface in response to child custody issues as a result of failed marriages between citizens of different countries); *see also* Harper, *supra* note 2, at 277 (addressing the risks of an abducted child being re-abducted by the wrongful parent); Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under The Hague Convention On the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308, 316-17 (1997) (discussing the tendency of a non-custodial parent to abduct a child in furtherance of a meaningful relationship with the child).

4. *See* Trooboff, *supra* note 2 (noting the psychological consequences to a child that results from abduction); *see also* Steward, *supra* note 3, at 316 (stating the adverse psychological effects, such as instability and uncertainty, that stem from removing a child from its usual environment).

5. *See* Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child: Contributions of the Hague Conference on Private International Law,* 3 ILSA J. INT'L & COMP. L. 665, 668 (1997) (there are approximately 700 children in the United States wrongfully removed or retained abroad); Steward, *supra* note 3, at 314 (noting that approximately 10,000 cases on international child abduction have been filed with the U.S. Department of State's Office of Children's Issues since the 1970s).

***J.D., 2001, St. John's University School of Law. B.A., Hofstra University, 1997.**

Due to the increasing number of international abductions, the Fourteenth Session of the Hague Conference on Private International Law,[6] adopted the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "Hague Convention") on October 24, 1980 by a unanimous vote.[7] The Hague Convention is an international civil remedy, available to the parents of children who have been "wrongfully removed or retained."[8] A parent may, therefore, invoke the Hague Convention to demand the immediate return of an abducted child.[9] The Hague Convention mandates that a Central Authority be established in every Contracting State to the Hague Convention to assist aggrieved parents in exercising their custody or visitation rights,[10] as well as to collaborate with their counterparts in other countries towards these goals.[11] Proceedings under the Hague Convention may be initiated by filing with the

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6. *See* Rania Nanos, Note, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L L. 437, 437-38 (1996) (stating that the "Convention's principal objective is to secure the prompt return of children wrongfully removed to or retained in any Contracting State under the most expeditious procedures possible."); *see also* Steward, *supra* note 3, at 309 (stating that the enactment of the Fourteenth Session of the Hague Conference on Private International Law Hague Convention on the Civil Aspects of International Child abduction is an international response to the increased number of children taken abroad illegally). *See generally* Starr, *supra* note 3, at 793 (suggesting that the Hague Convention is an effort to reduce the problem of international child abduction).

7. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, Letter of Submittal, 51 FED. REG. 10,494.

8. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 3, 51 FED. REG. 10, 494. Article 3 of the Convention provides that the removal or retention of a child is to be considered wrongful where:

> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

See id.

9. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 3, 51 FED. REG. 10, 494. Article 12 of the Convention provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

See id.

10. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 6, para. (a), 51 FED. REG. 10,494 (1986) ("A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.").

11. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 3, 51 FED. REG. 10,494.

Central Authority of the abducted child's habitual residence or the Central Authority of any other Contracting State.[12]

The judicial or administrative authority of the State is not obliged, however, to order return of the child if it is established that "there is a grave risk of harm that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[13] Although the Hague Convention requires that courts narrowly construe the grave risk of harm exception,[14] this note will consider the wide and narrow interpretations the courts have decided to give the exception.[15]

I. Preceding Legislation

The individual states located in the U.S. are not required, as a matter of comity, to enforce the custody decrees of sister states.[16] Therefore, non-custodial parents unsatisfied with a custody decree rendered by a state could go to another state or country in hopes of a more favorable decision from another court.[17] This problem, however, was first addressed by the Uniform

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12. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 12, 51 FED. REG. 10,494 (1986); *see also* Roger M. Baron, *Child Custody Jurisdiction,* 38 S.D. L. REV. 485, 494 (1993) (stating that a custodial parent in the United States may file an application with the State Department's Office of Citizen's Consular Services or directly with the Central Authority of the other Contracting State). *But see* In re Mohsen, 715 F. Supp. 1063, 1064 (D. Wyo. 1989) (holding that the Hague Convention is not applicable where the child is a habitual resident of a non-contracting country).

13. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 13, para. (b), 51 FED. REG. 10, 494 (1986).

14. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, Legal Analysis, (III)(1)(2), 51 FED. REG. 10, 494 (1986).

15. The author believes that the exceptions under the Convention should be narrowly construed. The determinative factor in applying the exception is the definition given to "grave risk of harm." The phrase "narrow and wide interpretations" is used to discriminate between courts that are more stringent with the exception than others. *See* Harper, *supra* note 2, at 259 (stating that the grave risk of harm exception to the Hague Abduction Convention allows for tremendous judicial discretion). *See generally* Elizabeth Ising, Note, *Refusing to Debate Wheaties Versus Milchreis: Blondin v. Dubois and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception,* 25 N.C. J. INT'L LAW & COMP. REG. 619, 636 (2000) (discussing the difficult interpretative questions under the grave risk of harm exception to the Hague Abduction Convention).

16. *See* Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 303 (1999) (emphasizing that "courts were not required to give full faith and credit to custody decrees from other states" despite the UCCJA); *see also* May v. Anderson, 345 U.S. 528, 528 (1953) (holding that the state decree was not entitled to full faith and credit); Marian C. Abram, Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness,* 33 CASE W. RES. 89, 92-93 (1982) (citing Supreme Court decisions demonstrating that individual states are not required to enforce the decree of sister states).

17. *See* L.G. v. People, 890 P.2d 647, 655 (Colo. 1995) (discussing the intent of the framers of the UCCJA is to remedy the problem of children being brought from state to state in furtherance of obtaining a more favorable custody decree); *see also* Lynda R. Herring, Comments, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C.J. INT'L L. & COM. REG. 137, 143 (1994) (stating that the legislation of the UCCJA emanated from practitioners and states addressing the confusion in the prevalent practice of judgment shopping). *See generally* Stoner, *supra* note 16 (discussing how it was common for the losing parent in a custody battle to try and have the case re-litigated in another state prior to the UCCJA).

Custody Child Jurisdiction Act (hereinafter "UCCJA")[18] to deter parents from abducting their child and attempting to receive a more favorable custody decree through forum shopping.[19] Under the UCCJA, a state court could assert jurisdiction under a limited number of circumstances: (1) if it sits in the child's home state;[20] (2) if the state has a significant connection with the child and its family;[21] (3) if the child was present in the state and was abandoned or subject to or threatened with abuse or neglect;[22] or (4) no other court would have jurisdiction under the act or a court of the home state of a child has declined to exercise jurisdiction because there

18. UNIFORM CHILD CUSTODY JURISDICTION ACT § 106, U.S.C. (1997) ("A child custody determination made by a court of this State that had jurisdiction under this [Act] binds all persons . . . the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified."); *see also* Baron, *supra* note 12 (discussing intrastate, interstate and international child custody disputes and how the UCCJA was the first "harmonious" attempt to resolve the problem of child abduction.); Finan, *supra* note 1, at 1009 (noting that the Federal Kidnapping Act of 1932, also known as the "Lindbergh Act," applied only to persons transported interstate against their will and specifically excluded cases of minors who were "kidnapped" by their parents).

19. UNIFORM CHILD CUSTODY JURISDICTION ACT § 1, U.S.C. (1997) (noting that the most general purposes of the Act includes the avoidance of jurisdictional competition, discouraging continuing controversies over child custody, and deterring abductions and other unilateral removals of children undertaken to obtain custody awards); *see also* Herring, *supra* note 17, at 174 n.48 (providing that the UCCJA seeks to ensure the custody dispute is litigated where the child has the closest connection and where significant evidence is most readily available). *See generally* Bernadette Weaver-Catalana, *Comment, The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583, 615 n.60 (1995) (noting that one of the main goals of the UCCJA is to deter forum shopping and repetitive litigation).

20. UNIFORM CHILD CUSTODY JURISDICTION ACT § 102, U.S.C. (1997) (defining "home state" as "the state in which the child immediately preceding the time involved lived with his parents . . . for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned."); *see also* Warren Cole, *Border Crossing: Responding to Abductions that Remove Children From Their Home States,* 79 A.B.A. J. 90, 90 (1993) (discussing the issuance of a custody order for an abducted child's home state). *See generally* Stoner, *supra* note 16, at 304 (stating that the PKPA, which was formulated in response to the UCCJA, "clearly gives preference to home state jurisdiction.").

21. UNIFORM CHILD CUSTODY JURISDICTION ACT § 201, U.S.C. (a)(2)(A) (1997) (giving a court jurisdiction to make an initial child-custody determination if "the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence."); *see also* Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join In?,* 34 FAM. L.Q. 239, 253 n.43 (2000) (stating that so long as there is a significant connection between the child and that State, the original State continues to have jurisdiction). *See generally* Linda D. Elrod & Robert G. Spector, *Review of the Year in Family Law,: Century Ends With Unresolved Issues,* 33 FAM. L.Q. 865, 879 n.97 (2000) (asserting that if a child has no home state, a court can assume significant connection jurisdiction).

22. UNIFORM CHILD CUSTODY JURISDICTION ACT § 204 (a) (1997) (granting a court temporary emergency jurisdiction if the child is present in the state and "has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling parent of the child, is subjected to or threatened with mistreatment or abuse."); *see also* L.G. v. People, 890 F.2d 647, 656 (Colo. 1995) (affirming the lower juvenile courts finding with respect to jurisdiction in a dependency and neglect proceeding, thereby limiting a fathers visitation rights); Sanford N. Katz, *Prologue*, 33 FAM. L.Q. 435, 438-39 (1999) (explaining that the Act emphasizes the importance of the best interest of the child, particularly their environment, as a major factor when deciding custody cases).

is a more appropriate forum.[23] Although the provisions of the UCCJA extend to the international arena,[24] the UCCJA has been undermined by the failure to achieve uniformity in judicial determinations and interpretations.[25]

The United States Congress sought to resolve the weaknesses of the UCCJA through the Parental Kidnapping Prevention Act (hereinafter "PKPA").[26] The PKPA mandates that each state grant full faith and credit to custody decrees of other states.[27] The PKPA, in other words, eliminated an individual state's discretion in determining what degree of weight to give to custody decrees.[28]

II. The Hague Convention

The Hague Convention is a remedial response to abductions that have occurred in the past, and is in effect, helping to prevent and deter future occurrences.[29] The principle objective of the Hague Convention is "the prompt return of children wrongfully removed to or retained

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23. UNIFORM CHILD CUSTODY JURISDICTION ACT § 201(a)(2) (1997); *see also* Hon. Viola J. Taliaferra, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Impact of the Uniform Child Custody Act on Juvenile Court Jurisdiction*, 29 AKRON L. REV. 531, 539 (1996) (noting that under the significant connection prong of the UCCJA, an Indiana court held that it lacked jurisdiction and Michigan was the more appropriate forum). *See generally* James P. George, *Parallel Litigation,* 51 BAYLOR L. REV. 769, 837 (1999) (stating that "the court in *Colum. Falls Aluminum Co. v. Hindin/Owen/Englke, Inc.* found that without the California litigation, Montana would have had jurisdiction, but that when comity was added to the jurisdictional test, California was the more appropriate forum.").

24. *See also* Stock v. Stock, 677 So. 2d 1341, 1345 (Fla. Dist. Ct. App. 4th Dist. 1977) (finding the UCCJA applies to an international custody dispute between Switzerland and Florida); Herring, *supra* note 17, at 174 n.48 (discussing the purpose and effect of the UCCJA). *See generally* Patricia E. Apy, *Current International and Domestic Issues Affecting Children, Managing Child Custody Cases Involving Non-Hague Contracting States,* 14 J. AM. ACAD. MATRIMONIAL L. 77, 90 (1997) (discussing the court's application of the UCCJA to "non-Hague" forums).

25. *See* Koons v. Koons, 161 Misc. 2d 842, 846 (Sup. Ct. 1994) (discussing the UCCJA's attempt to end interstate conflict over custody cases); *see also* Herring, *supra* note 17, at 171 (discussing problems encompassed within the jurisdiction of the UCCJA); Stoner, *supra* note 16, at 301 (explaining that the UCCJA has not been applied uniformly).

26. *See* FEDERAL KIDNAPPING PREVENTION ACT, 28 U.S.C.S. § 1738A (1999); *see also* Michalik v. Michalik, 172 Wis. 2d 640, 649 (Sup. Ct. 1993) (stating that the PKPA was enacted under Congressional power pursuant to Article IV of the Constitution which provides for the full faith and credit that each state must give to the "public acts, records, and judicial proceeding of every other state."); Passanante, *supra* note 1, at 684-85 (discussing the PKPA as a resolution to the weaknesses of the UCCJA); *see also* Abram, *supra* note 16, at 94-95 (discussing the legislative development of what, ultimately, ended up as the Parental Kidnapping Prevention Act).

27. PARENTAL KIDNAPPING PREVENTION ACT 28 U.S.C.S. § 1738A (1998); *see also* Abram, *supra* note 16, at 94 (1982) (citing Supreme Court decisions demonstrating that individual states are not required to enforce the decree of sister states and that the PKPA advocates full faith and credit to child custody orders). *See generally* Stoner, *supra* note 16, at 304 (stating that the PKPA "clearly gives preference to home state jurisdiction.").

28. *See* FEDERAL KIDNAPPING PREVENTION ACT, 18 U.S.C.S. § 1738A(a) (1998).

29. *See* Nanos, *supra* note 6, at 439 (quoting that the Convention was "designed to impede and deter parents from resolving family disputes concerning the care, custody, and control of minor children by means of self-help, in violation and indifference to customary legal or non-adversary methods of dispute resolution, usually accomplished by fleeing to a distant state or country."); *see also* Harper, *supra* note 2, at 258-59 (discussing how the Hague Convention is used as a procedural device to facilitate the return of a child, rather than a mechanism used in custody disputes); Starr, *supra* note 3, at 793 (stating that three-fourths of nations worldwide are not parties to the Hague Convention).

in any Contracting State."[30] The threshold issue is whether a child was "wrongfully removed" from his habitual residence.[31] Article 3 of the Hague Convention defines wrongful removal as:

> a) . . . in breach of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[32]

Once a child has been wrongfully removed or retained under Article 3, Article 12 of the Hague Convention requires the authority of the Contracting State to order the return of a child to their habitual residence.[33] A child must be returned provided that on the date the proceedings commence, a period of less than one year has passed from the date of wrongful removal or retention of the child.[34] Article 12 further provides that if the proceedings commence after the one-year period, the judicial or administrative authority must return the child "unless it is demonstrated that the child is now settled in its new environment."[35]

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30. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Oct. 25, 1980, art. 1, 51 FED. REG. 10498 (1986); *see also* Bridgette M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 102 (1980) (discussing how the Convention also balances competing policies of national jurisdictional discretion and deterrence of parental abduction); Mark Dorosin, *You Must Go Home Again: Friedrich v. Friedrich, The Hague Convention and The International Child Abduction Remedies Act*, 18 N.C. J. INT'L L. & COM. REG. 743, 743 (1993) (discussing how the return of children is one of the two stated objectives of the Hague Convention).

31. *See* Slagenweit v. Slagenweit, 841 F. Supp. 264 (N.D. Iowa 1993) (holding "wrongful retention arises at the point in time when the wronged parent asks for the return of the child, and the other parent refuses."); Cohen v. Cohen, 602 N.Y.S.2d 994, 998 (Sup. Ct. 1993) (citing Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D.Ariz. 1991)) ("Habitual residence is the country and jurisdiction where the child lived before the marital breakdown."). *See generally* Richard D. Kearney, *Current Development: Developments In Private International Law*, 81 AM. J. INT'L L. 724, 733 (1987) (discussing the discretion with which the competent authority decides on whether wrongful removal of the child has taken place and where a child's habitual residence is located).

32. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 3, 51 FED. REG. 10,494 (1986).

33. *See* Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993) (stating that the child's habitual residence pertains to the customary residence of the child prior to the abduction); *see also* Pesin v. Rodriguez, 77 F. Supp. 2d 1277, 1284-86 (S.D. Fla. 1999) (recognizing definition of "habitual residence" by state and foreign jurisdictions as "the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective."); *see also* Starr, *supra* note 3, at 796 (because the *Friedrich* case provides that a child's habitual residence can only be modified by the passage of time and a change in geography, the abducting parent cannot claim a new habitual residence for the child).

34. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 12, 51 FED. REG. 10,494 (1986); *see also* Herring, *supra* note 17, at 137 (providing that it is the objective of the Convention to immediately restore the statues quo before removal, and that the child's return to the status quo with minimum delay furthers the best interests of the child).

35. Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 12, 51 FED. REG. 10,494 (1986); *see also* Harper, *supra* note 2, at 263 (discussing the exception to the one-year statute of limitations and that a showing that a child has settled into a new environment leaves much discretion to judges); Nanos, *supra* note 6, at 441 (discussing various affirmative defenses employed by parents to avoid return of wrongfully removed children).

III. The "Grave Risk of Harm" Exception

The grave risk of harm exception is perhaps the most litigated provision of the Hague Convention because it has created the greatest amount of judicial discretion.[36] The varied judicial discretion stems from Article 13 of the Hague Convention, which provides three situations in which the return of a child is not mandatory.[37] Article 13 states that a state is not bound to order the return of the child if the person, institution or other body opposing the return of the child establishes that:

> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> c) . . . that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.[38]

Essentially, an abducting parent may invoke one of the above exceptions as a defense to defeat a petition for the child's return.[39] Courts in turn consider a variety of factors to make a

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36. *See* Trooboff, *supra* note 2, at 589 (discussing a case where the court rejected a mother's expansive reading of the grave risk of harm exception); *see also* Nanos, *supra* note 6, at 448-49 (quoting Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct., Kings Co. 1989) (citing the court's rejection of a father's claim that "there was a grave risk that the child's return to England would expose him to physical and psychological harm.")).

37. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 13, 51 FED. REG. 10498 (1986); *see also* Herring, *supra* note 17 (discussing how the three exceptions give the court discretionary power); Nanos, *supra* note 6, at 464 (analyzing the defenses inherent in Article 13); Passanante, *supra* note 1, at 688 (discussing how the predecessor to the Hague Convention lacked power to enforce the mandatory return of children).

38. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 13, 51 FED. REG. 10,494 (1986); *see also* Friedrich v. Friedrich 1967, 78 F.3d 1060, 1067 (6th Cir., 1996) (providing that courts should not refuse the return of a child "merely because an American court believes it can better or more quickly resolve a dispute.").

39. *See* Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995) (stating that any of the affirmative defenses in Article 12, 13 or 20 of the Convention may be invoked in opposition of the return of a child); *see also* The Public Health & Welfare Statute, 42 U.S.C.S § 11603(e)(2) (providing that the person opposing the return of the child must establish an exception under Article 13(b) or 20 of the Convention by clear and convincing evidence, while the exceptions found in Article 12 and 13 may be based upon a preponderance of the evidence); Lara Cardin, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 147-48 (1997) (noting that a parent can avoid returning the child by establishing a defense under Article 13 or 20).

decision as to whether there is a valid exception under Article 13.[40] For example, the case of *Friedrich v. Friedrich*[41] provides examples of two situations in which a "grave risk of harm" can exist under Article 13(b).[42] The first situation is one where the return of the child will place the child in imminent danger, such as returning the child to a war zone, famine or disease.[43] The second situation is one where the child will be subject to serious neglect, abuse or extraordinary emotional depen*d*ence where the courts located in the child's habitual residence may be incapable or unwilling to adequately protect the child.[44]

It is important to note that there are provisions of the Hague Convention that aid an abducting parent besides the "grave risk of harm" exception.[45] For instance, an abducting parent may argue that they did not wrongfully remove the child pursuant to Article 3 of the

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40. Some factors taken under consideration under the best interests of the child standard include:

> (a) The love, affection and other emotional ties existing between the competing parties and the child; (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any; (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care . . . ; (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; . . . (f) The moral fitness of the competing parties; (g) The mental and physical health of the competing parties; (h) The home, school and community record of the child; (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

Anh v. Levi, 586 F.2d 625, 634 (6th Cir. 1978).

But see Tahan v. Duquette, 259 N.J. Super. 328, 334 (Super. Ct. App. Div. 1992) ("Article 13(b) requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint. If that were all . . . the drafters of the Convention could have found a clear, more direct way of saying so."); Gary Zalkin, *The Increasing Incidence of American Courts Allowing Abducting Parents to Use Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction*, 23 SUFFOLK TRANSNAT'L L. REV. 265, 276-77 (1999) (noting that in *Tahan v. Duquette*, a New Jersey court held that a petition hearing should be based upon the child's level of safety at their home).

41. 78 F.3d 1060 (6th Cir. 1996).

42. *See Friedrich*, 78 F.3d at 1069 (asserting that psychological evidence is relevant if it helps prove the existence of one of the named situations).

43. *See id.* 78 F.3d 1060, 1069 (6th Cir. 1996) (discussing when the return of a child before custody dispute is resolved would endanger the child)*; see also* Freier v. Freier, 969 F. Supp. 436, 434 (E.D. Mich. 1996) (ordering the return of the child to Israel because Israel was not a "zone of war"); *Freidrich*, 78 F.3d at 1069 (finding that returning a wrongfully removed child to Germany did not inherently put the child in imminent danger); Kearney, *supra* note 31 (discussing how a court will not return a child when it would place the child in an "intolerable situation").

44. Friedrich v. Friedrich, 78 F.3d 1060, 1060 (6th Cir. 1996) (noting how some courts are incapable of helping a child).

45. *See* Danielle M. Andrews, *Non-Muslim Mothers v. Egyptian Muslim Fathers: The Conflict Between Religion and Law in International Child Custody Disputes and Abductions*, 23 SUFFOLK TRANSNAT'L L. REV. 595, 598 (2000) (discussing individual national discretionary exceptions that enable the child to remain with the removing parent); Merle H. Weiner*, International Child Abduction and the Escape From Domestic Violence*, 69 FORDHAM L. REV. 593 (2000) (discussing how domestic violence can be extended to the Convention beyond the grave risk of harm exception); *see also* Cardin, *supra* note 39, at 147 (explaining how parents can use defenses to counter removal of a child).

Hague Convention.[46] An abductor may also claim that the person who had the child in her care was not actually exercising custody rights.[47] Alternatively, it may be argued that the child's guardian agreed to or thereafter acquiesced in the removal of the child.[48]

Children who are wrongfully removed or retained within the meaning of the Hague Convention are to be promptly returned unless one of the narrow exceptions set forth in the Hague Convention apply.[49] The nature of the grave risk of harm exception is to give a judge the discretion, not the duty to refuse the return of the abducted child.[50] The burden is on the person

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46. *See Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction*); 34 I.L.M. 1159, 1165 (1995) (stating the ways removing a child will violate Article 3 of the Hague Convention); Silberman, *supra* note 21, at 20-24 (setting forth cases in which the abducting parents disputed the child's state of habitual residence); *see also* Trooboff, *supra* note 2, at 587 (discussing how Article 3 states that "removal or retention" of a child is wrongful where "it is in breach of the rights of custody attributed to a person . . . either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention."). *But see* Nanos, *supra* note 6, at 451 (discussing how the "piling on" of defenses will likely result in inaccurate portrayals of the child's mental health, emotional health and life in the country of habitual residence).

47. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 13, para. a, 51 FED. REG. 10, 494 (1986); Hague Convention on the Civil Aspects of International Child Abduction, art. 13(a) (1980) (allowing the defense that the parent with custody was not really exercising custodial rights); *see also* Kearney, *supra* note 31 (discussing "not exercising custodial rights" as a defense); *Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, *supra* note 46, at 1166 (stating that "the judicial or administrative authority of the requested State is not bound to order the return of the child if the person . . . establishes that the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of removal. . . .").

48. *See* Hague International Child Abduction Convention, *opened for signature* Oct. 25, 1980, art. 13, para. a, 51 FED. REG. 10,494 (1986); *Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, *supra* note 46, at 1166 (discussing Article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction, which states "the person, institution or other body having the care of the person of the child . . . had consented to or subsequently acquiesced in the removal or retention."); *Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225, 240 (1994) (noting that there is a need to "differentiate between acquiescence itself and later-occurring withdrawal of an acquiescence which had existed at an earlier stage."); *see also Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction), supra* note 46, at 1162 (discussing how the Manitoba Court of Appeals ordered a mother to return her child she abducted from Scotland).

49. *See* Trooboff, *supra* note 2, at 588-89 (noting the Court's rejection of the mother's Article 13 defense); *Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court*, 35 I.L.M. 529, 535 (1996) (discussing how the Hague Convention serves the interest of children yet also provides for an exception where the abductor will be allowed to keep the child); *Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, *supra* note 46, at 1163 (noting the Court's rejection of a mother's Article 13 defense that returning her wrongfully removed child would expose the child to a grave risk of physical or psychological harm).

50. *See* Trooboff, *supra* note 2, at 587 (explaining the various steps courts use to determine whether the return of the child to his father would create a grave risk of physical or psychological harm to the child); *Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court*, 35 I.L.M. 529, 535 (1996) (discussing how courts will "carefully consider the child's best interest as to custody."); *see also Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, *supra* note 46, at 1177-78 (stating that "the interest of the children are of paramount importance.").

opposing return of the child to prove the grave risk of harm or intolerable situation a child would face upon return to their habitual residence.[51]

A. Narrow Interpretation of the Grave Risk of Harm

1. The United States

In the case of *Escudero v. Tice-Menley,*[52] Stephanie Rose Tice-Menley (hereinafter "Tice-Menley"), a citizen of the United States, married Enrique Nuez-Escudero ("Nuez-Escudero"), a Mexican citizen, in Mexico.[53] Tice-Menley took their son, Enrique, to her parents' home in Minnesota shortly after his first birthday and Nuez-Escudero filed an action under the Hague Convention alleging the wrongful removal of their son from Mexico.[54] Tice-Menley responded by submitting an affidavit with affidavits from her parents and a psychologist stating that she was physically, sexually and verbally abused by Nuez-Escudero.[55] Consequently, the District Court determined, pursuant to the language of Article 13(b) of the Hague Convention that Tice-Menley established that her son's return to Mexico would subject him to a grave risk of physical and psychological harm.[56]

Upon appeal, the United States Court of Appeals for the Eighth Circuit (hereinafter "Eighth Circuit") concluded that the evidence offered by Tice-Menley was too general in nature and that there must be "specific evidence of potential harm" in order to satisfy Article 13(b).[57] The Eighth Circuit reasoned that the evidence concerns problems between Tice-Menley, her husband and father-in-law and that these circumstances have no bearing on the welfare of the child.[58] The only assessment of concern to the Eighth Circuit was whether the child would face an immediate and substantial risk of an intolerable situation if Enrique was returned to Mexico while the final custody determinations was being made.[59]

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51. *See Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court*, 35 I.L.M. 529, 536 (1996) (discussing the burden of proof for the abducting parent), *Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, *supra* note 46, at 1164 (stating "the court may require 'undertakings' of the requesting party"); *see also* Trooboff, *supra* note 2, at 586 (noting the Court's rejection of a mother's Article 13 defense).

52. 58 F.3d 374 (8th Cir. 1995).

53. Escudero v. Tice-Menley, 58 F.3d 374, 375 (8th Cir. 1995) (stating that Enrique Nunez-Escudero and Stephanie Rose Tice-Menley were married in Mexico on August 10, 1992).

54. *See id.* (noting that Nunez-Escudero alleged that Tice-Menley violated the Hague Convention when she wrongfully removed their son from Mexico).

55. *See id.* at 376 (claiming that Tice-Menley was treated "as a prisoner" by Nuez-Escudero and her father-in-law).

56. *See id.* (reasoning that a six-month-old would be both physically and psychologically harmed by the suggested action).

57. *Id. See* Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (finding there was no specific evidence of potential harm, despite respondent's citations to authorities recognizing the potential risk of psychological harm where a child is separated from their primary caretaker).

58. Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (noting that the evidence is of a general nature and deals only with the problems between Tice-Menley, her husband and father-in-law).

59. *See id.* Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (stating that determining which parent is better "in the long run" was irrelevant here).

2. International Interpretation

Perhaps the most cited foreign case discussing the "grave risk of harm" exception is *Thomson v. Thomson.*[60] *Thomson* involved a separated couple in Scotland, in which the mother was initially granted custody.[61] The mother took their child to Canada despite a court order requiring the child to remain in the jurisdiction, and later applied for custody of the child.[62]

Although the Manitoba Court of Appeals recognized that the child would suffer some psychological harm from being taken from his mother and given to his father,[63] the Supreme Court of Canada found that the harm to the child was not be drastic enough to meet the "grave harm" test under Article 13(b) of the Hague Convention.[64] The Supreme Court of Canada held that the phrase "or otherwise place the child in an intolerable situation" in Article 13 contemplates that the "harm" to the child must be tantamount to an intolerable situation.[65] Therefore, the risk must exceed an ordinary harm expected when a child is taken away from one parent and placed with the other.[66]

Another international case that gave the "grave risk of harm" exception a narrow interpretation is *N v. N.*[67] The case involved a married couple with three children living in Australia where the father was diagnosed with bipolar disorder, causing extraordinary stress to his wife and children.[68] The couple eventually separated and the children remained in their mother's custody while the mother took the children to England to visit family.[69] Shortly thereafter, the

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60. [1994] D.L.R. 253. The *Thomson* holding states:

> Although the word "grave" modifies "risk" and not "harm," this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.

Thomson v. Thomson, [1994] D.L.R. 253, 286.

See Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (noting that an Article 13(b) exception can only be triggered by severe potential harm to the child).

61. *See Thomson*, [1994] D.L.R. at 254 (stating that the mother obtained an interim custody order).

62. *See id.* (asserting that the question of whether the mother knew she was violating a Scottish court's order is irrelevant).

63. *See id.* (Manitoba Ct. App. 1993) (stating that the mother alleged that the child would suffer "serious harm" if returned to the father).

64. *See id.* at 256 ("[T]he harm contemplated by Art. 13(b) is harm to a degree that also amounts to an intolerable situation").

65. *See id.* at 286 (stating that although the word "grave" modifies "risk" and not "harm," this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation.").

66. Thomson v. Thomson, [1994] D.L.R. 253, 256 ("Article 12 makes it clear that the ordinary effects of settling in do not warrant refusal to surrender.").

67. 1 F.L.R. 107 (Eng. Fam. 1995).

68. *See* N v. N, (1995) 1 F.C.R. 595, (1995) 1 F.L.R. 107 (noting that certain written notes in the father's handwriting corroborate the fact that he must have caused "extraordinary stresses" to the mother and children).

69. *See* N v. N, (1995) 1 F.C.R. 595, (1995) 1 F.L.R. 107 (stating that the mother took the children to England after they separated and with the father's consent).

mother began to suspect that her daughter had been sexually abused and the father was implicated as the wrongdoer.[70]

The court recognized the possibility that the father sexually abused his daughter, but granted the return of the children to Australia anyway.[71] The court also stated that primary purpose of the Hague Convention is to ensure that abducted children are promptly returned as "the welfare of the children is an important, but not paramount, consideration."[72]

B. Broad Interpretation of the Grave Risk of Harm

1. The United States

Courts have generally adhered to the narrow interpretation of the grave risk of harm exception, resulting in few successful arguments based on the defense.[73] This trend was hindered, however, in the recent case of *Blondin v. Dubois*.[74] In *Blondin,* Judge Chin did not dispute the requirement that the "grave risk of harm" exception must be narrowly construed, but rather believed that "the court must [evaluate] the people and circumstances awaiting the child in the country of habitual residence."[75] Judge Chin is not as scant in determining whether the people and circumstances will cause "physical or psychological harm" or otherwise place the child in an "intolerable situation."[76]

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70. *See* N v. N, (1995) 1 F.C.R. 595, (1995) 1 F.L.R. 107 (reporting that a doctor reported that there was an irregularity in the girls hymen, which was "consistent with some interference by the insertion of [some] object into [her] vagina").

71. *See* N v. N, (1995) 1 F.C.R. 595, (1995) 1 F.L.R. 107 (recognizing that there is an "unresolved possibility that [the father] has exposed [the child] to inappropriate sexual contact).

72. N v. N, (1995) 1 F.C.R. 595, (1995) 1 F.L.R. 107.

73. *See Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225 (1994) (providing that most experts reported the narrow interpretation of Article 13(b) in their jurisdictions); *see also* England v. England, 234 F.3d 268, 272 (5th Cir. 2000) (holding that the District Court erred in failing to return [child] to Australia based on a "grave risk of harm," as this evidence did not satisfy a "clear and convincing" standard). *But see* Tahan v. Duquette, 259 N.J. Super. 328, 333-35 (1992) (rejecting the trial court's opinion that the Article 13(b) inquiry should focus on the jurisdiction of the child's habitual residence rather than the individuals involved and insistence on exploring psychological make-ups and ultimate determinations of parenting qualities in order to evaluate the circumstances to which the child is being sent back to).

74. 19 F. Supp. 2d 123 (S.D.N.Y. 1998). *See* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456 (1999) (finding that the return of the subject children to Venezuela would expose them to physical and psychological harm and place them in an intolerable situation); Currier v. Currier, 845 F. Supp. 916, 923 (1994) (where the grave risk of harm exception did not apply when serious doubts were lacking as to "the safety, propriety, or nurturing character of the environment to which the [abducted] children would return.").

75. *See Dubois*, 19 F. Supp. 2d at 127 (citing *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995)).

76. *See id.* at 123, 127 (stating that the "court's inquiry must be narrowly focused" on the type of impact that returning a child to a particular environment might have).

In *Blondin,* Merlyne Marthe Dubois and Felix Blondin lived together, unmarried, in Paris, France, where they had two children.[77] Blondin reportedly battered Dubois while intoxicated and while holding her daughter.[78] On one occasion, Blondin twisted an electrical cord around his daughter's neck, threatening to kill her and Dubois, and which motivated Blondin to move to a shelter for battered women.[79] At a later proceeding and at the initiative of Blondin, joint custody was awarded to the parents with "the principal residence of the child being with the father and Dubois having visiting and sheltering rights."[80] Though they began living together again, Blondin's abuse worsened, causing the children nightmares, so Dubois ultimately took her children to the United States without Blondin's knowledge or consent.[81] Judge Chin found, by clear and convincing evidence, that the children of Dubois and Blondin would be subject to a grave risk of physical or psychological harm or otherwise be placed in an intolerable situation if they were returned to Blondin in France.[82]

On appeal, The United States Court of Appeals for the Second Circuit (hereinafter "Second Circuit") agreed that returning the children to Blondin's custody would present them with a grave risk of harm within the meaning of Article 13(b).[83] Nonetheless, the Second Circuit vacated the judgment of the District Court and remanded the case for "a more complete analysis of the full panoply of arrangements that might allow the children to be returned" as required by the Hague Convention.[84] The Second Circuit suggested that the children could be placed in the temporary care of a third party in France, pending further determinations regarding the long-term custody of the children.[85]

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77. *See id.* at 124 (stating that Blondin and Dubois had one child, Marie-Eline, born in 1991, and lived in Paris along with Dubois' son from a prior relationship).

78. *See id.* (noting that Blondin, after drinking, sometimes beat Dubois even if she was holding the child).

79. Blondin v. Dubois, 19 F. Supp. 2d 123, 124 (S.D.N.Y. 1998) (detailing the type of abuse that continued after Francois was born).

80. *See id.* at 125 (noting that, in a 1993 action, the mother was awarded visitation rights by a French court, however, the child's principal residence was with the father).

81. *See id.* (at the time of the custody settlement, Blondin and Dubois began living together again and she became pregnant with Francois).

82. *See id.* at 127 (holding that if Marie-Eline was returned to France, the child would be exposed to "physical or psychological harm" or, in the alternative, placed in an "intolerable situation").

83. Blondin v. Dubois, 189 F.3d 240, 250 (2d Cir. 1999) (finding that the children should not be returned to their father in France because doing so would place them at a "grave risk" of harm according to Art. 13(b) of the Convention).

84. Blondin v. Dubois, 189 F. 3d 240, 242 (2d Cir. 1999). The Second Circuit held:

> [W]e believe the District Court should be given another opportunity to consider . . . whether other options are indeed available under French law—options that may allow the courts of the United States to comply *both* with the Convention's mandate to deliver abducted children to the jurisdiction of the courts of their home countries *and* with the Convention's command that children be protected from the "grave risk of harm."

See id.

85. *See id.* at 249 ("[W]e think it appropriate to remand this matter to the District Court for further consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm, pending a custody award in due course by a French court with proper jurisdiction.").

On remand, Judge Chin again found that the children would be threatened by a grave risk of physical or psychological harm or an intolerable situation should they be ordered to return to France.[86] After considering other possible arrangements suggested by the Second Circuit, Judge Chin found that the children's return to France should not be granted.[87] In doing so, Judge Chin adopted the written reports and testimony of psychologist Dr. Solnit who stated that removing the children from their now secure environment would "almost certainly" cause them to suffer post traumatic stress disorder.[88] Judge Chin, was not in conflict with the narrow interpretation to be given to exceptions under the Hague Convention, and conclusively found the situation of these two children to be an extraordinary circumstance to which the Article 13(b) exception was meant to apply.[89]

In making this distinction, Judge Chin stated that the present case is unlike other Hague Convention cases in which there is a mere "disruption of the usual sense of attachment."[90] The *Blondin* case involved the abuse of a mother and children, and therefore differs from earlier cases that declined to apply the "grave risk" exception.[91] Further, the likelihood that the children's return to France may trigger a recurrence of traumatic stress disorder and may result in

86. Blondin v. Dubois, 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000), *aff'd*, 2001 U.S. App. Lexis 77 (2d Cir. 2001). The District Court stated:

> [F]irst, removal of the children from their presently secure environment would interfere with their recovery from the trauma they suffered in France; second, returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm; and third, Marie-Eline objects to being returned to France.

See Dubois, 78 F. Supp. 2d at 294.

87. *See id.* at 299 ("The Convention sets up a framework for analyzing international child abduction cases, and we must work within that framework; [It is] a matter of working within the framework of the Convention.").

88. Blondin v. Dubois, 78 F. Supp. 2d 283, 291 (2000) (discussing specific psychological risks that the children would be exposed to, if returned to France, such as "not feeling safe," and "having their fate determined by strangers").

89. *See id.* at 285 (holding that the Article 13(b) exception is applied to this situation because "any repatriation arrangements . . . would expose [the children] to a 'grave risk' of psychological harm."); *see also* In re Coffield, 644 N.E.2d 662, 664 (1994) (discussing how U.S. courts generally apply a narrow interpretation to the grave-risk exception); Currier v. Currier, 845 F. Supp. 916, 923 (1994) (stating that although [under Article 13(b)] the court does take into consideration the surroundings of the place where the children will be sent, the primary focus is limited to the specific factors that contribute to the "grave risk factor").

90. *See Dubois*, 78 F. Supp. 2d at 297 (quoting Friedrich v. Friedrich, 78 F.3d 1060, 1068 (1996) ("The disruption of the usual sense of attachment that arises during most long stays in a single place with a single parent should not be a "grave" risk of harm for the purposes of the Convention."); *see also* Friedrich v. Friedrich, 78 F.3d 1060, 1068 (1996) (stating that under the Convention, the grave risk of harm is actually caused by the abduction of the child itself, rather than from the disruption of the usual sense of attachment that arises during long stays in a single place with a single parent).

91. *See, e.g.,* Freier v. Freier, 969 F. Supp. 436, 442 (E.D. Mich. 1996) (declining to apply the grave risk exception, where the child was sent to Israel and separated from grandparents, aunts, and uncles who lived in Michigan); Rydder v. Rydder, 49 F.3d 369, 373 (1995) (rejecting the application of grave risk exception and granting the return of children to Poland because there was no direct evidence of harm to the children with their father); Ciotola v. Fiocca, 86 Ohio Misc. 2d 24, 36 (1997) (holding that the Article 13(b) exception was not applicable because the plaintiff did not present sufficient evidence of the potential physical and psychological harm that the child would be exposed to if returned to Italy).

permanent harm, making it clear that this was not a typical adjustment problem that hinders the return of the child under the Hague Convention.[92]

In *Blondin*, the United States and France argued that Judge Chin is reading Article 13(b) too broadly.[93] Judge Chin argued that the guidance from the appellate court suggests a leaning towards the extremely narrow conception of the "grave risk" exception set forth by the Sixth Circuit, which provides that a "grave risk of harm" can only exist in two situations.[94] Essentially, this view will not find a "grave risk of harm" no matter how serious the abuse, neglect or extraordinary emotional dependence, absent the finding that the court of the country in which the child was abducted from is "incapable or unwilling to give the child adequate protection."[95]

Judge Chin stated that similarly, in directing him to consider the other alternatives available to allow the children's return to France, the appellate court implied that his finding that the children were seriously abused by Blondin, standing alone, was insufficient to constitute a "grave

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92. *See* Blondin v. Dubois, 78 F. Supp. 2d 283, 297 (2000) (describing the potential psychological trauma that the children would suffer from being returned to France as being "far worse" than other cases due to the physical and emotional abuse suffered at the hands of their father); *see also* Hon. Betty Weinberg Ellerin, *Symposium: Women, Children And Domestic Violence: Current Tensions And Emerging Issues*, 27 FORDHAM URB. L.J. 565, 756 (2000) (analyzing the application of Article 13 under the Hague Convention in U.S. courts, where significant emphasis is placed upon the social conditions of the country to which the child is supposed to be returned). *See generally* Anna I. Sapone, *Children as Pawns in Their Parents' Fight for Control: The Failure of the United States to Protect Against International Child Abduction*, 21 WOMEN'S RTS. L. REP. 129, 133 (2000) (discussing general requirements of the Hague Convention, including how the proceedings must have been instituted within a one-year statute of limitations and that the child must have been wrongfully removed from its habitual residence).

93. *See Dubois*, 78 F. Supp. 2d at 297 (describing Judge Chin's rationale for a broad interpretation of Article 13); *see also* Weiner, *supra* note 45, at 662 ("Although the broader interpretation of Article 13(b) . . . is gaining currency, victims often still face doctrinal hurdles to the defense's successful invocation."); Zalkin, *supra* note 40, at 292-93 (discussing several recent U.S. court decisions that have interpreted the grave-risk exception broadly).

94. The Sixth Circuit stated:

> First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

See Friedrich, 78 F.3d at 1069; *see also* Blondin v. Dubois, 78 F. Supp. 2d 283, 297 (2000) (interpreting the Sixth Circuit analysis to mean that "issues of . . . extraordinary emotional dependence do not amount to a 'grave risk of harm' absent an additional finding that the court in the abducted-from country is incapable or unwilling to give the child adequate protection"). *See generally* Zalkin, *supra* note 40, at 278 (discussing the two situations in which a grave risk of harm exists).

95. *See Dubois*, 78 F. Supp. 2d at 297-98; *see also* Ising, *supra note* 15, at 630 (explaining why the Blondin court did not require that the "court in the abducted-from country [be] incapable or unwilling to protect the child" in order to satisfy the 'grave risk of harm' defense). *See generally* Weiner, *supra* note 45, at 663-65 (discussing a case where the First Circuit declined to apply the grave risk of harm exception even though there was substantial evidence of physical and emotional abuse to the abducting mother).

risk of harm."[96] Judge Chin iterated his view that these interpretations of Article 13(b) are "unduly narrow."[97] He found the present case to be directly analogous to what the United States Department of State identified as a factual situation falling under the "grave risk" exception.[98]

An earlier case giving the "grave risk" exception a wide interpretation is *Tahan v. Duquette*.[99] The case was remanded to the trial court for the limited purpose of determining whether any of the exceptions in Article 13(b) of the Hague Convention were applicable.[100] *Tahan* involved a couple in the process of a divorce, Michelle Duquette and Fred Tahan, who had joint custody of their child pursuant to a consent order, where each had custody on a 14-week alternate schedule.[101] When Ms. Duquette refused to return the child to the United States from her home in Canada, Mr. Tahan filed an action for exemplification of the consent order.[102]

The trial court determined that an Article 13(b) inquiry was not intended to cover a factual matter that is subject to consideration in a plenary custody hearing.[103] The trial court,

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96. *See Dubois*, 78 F. Supp. 2d at 297-98 (indicating that the 'grave risk of harm' defense is not fully satisfied by the abuse of the children, but also requires that "the court in the abducted-from country is incapable or unwilling to give the child adequate protection."); *see also* Blondin v. Dubois, 189 F.3d 240, 247 (1999) (arguing that, even though the District Court correctly relied on the evidence of the physical abuse of the children in determining that the grave risk exception applies, it did not rely accurately on other significant evidentiary considerations surrounding evidence in finding its holding). *See generally* Weiner, *supra* note 45, at 660-61 (arguing that under the *Blondin* approach, it is a "high hurdle" to claim an Article 13(b) defense due to the high burden of proof and the required Hague proceeding).

97. *See Dubois*, 78 F. Supp. 2d at 298 (describing the appellate court's interpretation of Article 13(b) as "unduly narrow," by discussing a comparable factual situation put forth by the U.S. Department of State, where abuse by itself was sufficient to meet the grave risk of harm standard).

98. Blondin v. Dubois, 78 F. Supp. 2d 283, 298 (2000). "An example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child. *Id.* If the other parent removes . . . the child to safeguard [him or her] against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. *Id.* Such action would protect the child from being . . . subjected to a grave risk of psychological harm." *Id. See* Weiner, *supra* note 45, at 660-61 (discussing an Ontario Court of Appeals case that considered substantial physical abuse against the abductee parent satisfied the grave risk of harm exception in regard to the child); *e.g.,* Steffen v. Severina, 966 F. Supp. 922, 926 (1997) (holding that the child would be exposed to a grave risk of harm where a psychologist found that the child had "bond[ed] and attach[ed]" to the abducting parent and not to the parent in the home country).

99. 259 N.J. Super. 328 (1992) (holding that the issue of Article 13(b) was not meant to be dealt with in a plenary custody hearing).

100. Tahan v. Duquette, 259 N.J. Super. 328, 332 (1992) (quoting Duquette v. Tahan, 252 N.J. Super. 554, 563 (App. Div. 1991)).

101. Duquette v. Tahan, 252 N.J. Super. 554, 556 (App. Div. 1991) (describing the events which chronologically led to the appeal).

102. *See id.* at 557 (explaining the progression of events that let to the child being kept from the father).

103. Tahan v. Duquette, 252 N.J. Super. 554, 557 (1991) (holding that the Hague Convention reserves the Article 13(b) considerations for an appropriate tribunal in the location of the habitual residence).

instead, felt that the inquiry was to be limited to "internal strife" or unrest in the place of habitual residence that would place the child at risk.[104]

The Court held that "it is clear that Article 13(b) requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint."[105] It stated that if all that the Article required was this limited inquiry, the drafters of the Hague Convention could have found a more direct and clear way of stating it.[106]

2. International Interpretation

The English case of *Johnson v. Fowler-Winning*[107] involved an unmarried couple living in Canada with a two-year-old son.[108] Samantha Claire Fowler-Winning left Canada and brought their son, Derek, to England.[109] Fowler-Winning stated that her reason for leaving was because the child's father, Colin Duncan Johnson, would have his friends over at the flat to organize their business of supplying drugs.[110] She further testified that she had received threats that if she were to return to Canada, she would be in danger of violence from Collin's "colleagues."[111] The court found this to be an "exceptional case" in which the "otherwise intolerable situation" provision of Article 13(b) is exemplified, and return of the child to Canada was denied.[112]

Another case giving the "grave risk" exception a wide interpretation is *G* (minors).[113] The case involved a couple in the middle of divorce proceedings.[114] The mother was granted leave by a Texas court to take the children to England to visit their grandparents.[115] The mother

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104. *See id.*; *see also* Eric S. Horstmeyer, Note, *The Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Tahan and Viragh and their Impact on its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 130 (1994) ("The court limited the Article 13(b) inquiry to the question of whether there exists in the place of habitual residence such 'internal strife' or unrest as to place the child at risk."); Regan Fordice Grilli, Comment, *Domestic Violence: Is It Being Sanctioned by the Hague Convention?*, 4 SW. J. L. & TRADE AM. 71, 81 (1997) (stating that the court established how narrow the scope of inquiry is).

105. *See Duquette*, 259 N.J. Super. at 334; *see also* Grilli, *supra* note 104, at 81 n.83 ("The court declared that if the drafters of the Convention had intended that the 13(b) exception required the courts to merely look at civil stability and the availability of a tribunal to hear the custody complaint, they would have directly said so."). S*ee generally* Ising, *supra* note 15, at 638 (recognizing the scope of the exception as more than a cursory evaluation).

106. Tahan v. Duquette, 259 N.J. Super. 328, 334 (1992). *See* Horstmeyer, *supra* note 104 (stating that the reasoning behind such a decision stemmed from the Convention's language which would have been more clear if a "perfunctory review was all the Convention required").

107. Case No. CA 114 of 1997, Royal Courts of Justice, Strand, London, Sir Stephen Brown, 24 March 1998.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. [1995] 1 F.L.R. 64, [1995] Fam. Law 116, [1995] 2 F.C.R. 22.

114. *Id.*

115. *Id.* (noting that the father left the mother in November 1993 and began divorce proceedings in Texas in December 1993).

failed to return the children to Texas on the agreed date and the father filed an action to have the children returned pursuant to the Hague Convention.[116]

The mother asserted the "grave risk" exception due to her own psychological vulnerabilities.[117] The court stated that it has never seen a case in which the children were so emotionally and physically dependant on their mother.[118] There were written reports by doctors from the initial hearing indicated that the mother suffered from depression and that it is likely she would become psychotic if she had to return to Texas.[119] Further, if the children were to see their mother's health deteriorate they would "be so immediately and obviously affected."[120] The court stated that:

> If a court is satisfied that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child an intolerable situation, then it seems to me the court would take a lot of convincing in such a case to exercise its discretion to return the child; that would almost be a contradiction in terms.[121]

IV. Analysis

A determination as to whether a child will experience a "grave risk of physical or psychological harm" or place the child in an "intolerable situation" inescapably requires the consideration of what is in the best interests of a child."[122] The courts are scrupulous in cases brought under the Hague Convention to refrain from making inquiries to be made during custody

116. *Id.* (stating that signatories to the Hague Convention must return a child's country of origin).

117. *Id*. (noting that evidence was offered that the mother's mental sanity was at risk).

118. [1995] 1 FLR 64, [1995] Fam. Law 116, [1995] 2 FCR 22 (stating that the oldest child was three years old and the youngest was just over a year old).

119. *Id.* (noting that she may have been suffering from post-natal depression).

120. *Id.* (stating that a child who witnesses his mother's deteriorating health will suffer adverse effects); *see also* In Re P (minor) Court of Appeal (Civ. Div. Eng. 1996) (discussing the effect upon a child in the care of a mother whose health is deteriorating); In re G, 1 Fam. Div'l Ct. 64 (1995) (arguing that a child would be at risk for psychological harm after watching his mother's health deteriorate).

121. *See* Ising, *supra* note 15, at 623 (predicting what physical and psychological harm might result if a child were placed in an intolerable situation); Caroline LeGette, Note*, International Child Abduction And The Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception,* 25 TEX. INT'L L.J. 287, 302 (1990) (discussing the court's interpretation of a grave risk of physical or psychological harm in *In Re Ottens*); *see also* Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557, 560 (1998) (analyzing Article 13(b) of the Hague Convention which sets forth regulations on "psychological harm" to children in parental custody situations).

122. *See* Thomson v. Thomson, 119 D.L.R. 4th 253, 255 (Can. 1994) (agreeing with Convention by finding that "it was in the best interests of the child that he remain in the mother's care both for the short and long term."); Ising, *supra* note 15, at 636-38 (referring to a case in which the court disagreed that returning an abducted child would place him at a grave risk of physical or psychological harm); *see also* Dorothy Carol Daigle, *Note, Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exception,* 26 VAND. J. TRANSNAT'L L. 865, 877 (1993) (discussing the necessity of coming forth with "clear and convincing evidence" that the child would be "subject to a grave risk of physical or psychological harm, or placed in an intolerable situation.").

determinations under the best interests of the child standard.[123] This is quite difficult, as the inquiries appropriate under the best interests of the child standard to be applied in custody proceedings are appropriate to determine where a child should reside prior to that custody proceeding.[124]

Are we not in fact looking to serve the child's best interests in the determination of what may and may not harm them? The legal analysis to the Hague Convention states that Article 13(b) was not intended to be used to "litigate (or relitigate) the child's best interests."[125] This clearly indicates that a court must not make custody determinations, based on the best interests of the child standard, in Hague proceedings. The Hague Convention was meant in part, to give priority to the custody determinations made by the child's state of habitual residence.[126] It does not necessarily follow however, that because the best interests standard explores the child's best interest by definition, that those inquires should not be made in evaluating what is in a child's foremost interest in dissimilar court proceedings.[127] If the best interests of the child *are* taken into consideration in a Hague Convention proceeding, this does not mean that they are being "litigated."

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123. *See* discussion *supra* Part III.A.1, III.B.1; Ising, *supra* note 15, at 635 (stating that despite the Convention is not using the term "best interests of the child," it is in fact being considered when a court makes custody decisions); *see also* Whallon v. Lynn, 230 F.3d 450, 457 (1st Cir 2000) (discussing how courts began using the best interests of the child standard in the early 19th century).

124. *See* Perminder Basran, *Gordon v. Goertz: The Supreme Court Compounds Confusion over Custody and Access,* 61 SASK. L. REV. 159, 159 (1998) (citing *Gordon v. Goertz,* where the majority "viewed the best interests of the child as the only consideration relevant to any issue concerning the child, including where the child is to reside"); Kenneth Rigby, *Forum Juridicum: 1993 Custody And Child Support Legislation,* 55 LA. L. REV. 103, 104 (1994) (discussing the Louisiana Civil Code which provides for custody of the child based on what is in the "best interest of the child"). *See generally* Sondra Miller, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?,* 15 PACE L. REV. 339, 345 (1995) (discussing how social science research should be considered in making a determination of the child's best interests).

125. *See* Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) (recognizing that the grave risk of harm exception was "not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."); Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000) (citing a Department of State article which stating "Article 13(b) was not intended to be used by defendants as a vehicle to litigate . . . the child's best interests."); *see also* Horstmeyer, *supra* note 104, at 127 (stating that, contrary to the desired result, "Article 13(b) is the Convention's most litigated provision.").

126. *See* Ohlander v. Larson, 114 F.3d 1531, 1540 (1997) (discussing the intent of the Convention); Susan L. Barone, *International Parental Child Abduction: A Global Dilemma With Limited Relief—Can Something More Be Done?*, 8 N.Y. INT'L L. REV. 95, 106 (1995) (analyzing why the habitual residence of the child is used as the child's "home" state to prevent "forum shopping"); *see also* Peggy D. Dallmann, *The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by U.S. Courts,* 5 IND. INT'L & COMP. L. REV. 171, 185 (1994) (discussing that even though "habitual residence" is not defined in the Convention, the court must look backward and focus on the child to make his determination).

127. *See* Jennifer Benning, Note*, A Guide for Lower Courts in Factoring Religion into Child Custody Disputes, Annotated Legal Bibliography: Women's Annotated Legal Bibliography,* 5 CARDOZO WOMEN'S L.J. 249, 258 (1998) (discussing various articles which all focus on the best interests of the child with respect to religion, sexuality and how these other factors play a role in where the child should reside); Horstmeyer, *supra* note 104, at 139 (asserting that custody proceedings are usually determined according to the "best interests of the child"); *see* Michelle Morgan Kelly, Note*, Taking Liberties: The Third Circuit Defines "Habitual Residence" under the Hague Convention on International Child Abduction,* 41 VILL. L. REV. 1069, 1083 (1996) ("A court should consider the best interests of the child" and that "such tugging and shuttling" can only be detrimental.").

To say that the drafters of the Hague Convention meant for the courts not to take the best interests of the child into consideration undermines the purpose behind the ratification of the Hague Convention. The stated objective of the Hague Convention is to "secure the prompt return of children who have been wrongfully removed or retained."[128] Even though there is no explicit reference to the child's best interests, this does not mean that this necessity should be ignored. [129] The preamble of the Hague Convention states the following:

> [R]ight from the start the Signatory States declare themselves to be firmly convinced that the interests of the children are of paramount importance in matters relating to their custody; it is precisely because of this conviction that they drew up the Convention, desiring to protect children internationally from the harmful effects of their wrongful removal or retention.[130]

The explanatory report to the Hague Convention states that the philosophy of the Hague Convention is clearly defined as "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests."[131] The ultimate objects of the Hague Convention to prevent children from experiencing the harms of abduction and the speedy return of wrong-

128. *See* Trooboff, *supra* note 2, at 589 (noting that the Hague Convention was designed to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States."); *see also* Patricia M. Hoff, *Book Review, Child Abduction,* 78 A.J.I.L. 723, 723 (1984) (discussing "how the Convention is designed to secure the prompt return of children who have been wrongfully removed to, or retained in Contracting States, and to facilitate the exercise of visitation rights across international borders."); Starr, *supra* note 3, at 794 ("According to Article 1(a), the Hague Convention's goal is to "secure the prompt return of children wrongfully removed to or retained in one Contracting State.")

129. *See* Ciotola v. Fiocca, 86 Ohio Misc. 2d 24, 34 (1997) (considering the purpose of the Hague Convention and stating that the best interests of the child need to be taken into consideration under "traditional Ohio laws" when deciding habitual residency); *see also* Horstmeyer, *supra* note 104, at 127 (discussing how the Convention's primary focus is on custody rights and how access rights are secondary). *See generally* Pfund, *supra* note 5, at 670 (discussing the procedure of deciding custody in the country of origin of the child).

130. Hague Convention of the Civil Aspects of International Child Abduction, S Treaty Doc. No. 99-11, reprinted in 19 I.L.M. 1501 (1980); *see also* Jacqueline D. Golub, *The International Parent Kidnapping Crime Act of 1993: The United States Attempt to Get Our Children Back—How Is It Working*? 24 BROOK. J. INT'L L. 797, 799 (1999) (stating the intent of the Hague Convention was "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence"); Steward, *supra* note 3, at 323 (noting that the objectives of the Hague Convention is to make sure children are safe from abduction and to protect their home).

131. *See* Courtney E. Hoben, *The Hague Convention on International Parental Kidnapping: Closing the Article 13(b) Loophole*, 5 J. INT'L LEGAL STUD. 271, 279 (1999) (noting that the Convention's official reporter, Elisa Perez-Vera, described the theme of the Convention as: "[T]he struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests."); Weiner, *supra* note 45, at 637 (noting that the explanatory report instructs courts, when establishing custody rights, to follow the law).

fully removed or retained children, which comply with the idea of what comprises the child's best interests.[132]

No matter what angle the Hague Convention is viewed from, deterring abductions and the prompt return of wrongfully removed children is essentially an effort to protect them, and is ultimately serving the best interests of the child.[133] Therefore, the fact that certain evidence is used in custody proceedings, at which the best interests of the child dominates the outcome, is no reason for courts to dance around the realization that what is in fact under evaluation in Hague proceedings is the best interests of the child.[134] The child's interests must be addressed although it may be is possible that such an inquiry may in fact give a parent displeased with the outcome of a custody determination incentive to abduct her child to another jurisdiction in hopes that the court will find in her favor.[135]

Furthermore, it seems that the reason for the low success rate of the grave risk of harm exception under Article 13(b) is a consequence of the courts' interpreting the meaning of

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132. *See Fiocca*, 86 Ohio Misc. 2d at 33 ("The United States, convinced that the interests of children are of paramount importance in matters relating to their custody, became a party to the Hague Convention."); Susan Mackie, *Comment, Procedural Problems in the Adjudication of International Parental Child Abduction Cases,* 10 TEMP. INT'L & COMP. L.J. 445, 449 (1996) (stating that the Convention focuses on "the well-being of the child and a speedy resolution to the dispute."); *see also* Martin I. Bodzin, *Comment, International Parental Child Abduction: The Need for Recognition and Enforcement of Foreign Custody Decrees,* 3 EMORY J. INT'L DISP. RESOL. 205, 212 (1989) (discussing how the Convention was intended to deter parents from abducting their children).

133. *See* Blondin v. Dubois, 78 F. Supp. 2d 283, 299 (S.D.N.Y. 2000) ("The courts, the parents, and the governments of both France and the United States should be motivated by the best interests of the children. Indeed, the drafters of the Convention undoubtedly sought to do what was in the best interests of children."); Daigle, *supra* note 122, at 865 (noting how the Hague Convention is subject to criticism because in essence it focuses on the well-being of the child rather than the rights of the parents); *see also* Robin Jo Frank, Note*, American and International Responses to International Child Abductions,* 16 N.Y.U. J. INT'L L. & POL. 415, 418 (1984) (discussing how the Hague Convention is used as a means to prevent "child snatching" and in the process promote the best interests of the child).

134. *See* Feder v. Evans-Feder, 63 F.3d 217, 231 (3d Cir. 1995) (Sarokin, J., dissenting) ("Although the best interests of the child will be determined ultimately, they should not be ignored in these preliminary proceedings."); Starr, *supra* note 3, at 799 (discussing the great flexibility in initial court custody proceedings, however, child's habitual residence is often at issue); *see also* Dallmann, *supra* note 126, at 194 (asserting that courts consider evidence pertaining to a child's habitual residence through the use of witnesses).

135. *See* G (minors) 19, Court of Appeal (Civ. Div. Eng. 1994). The Court stated:

> [A]rt 13 . . . is part of the Convention and it is to be treated as part of the Convention just as much as art 12 . . . [W]e are fully conscious that [applying art 13 to a case of wrongful retention] . . . may indicate a course which could attract other parents in a similar situation to try and get around the difficulties which art 12 of the Hague Convention poses. I am quite sure in my mind that all High Court judges to whom matters of this kind are assigned will be fully aware of those risks.

G (minors) 19, Court of Appeal (Civ. Div. Eng. 1994).

See Starr, *supra* note 3, at 799 (discussing the great flexibility in initial court custody proceedings, however, child's habitual residence is often at issue); *see also* Dallmann, *supra* note 126, at 194 (stating that courts consider evidence pertaining to a child's habitual residence through the use of witnesses).

"harm" itself too narrowly.[136] Harm can be defined as "physical or mental damage" or a "detriment or loss to a person."[137] Courts speak of harm to children in the confines of abuse and neglect or "zones of war and disease."[138] It must be realized that children of tender years are vulnerable and that disruptive experiences falling short of these confines early in their lives can have a detrimental impact on the development of their character.[139] Therefore, the courts must consider the vulnerability of children in evaluating their risks of harm pursuant to Article 13(b) of the Hague Convention, and adopt a less rigid interpretation of the exception.

Children are fragile beings and it is therefore important to recognize the impact a bad experience can have on a child.[140] A harmful situation for a child can be as drastic as a child being sexually molested or being taken away from a parent with whom the child has an unusual emo-

136. *See* Ising, *supra* note 15, at 624 ("Courts must narrowly construe Article 13(b)'s exception."); *see also* Horstmeyer, *supra* note 104, at 140 (stating that the courts must be willing to narrowly interpret the Convention' exceptions in order for the Hague Convention to be a success).

137. *See* People v. Tuan Van Nguyen, 22 Cal. 4th 872, 877 (2000) (stating that "Webster's defines harm as physical or mental damage."); *see also* Lovelace Medical Ctr. v. Mendez, 111 N.M. 336, 342 (1991) (defining harm as "the detriment or loss to a person and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being. . . ."). Harm is defined as:

> Detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things, and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests.

138. RESTATEMENT (SECOND) OF TORTS 7 cmt. b (1965).

See Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) (holding that, for purposes of the Convention, a grave risk of harm exists when a child is put in imminent danger before a custody dispute is resolved by returning the child to a "zone of war, famine, or disease"); Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000) (stating that courts have permitted the return of a child to their home country when confronted with a grave risk of physical harm when adequate protection was afforded); *see also* Ising, *supra* note 15, at 640 (stating that the Sixth Circuit held that under Article 13(b), a grave risk only exists when returning a child to a "zone of war, famine, or disease" or in cases of serious neglect and abuse).

139. *See* Feder v. Evans-Feder, 63 F.3d 217, 231 (3d Cir. 1995) (stating that with respect to returning the subject child to his residence before the alleged abduction, "[S]uch tugging and shuttling can only be detrimental."); Grilli, *supra* note 104, at 85 (noting that in custody battles, tugging and shuttling have a detrimental impact and should be paid attention to in preliminary proceedings); *see also* Andrew S. Rosenman, *Babies Jessica, Richard, and Emily: The Need For Legislative Reform of Adoption Laws*, 70 CHI.-KENT. L. REV. 1851, 1852 (1995) (discussing the impact on children of custody disputes over uncertainty of whether or not they will remain in their current home).

140. *See* J. Thomas Carroll, Jr., *A Thirty-Year Retrospective,* 77 U. DET. MERCY L. REV. 431, 459 (2000) (noting that children are fragile and a parents impact on them is tremendous); *see also* Vanessa L. Warzynski, *Termination of Parental Rights: The "Psychological Parent" Standard,* 39 VILL. L. REV. 737, 766 (1994) (noting that separation affect children because they are inept in dealing with threats to their emotions); Dr. Andy Man Chung Chiu & Vera Moon Hing Lam, *Development of an Indigenous Feminist Legal Political Discourse on Child Domestic Abuse,* 8 BUFF. WOMEN'S L.J. 25, 46 (1999/2000) (noting that children are considered "as fragile creatures of God who need to be both safeguarded and reformed.").

tional dependence.[141] Courts speak of the "immediate effects" a situation will have on a child, while ignoring the long term.[142] There is a need for recognition that this approach is not consistent with the Hague Convention's purpose to "protect children internationally from the harmful effects of their wrongful removal or retention."[143] Harm to a child is what can have a detrimental impact on their emotional well-being in the present, near future and the distant future.

V. Conclusion

The prevention of international child abduction "must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests."[144] Through cautious assessments, courts are careful to avoid determinations on the merits of an underlying custody dispute in cases brought pursuant to the Hague Convention. With the exception of a few circumstances, courts generally clutch to the Hague Convention's rule of

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141. *See* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U.L. REV 841, 850 (1997) (noting that the state has the power to terminate a parent-child relationship if it is harmful, so long as there is clear and convincing proof that this is necessary); *see also* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1028 (1999) (noting that children's growth and development can be harmed by separating them from their parents); Susan Yates Ely, *Natural Parents' Right To Withdraw Consent To Adoption: How Far Should the Right Extend*?, 31 U. OF LOUISVILLE J. FAM. L. 685, 693 (1993) (noting that parent and child bonds are difficult to break without a high degree of risk of psychological distress).

142. *See* Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt,* 38 AM. U.L. REV. 491, 5008 (1989) (noting that long-term effects on children who have experienced sexual abuse are not completely known, but research shows effects on the child's ability to later have appropriate marital and parental relationships); *see also* Rosemarie Ferrante, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity For Redress,* 61 BROOK. L. REV. 199, 232 (1995) (stating that instituting legal action against their abuser will serve as a deterrent and increase the public's awareness of the long-term effects associated with abuse of children). *But see* Elaine M. Hartnett*, Use of the Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest,* 24 NEW ENG. L. REV. 1243, 1248-49 (1990) (noting that childhood sexual abuse has both immediate effect and long-term effects and both should be considered).

143. *See* Golub, *supra* note 130, at 799-801 (noting that ratification of the Hague Convention was designed to "provide a meaningful remedy to parents whose children are abducted across international borders."); *see also* Hoben, *supra* note 131, at 274-75 (noting that Article 1 of the Hague Convention has the two objectives of securing the prompt return of children wrongfully removed or retained and ensuring that parental custody rights are respected); Pfund, *supra* note 5, at 667 (noting that Convention refers to the desire "to protect children internationally from the harmful effects of their wrongful removal or retention," which is similar to the language used in the United Nations Convention on the Rights of Children developed after).

144. *See* Hoben, *supra* note 131 (noting that this theme of the Convention is aimed at the need for the prompt return of children wrongfully abducted); *see also* Nanos, *supra* note 6, at 438-39 (discussing how the 14th session of the Hague Conference adopted the Convention on the Civil Aspects of International Child Abduction and was motivated by the desire to decrease the effects of abduction on children); Weiner, *supra* note 45, at 598-99 (noting how the Hague Convention is in effect in over 60 countries, and affords parents a remedy "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.").

mandatory speedy return of wrongfully removed children.[145] While strict construction is important to the preservation of the Hague Convention's objectives, courts must recognize the child's interests imbedded in these objectives and hold them in consideration when constructing the grave risk of harm exception.[146] The decision in *Blondin* brings life to these realizations and demonstrates the approach a court should take in striving for the ultimate goal of protecting our society's children.[147]

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145. *See* Steward, *supra* note 3, at 310 (noting that under the Hague Convention, a court must order that a wrongfully removed child must be returned to their home immediately); *see also* Hoben, *supra* note 131, at 271 (noting that in Lady Meyer's case, the High Court of England and Wales ordered that her children be immediately returned to Britain pursuant to the Hague Convention); Horstmeyer, *supra* note 104, at 130 (noting that in the Tahan case, a New Jersey court ordered the father to return his child to Canada).

146. McCullough v. McCullough, 4 F. Supp. 2d 411, 414 (1998). *McCullough* states:

> It is clear to the undersigned that that polestar of custody adjudication does not apply in a merits determination of this case which is to be decided "in accordance with the Convention." 42 U.S.C.A. § 11603(d). For purposes of granting a temporary provisional remedy under 42 U.S.C.A. § 11604, however, I hold that the "best interests of the child" standard is applicable.

See id.

See Ising, *supra* note 15, at 635 (noting that despite the Hague Convention's efforts in recognizing the child's best interest, the failure of the delegates to define "grave risk" and "intolerable situation" has resulted in interpreting Article 13(b) in various manners by courts throughout the world); *see also* Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served?* 8 PAC. RIM L. & POL'Y 189, 191 (1999) (noting that the implementation procedures of the Hague Convention does not serve the best interests of children because of it lacks clear definitions of key terms and is complex and inefficient).

147. *See* discussion *supra* Part III.A.2; Mark R. Kravitz, *Developments in the Second Circuit:* 1998-1999, 32 CONN. L. REV. 949, 1002-04 (2000) ("The Blondin case requires clear and convincing evidence that returning the child would result in harm to the child or that returning the child would violate fundamental human rights or freedom."); *see also* Hoben, *supra* note 131, at 282 (noting that in the *Blondin* case, the court held that the child's protection must be considered above letting the child remain with an abducting parent). *But see* Zalkin, *supra* note 40, at 292 (noting that the Blondin court's decision is unhelpful because it partially based its holding to let the children stay in the United States on the grounds that the children have become well settled there).

Wiwa v. Royal Dutch Petroleum Co.

226 F.3d 88 (2d Cir. 2000)

The United States Court of Appeals for the Second Circuit held that jurisdiction is properly exercised over defendants, because they have sufficient contacts with New York, and they are not entitled to dismissal on *forum non conveniens* grounds based on policy interests.

In *Wiwa v. Royal Dutch Petroleum Co.*,[1] plaintiffs are three Nigerian émigrés, a woman identified as Jane Doe for security reasons, and the next of kin of other alleged victims of human rights abuses in Nigeria.[2] Defendants are Royal Dutch Petroleum Company ("Royal Dutch"), a business corporation incorporated in the Netherlands,[3] and Shell Transport and Trading Co., P.L.C. ("Shell Transport"), a business corporation incorporated in England.[4] The defendants jointly control and operate the Royal Dutch/Shell Group, an international, vertically integrated network of affiliated but formally independent oil and gas companies.[5] Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), which conducts a large amount of oil exploration and development in the Ogoni region of Nigeria, is a wholly-owned Nigerian subsidiary of the defendants.[6]

Plaintiffs allege that they were convicted of murder on fabricated evidence, beaten, tortured, imprisoned and shot. Although the attacks were executed by the Nigerian government and military, plaintiffs allege that Shell Nigeria instigated, orchestrated, planned and facilitated the attacks, because it was ordered to do so by the defendants.[7] Allegedly, defendants provided the Nigerian military with the necessary tools and support to carry out the brutal attacks.[8] Plaintiffs were members of a protest group[9] who politically opposed Shell Nigeria's oil development projects in Ogoni.[10] The plaintiffs allege that Shell Nigeria convinced the Nigerian police and military to attack the Ogoni villages and to suppress the protesting. There were many instances of brutal behavior by the police and military of Nigeria in response to the plaintiffs' opposition to Shell Nigeria's tremendous air and water pollution.

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1. 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 69 U.S.L.W. 3628 (U.S. Mar. 26, 2001) ("Wiwa II").
2. *Wiwa II*, 226 F.3d at 91.
3. *Id*. at 92.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*. at 93.
9. *See* Karen McGregor, *Shell to Face US Lawsuit for Saro-Wiwa Execution,* THE INDEPENDENT, Sept. 19, 2000. The Ogonis are a minority ethnic group with very little political influence. Their opposition began peacefully, but the protests became very militant. The dictatorial Nigerian military government saw the protests as a threat to their business revenue and political standing. Therefore, the military government made a strenuous effort to put an end to the opposition.
10. *Wiwa II*, 226 F.3d at 93.

Plaintiffs' complaint sets forth causes of action[11] for damages under the Alien Tort Claims Act (ATCA),[12] the Racketeering Influenced and Corrupt Organizations Act (RICO),[13] international law and state law[14] for the defendants' participation with the Nigerian government in human rights violations committed in Nigeria.[15] The action was commenced in the United States District Court for the Southern District of New York.[16] The court held that it had jurisdiction on the basis of Rule 4(k)(1)(a) of the Federal Rules of Civil Procedure and New York C.P.L.R § 301, but granted defendants' motion for dismissal of the suit on *forum non conveniens* grounds, finding that England was an adequate alternative forum to New York.[17] The Court of Appeals agreed that the district court had jurisdiction, but reversed the dismissal on *forum non conveniens* grounds,[18] and remanded the case to the district court for further proceedings.[19]

The defendants have contacts with New York, including the listing of their shares on the New York Stock Exchange, maintaining an investor relations office in New York City, and owning Shell Oil Company, which has extensive operations in New York.[20] Defendants offered four arguments against being subject to personal jurisdiction in the state of New York.[21] Although being listed on the New York Stock Exchange and having a U.S. subsidiary do not necessarily confer jurisdiction, the Court of Appeals followed the established New York law, holding that the director of the Investor Relations Office and the office itself were agents of the defendants for jurisdictional purposes, which rendered services on behalf of the defendants, and that these services went beyond "mere solicitation and are sufficiently important to the for-

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11. *Id.* at 94. Plaintiffs sought damages for summary execution; crimes against humanity; torture; cruel, inhuman and degrading treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security of the person, and peaceful assembly and association; wrongful death; assault and battery; intentional and negligent infliction of emotional distress; and conspiracy. *Id.* at 94.

12. 28 U.S.C. § 1350 (1998).

13. 18 U.S.C. § 1961-1968 (2000).

14. *Wiwa II*, 226 F.3d at 94.

15. *Id.* at 92.

16. Wiwa v. Royal Dutch Petroleum Co., 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998) ("Wiwa I").

17. *Id.* at *18. The court balanced the public interest and private interest factors that make the British forum preferable. *Id.*

18. *Wiwa II*, 226 F.3d at 108.

19. *Id.* The case was remanded to consider defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(6). This motion was not considered in the lower court, because of the dismissal based on *forum non conveniens. Id.*

20. *Id.* at 93.

21. *Id.* at 95. Defendants argue that

> (1) these activities are not attributable to the defendants for jurisdictional purposes; (2) these New York activities cannot be considered in the jurisdictional calculus because they are merely "incidental" to a stock market listing and are jurisdictionally inconsequential as a matter of law; (3) the Investor Relations activities are legally insufficient to confer general jurisdiction; and (4) exercising jurisdiction over the defendants would violate the fairness requirement of the Due Process Clause.
>
> *Id.*

eign entity that the corporation itself would perform equivalent services if no agent were available."[22] The court held that the Investor Relations Office's services were sufficiently important to the defendant,[23] the office was located in New York because it was the best location for the office,[24] and the activities conducted by the office were not "incidental" to the stock exchange listing, but rather were sufficient to subject defendants to jurisdiction in New York.[25] Defendants also assert that the activities of the Investor Relations Office did not create sufficient contacts to confer jurisdiction. The court held that the activities and presence of the Investor Relations Office met the "doing business"[26] standard that would justify a New York court having jurisdiction over the defendants.

Finally, defendants argue that being subject to jurisdiction in New York violates the fairness requirement of the due process clause.[27] A defendant must have "minimum contacts" with the forum state and the exercise of jurisdiction must comply with "traditional notions of fair play and substantial justice."[28] The court held that the defendants' contacts went well beyond the minimum contacts required.[29] Additionally, the defendants failed to provide a "compelling case that the existence of some other considerations would render jurisdiction unreasonable."[30] The court concluded that being subject to jurisdiction in New York would not present a great inconvenience to Royal Dutch and Shell Transport, because they had a significant presence in the state, they speak English and have litigated in the USA before.[31]

However, defendants had made a motion to dismiss the lawsuit on grounds of *forum non conveniens*, which was granted by the District Court.[32] The Court of Appeals followed the

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22. *Id*. The court relied upon well-settled law, established by *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533 (1967), which found jurisdiction over a foreign hotel chain based on the activities of an affiliated reservations service, and *Gelfand v. Tanner Motor Tours, Ltd.,* 385 F.2d 116 (2d Cir. 1967), where the court applied *Frummer* and found jurisdiction over a tour operator based on the activities of an affiliated travel agent.

23. *Id*. at 96.

24. *Id*.

25. *Id*. at 97. Defendants cited case law stating that the activities associated with a listing on the stock exchange were insufficient to confer jurisdiction. However, the court held that the activities of defendant went beyond the incidental activities. *Id.*

26. *Id*. at 98. The court cited *Hoffritz for Cutlery, Inc. v. Amajac, LTD*., 763 F.2d 55, 58 (2d Cir. 1985), and *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 537 (1967), offering factors to decide if jurisdiction is proper "whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there and whether it has individuals permanently located in the state to promote its interests."

27. *Wiwa II*, 226 F.3d at 99.

28. *Wiwa II*, 226 F.3d at 99 (citing Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1027 (2d Cir. 1997)).

29. *See* International Shoe Co. v. Washington*,* 326 U.S. 310 (1945).

30. Metropolitan Life Ins. Co, v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996).

31. *Wiwa II*, 226 F.3d at 99.

32. *Wiwa I*, 1998 U.S. Dist. LEXIS 23064 at *3.

established Supreme Court law, consisting of a two-step process,[33] in determining whether the dismissal was proper. The defendants must carry the burden to show that an adequate alternative forum exists, and then show that the relevant factors[34] "tilt . . . strongly in favor of trial in the foreign forum."[35]

Concerning the first step, plaintiffs challenged the adequacy of the British forum preferred by defendants, asserting that doctrines of English law[36] would preclude the English courts from considering the matters of this dispute. However, the court held that it was unnecessary to resolve these issues, because the defendants had not shown that the *Gilbert* factors tilt strongly in favor of trial in the foreign forum to justify the dismissal on *forum non conveniens* grounds.[37] Therefore, the court concluded that the dismissal must be reversed.

The Court of Appeals stated that the lower court should have afforded greater consideration to three particular *Gilbert* factors.[38] First, plaintiffs are U.S. residents, and are likely to be inconvenienced, and it would cause plaintiffs a considerable hardship if required to bring the suit in a foreign jurisdiction.[39] Although the plaintiffs are not residents of the Southern District, they are residents of the United States, and deference should be given to their choice of a forum in the United States.[40] Although the district court weighed against the plaintiffs the fact that they were not residents of the Southern District of New York, the Court of Appeals held this was error, noting that a resident plaintiff's choice of forum is not restricted to his or her particular district of residency, but to a choice of forum in the United States.

Plaintiffs assert, and the court agrees, that the United States has a strong policy interest in adjudicating international human rights abuses.[41] The lower court did not factor this policy interest into the balancing of the *Gilbert* factors.[42] The court found support in its argument from the ATCA as supplemented by the Torture Victim Prevention Act (TVPA),[43] noting that the language of the TVPA "expresses a policy favoring" the exercise of jurisdiction by United

33. *Wiwa II*, 226 F.3d at 100. The court relied upon the test in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n.22 (1981), stating that it must first be decided whether an adequate alternative forum exists. The court then applied the next step, from *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 507 (1947), which is to balance factors involving the private interests of the parties in having the litigation in another forum and any public interests that may be involved. *Id.*

34. *Wiwa II*, 226 F.3d at 99. These factors will be referred to as the "Gilbert factors."

35. *Wiwa II*, 226 F.3d at 100 (citing R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)).

36. *Id*. The plaintiffs cite the doctrines of double actionability, transmissibility and the act of state doctrine. *Id.*

37. *Id*. at 101.

38. *Id.*

39. *Id.* at 102.

40. *Id.* at 103.

41. *Id*. at 104.

42. *Id*.

43. 28 U.S.C. § 1350 (1991). The act provides the United States court with jurisdiction over suits by aliens regarding international human rights abuses, creates liability and gives a remedy to aliens as well as residents of the United States.

States courts over claims brought under the ATCA concerning torture.[44] The court further explained that the passage of the TVPA demonstrates Congress's policy that torture committed under the law of a foreign nation in violation of international law is also a violation of U.S. domestic law.[45] Furthermore, the defendants have again failed to carry their burden to show that a weighing of the *Gilbert* factors tilts strongly in favor of a foreign forum.[46]

For these reasons, amongst others, the court reversed the lower court's grant of dismissal based on *forum non conveniens,* and affirmed its exercise of jurisdiction over defendants.

The court's reversal of the dismissal on *forum non conveniens* grounds recognizes the strong policy interest of the United States in providing a forum for adjudication of disputes involving international human rights violations. Although the court did not entirely rule out the possibility of these suits being dismissed on *forum non conveniens* grounds, it did hold that greater deference should be given to public policy, as exhibited in Congress's enactment of the ATCA and TVPA, when balancing the *Gilbert* factors. A plaintiff who is a victim of torture may face many setbacks when a case is dismissed on *forum non conveniens* grounds. For example, the victim may not be able to return to the place the torture took place, he or she may be harmed if he or she returned, and the courts may not be receptive to these types of claims. Therefore, the victim may never be vindicated.

The TVPA supports the determination that torture committed under color of law of a foreign nation in violation of international law violates both international law and domestic law. Therefore, the vindication of a torture victim is of interest in the U.S. federal courts. It seems clear that the U.S. federal courts are a receptive forum for settling international human rights cases.

Cari-Ann Levine

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44. *Wiwa II*, 226 F.3d at 106.

45. *Id*. at 105.

46. *Wiwa II*, 226 F.3d at 106. (citing R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)).

Blondin v. Dubois

238 F.3d 153 (2d Cir. 2001)

The District Court properly considered whether under Article 12 of the Hague Child Abduction Convention the children were "settled" in their new environment and properly considered the view of one child on the possibility of returning to France.

In *Blondin v. Dubois* ("*Blondin IV*"),[1] the United States Court of Appeals for the Second Circuit held that the lower court applying Article 13(b) of the International Child Abduction (the "Child Abduction Convention"),[2] properly found that to grant the petitioner's motion for the return of his children to France would subject them to post-traumatic stress disorder and thus constitute a "grave risk of psychological harm."[3] Article 13(b) states

> [N]otwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[4]

The Second Circuit also held that the lower court properly considered that one of the children was "settled"[5] in a new environment, because the testimony of the respondent's expert was unconverted.

The case arose in August 1997, when Marthe Dubois abducted her children from France and brought them to the United States in order to prevent further abuse of not only herself, but also her two children, Marie-Eline, and Francois, at the hands of their father, Felix Blondin.[6] In June 1998, Felix Blondin petitioned the United States District Court for the Southern District of New York for the return of his children pursuant to the Child Abduction Convention.[7] The district court denied Blondin's petition, because it found that there was a "grave risk of psychological harm" under Article 13(b).[8] Subsequently, Blondin appealed to the United States Court of Appeals for the Second Circuit,[9] which remanded the case to the district court for the South-

1. 238 F.3d 153 (2d Cir 2001).
2. 25 Oct. 1980, entered into force for the United States 29 April 1988, reprinted at 51 FED. REG. 58 (26 March 1986). The Convention is implemented by the Child Abduction Remedies Act, 42 U.S.C. §§ 11601 *et seq*.
3. *Blondin IV*, at 153.
4. *Id*. at 158.
5. *Id*.
6. Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999) ("*Blondin II*").
7. Blondin v. Dubois, 78 F. Supp. 2d 283, 286 (S.D.N.Y. 2000) ("*Blondin III*").
8. Blondin v. Dubois, 19 F. Supp. 2d 123 (S.D.N.Y. 1998) ("*Blondin I*").
9. *Blondin II,* 189 F.3d 240.

ern District of New York for reconsideration of the two matters.[10] While the district court properly concluded that Blondin abused both Dubois and their children, it improperly concluded that, if Dubois were to return to France with the children, they would be forced to stay with him because of their financial situation.[11] The Court of Appeals also stated that the district court "improperly considered Marie-Eline's adjustment to life and preference to remain in the United States."[12] Upon remand, the district court again denied the petitioner's request for the return of his two children to France pursuant to the Child Abduction Convention.[13] The petitioner appealed the decision of the district court, but the Second Circuit affirmed the decision, finding no clear error.[14]

The Child Abduction Convention was designed "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[15] Article 13(b) provides an exception that allows an abducting parent to keep a child when "there is a grave risk that his or her return would expose the child to physical or psychological harm. . . ."[16]

Although the Court of Appeals remanded the case for a decision consistent with its rulings, the district court reached the same result as before for three primary reasons. The Court of Appeals instructed the district court to consider alternative placements for the children in France.[17] Relying on Dubois's psychologist, the district court held that to return the children to France would cause them serious psychological harm.[18] However, the definition of the grave risk of harm exception is not clear.[19] The lack of a clear definition has yielded various interpretations of the grave risk of harm exception by various courts in different countries.[20] Because Article 13(b) of the Child Abduction Convention is an exception to the Convention's purpose, it is to be narrowly construed.[21] In *Friedrich v. Friedrich*,[22] the Sixth Circuit stated that a grave risk of harm exists "only when return of the child puts the child in imminent danger prior to

10. *Id*. at 242.

11. *Id*. at 248.

12. *See* Elizabeth Ising, *Refusing to Debate Wheaties Versus Milchreis: Blondin v. Dubois and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception*, 25 N.C.J. INT'L LAW & COM. REG. 619, 627 (2000).

13. *Blondin III*, 78 F. Supp. 2d at 285.

14. *Blondin IV*, 238 F.3d at 158.

15. Ising, *supra* note 12 at 631.

16. *See* Child Abduction Convention, art. 13(b).

17. *Blondin II*, 189 F.3d at 242.

18. *Blondin IV*, 238 F.3d at 157.

19. *See* Courtney E. Hoben, *The Hague Convention on International Parental Kidnapping: Closing the Article 13(b) Loophole*, 5 J. INT'L LEGAL STUD. 271, 276 (1999).

20. *See* Hoben, *supra* 19 at 276 (comparing the broad interpretation of Article 13(b) taken by the court in *Steffen F. v. Severina P.* (966 F. Supp 922 (D. Ariz.) (1997)) to the more strict interpretation of Article 13(b) taken in *Friedrich v. Friedrich* (78 F.3d 1060 (6th Cir. 1996) ("Friedrich").

21. *Blondin II*, 189 F.3d at 246.

22. 78 F.3d 1060 (6th Cir. 1996).

the resolution of the custody dispute—e.g., . . . when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[23] In the present case, a narrow construction of Article 13(b) should have included consideration of whether the children could be returned to France without a grave risk of harm. The broad interpretation taken in *Blondin IV* rewards those who unlawfully abduct their children from their habitual residence. This interpretation makes it easier for abducting parents to assert and prove an Article 13(b) exception. The district court should have followed the Second Circuit's instruction to evaluate whether there were any alternative places for the children to stay that would reduce the risk of grave harm to the children pending the French custody proceeding.

Although the Second Circuit affirmed the decision of the lower court, several courts have considered "the ability of the petitioner to improve the situation for the abducting parent and the children upon their return to the country of habitual residence."[24] In *Panazatou v. Pantazatos*,[25] the court noted that the grave risk of harm "would be minimized if the respondent-mother had a home and financial support and would not be imprisoned before the judicial consideration of custody."[26] In the present case, both the French government and the father offered to take steps to minimize any emotional trauma the children might experience upon their return to France.[27] For instance, the French government offered to provide for the children's living arrangements during the proceedings.[28] There was even the possibility of the children living with their godmother during the proceedings.[29] Felix Blondin offered to pay for his family's trip back to France and not to enforce the current French custody order, allowing the children to live with their mother until the custody issue was resolved.[30] Furthermore, Blondin also offered to pay for their hotel bill while the case was pending in order to help alleviate any financial difficulties Marthe Dubois might incur during the pending custody case in France.[31]

Moreover, the district court improperly considered whether Marie-Eline was "settled" in a new environment pursuant to Article 12 of the Child Abduction Convention.[32] In the *Friedrich* case, the court held the fact that the child had adjusted to life in Ohio was not a consideration under Article 13(b) and ordered the return of the child to the habitual residence of

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23. *Id.* at 1067.

24. *See* Ising, *supra* note 12 at 642.

25. Pantazatou v. Pantazatos, No. FA 9607135715, 1997 WL 614519 (Conn. Super. Ct. Sept. 24, 1997) ("*Pantazatou*").

26. *Pantazatou*, 1997 WL 614519 at *3.

27. *Blondin II*, 189 F.3d at 248.

28. *Id.*

29. *Blondin IV*, 238 F.3d at 159.

30. *Id.*

31. *Id.*

32. *Id.* at 163.

Germany.[33] The court stated that to make such a consideration would encourage "abductors to forum shop."[34]

Furthermore, the district court improperly considered the legal uncertainties surrounding the custody proceedings.[35] The possibility of the mother and the children returning to France, where the French court could decide the custody dispute, should have been examined. The court of appeals remanded the case to the district court so it could consider Article 13(b) in light of the Child Abduction Convention's preference for trying to resolve the dispute in the habitual residence of the child.[36] The district court's lack of faith in the judicial process of France was unfounded for several reasons. The district court's concern that Blondin might gain temporary custody of the children was unfounded because Blondin stated that if the children were to return to France he would not enforce the custody order during the French custody proceedings.[37] The district court's mistrust in the French courts is also unfounded because "France became one of the first nations to allow domestic violence advocacy agencies to become a civil party in the criminal trial of an accused batterer."[38]

Lastly, the district court improperly considered Marie-Eline's wishes.[39] The petitioner argues that while his daughter is intelligent at eight years old, she is not capable of fully understanding the ramifications of her decision.[40] The standard applied under Article 13 of the Child Abduction Convention to determine whether the wishes of a child are to be considered by the court is whether the authority "finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[41] While the lower court found Marie-Eline to be mature enough to take into account her view, the court also noted that when asked whether she wanted to return to France, she said yes, and that when asked whether she wanted to return to France to live with her father she answered no.[42]

Perhaps the petitioner's request for the return of his children to France would have still been denied if he had presented expert testimony about what the psychological impact would have been on the children upon their return to France, but neither court that heard this case was afforded this opportunity. If the district court had at least examined this potential solution, it would have been considering the best interests of the child pursuant to the grave risk of harm exception in Article 13(b), while at the same time respecting the contracting State's jurisdiction

33. *Friedrich*, 78 F.3d at 1069.

34. *See* Ising, *supra* note 12 at 640-41.

35. *Blondin II*, 189 F.3d at 248.

36. *Id.* at 248-49.

37. *Blondin IV*, 238 F.2d at 160.

38. *Id.* at 158.

39. *Blondin I*, 19 F. Supp. 2d at 128.

40. *Blondin IV*, 238 F.3d at 167.

41. *Id.*

42. *Id.*

over the case.[43] To include such a consideration in a grave risk analysis would help prevent Article 13(b) abuses, while at the same time protecting the children. International parental kidnapping is a serious problem the international community sought to address with the creation of the Child Abduction Convention. Unfortunately, it fell prey to the fate of many other pieces of law, because it too contains ambiguous language that has caused a lack of consistency in the decisions rendered by various courts across the world.[44]

Megan Marchick

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43. *See* Hoben, *supra* note 19 at 291.

44. *See* Hoben, *supra* note 19 at 284 (discussing the fact that one of the reasons for the disparity in decisions concerning the Article 13(b) exception to the Child Abduction Convention is due to the fact some judges interpret it broadly while other judges interpret the exception more narrowly).

Group Josi Reinsurance Company SA v. Universal General Insurance Company

Case C-412/98 (13 July 2000)

The European Court of Justice determined that the special rules of jurisdiction contained in the 1968 Brussels Convention are not applicable to contracts between reinsurance and insurance companies.

The special rules of jurisdiction found in Title II of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention")[1] are applicable regardless of whether the plaintiff is domiciled in a non-Member or Member State, but these rules do not apply to reinsurance contract disputes.[2]

This was the decision handed down by the European Court of Justice in *Group Josi Reinsurance Co. SA v. Universal General Insurance Co.*, which found that the rules of the Brussels Convention were not applicable to a dispute heard before it between a Canadian insurance company and a Belgian re-insurance company.[3] The Brussels Convention provides that a person domiciled in a Contracting State is subject to suit in the courts of that State.[4]

Universal General Insurance Co. (UGIC), a Canadian insurance company in liquidation, instructed its broker, Euromepa, a French company, in April 1990, to procure a reinsurance company to compile a portfolio of comprehensive home-occupier's insurance policies based in Canada.[5] Group Josi Reinsurance Co. SA ("Group Josi"), a company incorporated under Belgian law, was offered and acquired a 7.5% share in the reinsurance contract, in which the largest participants were Union Ruck with 24% and Agrippina Ruck with 20%.[6]

Euromepa notified Group Josi that it owed money in respect of its share in the reinsurance transaction.[7] Group Josi refused to pay on the ground that it had been induced to enter into the reinsurance contract as a result of information that subsequently turned out to be false.[8] The company learned afterwards that Union Ruck and Agrippina Ruck, who were also parties

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1. 1998 O.J.E.C. C 27, p. 1, 26 Jan. 1998 (consolidated version), *amended*, 2000 O.J.E.C. C 160, p. 1, 8 June 2000.
2. Group Josi Insurance Co. v. Universal General Insurance Co., Case C-412/98, [2000] E.C.R. ____ ("*Group Josi*").
3. *Id.* ¶ 18.
4. *See* Brussels Convention, Title II, Section 2. (Sections 2-6 of Title II of the Convention set forth rules of special or exclusive jurisdiction).
5. *Group Josi*, ¶¶ 1, 18.
6. *Id.* ¶¶ 1, 19-20.
7. *Id.* ¶ 22. The court noted the final calculation as CAD 54 679.34; *see also Jurisdictional Rules of Brussels Convention Do Not Apply to Reinsurance Disputes,* 11 MEALY'S LITIG. REP.: REINSURANCE, Sept. 14, 2000 at Jurisdiction. "In Feb. 1991, Euromepa informed Group Josi that it owed $36,947 under the contract."
8. *Group Josi*, ¶ 23.

to the contract, notified Euromepa that Union did not want to retain its shares and Agrippina wanted to reduce its shares to 10%.[9]

In response to Group Josi's refusal to pay, UGIC instituted proceedings before a French Tribunal de Commerce (Commercial Court) in July 1995.[10] Group Josi argued that this court lacked jurisdiction, because only the Tribunal de Commerce, Brussels, had jurisdiction over the company.[11] The French court held that it had jurisdiction, because UGIC was incorporated under Canadian law without a place of business in the community and the Convention could not be applied to it.[12] Group Josi was ordered to pay the amount claimed by UGIC in addition to statutory interest.[13]

The judgment was appealed to the Cour d'Appel, Versailles.[14] In support of its position, Group Josi contended against jurisdiction in France and argued that the Convention applies when a "connecting factor" with the Convention is apparent.[15]

The link with the Convention was illustrated through Article 2 of the Convention.[16] The defendant's domicile is the location that matters for purposes of the Convention. Accordingly, Group Josi argued that because it was registered in Brussels and had no subsidiary place of business in France, it could be subject to jurisdiction only in a Belgian court.[17] UGIC argued that the Convention could apply only if the plaintiff were also domiciled in a contracting state[18] and therefore not to a company incorporated under Canadian law with no subsidiary or place of business in a contracting state.[19]

The Cour d'Appel stayed the proceedings and submitted the issues to the European Court of Justice.[20] Two questions were referred to the Court on the interpretation of the provisions of Title II of the Convention amended by the Convention of May 26, 1989 on the Accession of

9. *Id.* ¶ 21.

10. *Id.* ¶ 24. The Court is in Nanterre, France.

11. *Id.* ¶ 25.

12. *Id.* ¶ 26.

13. *Id.*

14. *Id.* ¶ 27.

15. *Id.* ¶ 28.

16. *See* Brussels Convention, Article 2 ("Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in Courts of that State").

17. *Group Josi*, ¶ 28.

18. *Id.* ¶ 29.

19. *Id.*

20. *Id.* ¶ 32.

the Kingdom of Spain and the Portuguese Republic.[21] The questions were whether the rules of the Convention apply where the defendant has its domicile in a Contracting State, even if the plaintiff is domiciled in a non-member country, and whether these principles of jurisdiction under the Brussels Convention apply to cases involving re-insurance.[22]

The Court of Justice held that the Convention is applicable where the defendant is domiciled in a Contracting State even if the plaintiff is domiciled in a non-member country.[23] The Court reasoned that the intent of the framers of the Convention would be controverted if jurisdiction were extended to the plaintiff's domicile in such cases.[24] Section 3 of Title II allows an insurer domiciled in a Contracting State to be sued in another Contracting State where the policyholder is domiciled.[25] Under this section, a co-insurer may also be sued in the courts of a Contracting State.[26]

In response to the second question, the Court decided that parties to reinsurance contracts, such as the plaintiff here, are not accorded protection under the Convention's rules, because they are considered professionals in the insurance business and are not in a weak position when compared with one another.[27] The Court also noted that, if the contract had been against the reinsurer in a case of bankruptcy or liquidation of the insurer, the plaintiff would be regarded as weak and in need of protection of the special rules of the Brussels Convention.

Article 8(2) of the Convention would only apply when the insured is the weaker party and when it is domiciled in a Contracting State, conditions not satisfied by UGIC.[28] The Court recognized that the purpose of this part of the Convention is to protect the legal rights of whomever is the "weaker and less experienced" party however the Court strictly interpreted the Brussels Convention statute and declined to extend the scope of the Convention beyond that purpose.

A reinsurance contract may be distinguished from a regular insurance contract in that it constitutes "an independent contract of insurance whereby the reinsurer engages to indemnify

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21. OJ 1989 L 285, p. 1. *See Group Josi*, ¶ 1. The Convention was amended prior to this on October 9, 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, amended version of the Convention at p. 77) by the Convention of October 25, 1982 on the Accession of the Hellenic Republic (OJ 1982 L388, p. 1) and most recently on June 8, 2000 (2000 O.J.E.C. C 160 p.1).

22. *Group Josi*, ¶ 32.

23. *Id.* at Ruling (1).

24. *Id.* ¶ 72.

25. *Id.* ¶ 10. ("Articles 7 to 12a constitute Section 3, entitled 'Jurisdiction in matters relating to insurance,' of Title II of the Convention.").

26. *Id.* at 12(3). "An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State." *Id.*

27. *Id.* at Ruling (2).

28. Group Josi Reinsurance Co. v. Compagnie d'Assurances Universal General Insurance Co. (UGIC), Opinion of the Advocate General Fennelly, C-412/98 [2000] (*UGIC*).

the reinsured against losses for which the latter is liable to the insured under the primary contract of insurance."[29] The court cited the Schlosser Report on the Convention of Accession of the UK,[30] and decided that because reinsurance contracts are not considered to be "matters relating to insurance for the purpose of the Brussels Convention," it is not likely that such contracts were originally intended to be included within the general jurisdictional rules in section 3, Title II of the Brussels Convention.[31]

The decision of the Court in this case was quite significant in that it provided future plaintiffs and defendants with the greatest possible degree of legal certainty.[32] The Brussels Convention establishes a scheme rendering the domicile of all plaintiffs irrelevant for purposes of the Convention and providing for jurisdiction over all defendants whether or not they are domiciled in a Contracting State.[33]

Jennifer Marciano

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29. *UGIC*, ¶ 27 (citation omitted).
30. OJ 1979 C 5 9, p. 71, 117.
31. *UGIC*, ¶ 32.
32. *Id.* ¶ 16.
33. *Id.* ¶ 22, 19.

Bodner v. Banque Paribas

114 F. Supp. 2d 117 (E.D.N.Y. 2000)

The United States District Court for the Eastern District of New York held in favor of French victims' claims for relief for injustices committed during the Holocaust, and thereby denied the French banks' motion to dismiss.

In *Bodner v. Banque Paribas*,[1] the United States District Court for the Eastern District of New York held that plaintiffs, as statutory distributees of decedents whose assets were seized, held vested property rights, which they could prosecute in their own names; that plaintiffs had pled clear violations of international laws, which did not trigger a comity conflict; and that defendants had not established that an adequate alternative forum was available to plaintiffs.[2]

Banque Paribas, several other French banks, Barclays Bank, J.P. Morgan, and Chase Manhattan Bank ("the banks") are banking institutions, or successors to banking institutions, that were doing business in France, as well as worldwide, during World War II, and continue to do so today.[3] They are alleged to control the majority of the banking market in France.[4]

In a joint complaint,[5] Bodner and Benisti brought suit in the Eastern District of New York for alleged violations of international law,[6] conversion,[7] unjust enrichment,[8] and breach of fiduciary duty.[9] The basis for the complaint was that the banks conspired with the Vichy and Nazi regimes to plunder private property of the Jews.[10] As a consequence, they were financially incapable of funding an escape, and the French government and banks amassed great wealth

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1. 114 F. Supp. 2d 117 (E.D.N.Y. 2000).
2. *Bodner,* 114 F. Supp. 2d at 126, 130, 133.
3. The named defendant banks include Banque Paribas, Crédit Lyonnais, Société Générale, Crédit Commercial de France, Crédit Agnricole Indosuez, Natexis; in addition, the Benisti plaintiffs added Banque Nationale de Paris, Chase Manhattan Bank, and J.P. Morgan & Co. *See* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 249 & nn. 1062-63 (2000).
4. *Bodner,* 114 F. Supp. 2d at 121.
5. *Id.* at 121. The Bodner plaintiffs are 16 United States citizens, while the Benisti plaintiffs are 18 aliens who asserted their claims under the Alien Tort Claims Act. Both groups are Jewish victims and survivors of the Nazi Holocaust in France, as well as their relatives, heirs and beneficiaries (hereinafter "Bodner and Benisti"). *See* Bazyler, *supra* note 3 at nn. 1062-63.
6. *Bodner,* 114 F. Supp. 2d at 122 (laws alleged to be violated include the Nuremberg Charter Article 6(b), the Hague Convention of 1907 Article 46, the Genocide Convention Article III(e), the United Nations Charter, the Universal Declaration of Human Rights, and the Convention of Establishment).
7. *Id.* Under this cause of action, plaintiffs claim that defendants wrongfully assumed, retained, and exercised rights of ownership over looted assets. *Id.*
8. *Id.* Plaintiffs allege that defendants deprived them of their property and never returned it. *Id.*
9. *Id.* The banks had a special duty of care to the plaintiffs in regards to assets that they had entrusted to them, and plaintiffs assert that defendant banks breached that duty. *Id.*
10. *Id.* at 122 (the court explained that in an attempt to "aryanize" the personal, real, and business property of the Jews, the Vichy authorities seized their personal and business assets and blocked an estimated 68,000 bank accounts).

that they have not yet returned. Defendants filed a motion to dismiss, claiming that plaintiffs lacked standing[11] and that there was no federal question subject matter jurisdiction[12] and no diversity in regards to Benisti's action.[13] Additional asserted grounds for dismissal were that the court lacked jurisdiction under principles of international comity,[14] the Act of State Doctrine,[15] and the doctrine of *forum non conveniens*.[16] Finally, the banks argued that Bodner and Benisti failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, that the statute of limitations created a bar,[17] and that plaintiffs had failed to join indispensable parties pursuant to Rule 19 of the Federal Rules of Civil Procedure.[18] The district court denied the defendants' motion.[19]

The banks claimed that Bodner and Benisti lacked standing because they did not plead facts sufficient to demonstrate that the alleged injuries were "fairly traceable" to the conduct of a specific bank that was the source of the loss.[20] The court held that Bodner and Benisti had alleged sufficient facts to support the inference that French banking institutions had participated in a conspiracy to deprive French Jews of their assets during the Holocaust.[21] The banks also asserted that they lacked standing to bring an action in the name of their deceased family members.[22] The court agreed with Bodner and Benisti's position that they were statutory distributes of their relatives' estates, and the property interests prosecuted in this case vested in them upon the deaths of their ancestors.[23]

The banks argued that the court lacked jurisdiction.[24] The court held that the Bodner and Benisti's claims of looting, conversion, and continued withholding of assets, if proved, would

11. *Id.* at 124.

12. *Id.*

13. *Id.*

14. Defendants argued that French law should apply because the incidents happened in France. *Id.* at 128.

15. *See id.* The Act of State Doctrine provides that "U.S. courts will not sit in judgment of acts of a foreign state within its own territory." *Id.* at 130.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 138.

20. Contrary to Paribas' claim, the court points out that "plaintiffs accurately state that they need not show more than general factual allegations laying out a good faith basis for how one or more of the defendants injured the plaintiffs." *Id.* at 125.

21. The court emphasizes that "[t]he nature, scope, and magnitude of the alleged conspiracy is evident to the court and plaintiffs have satisfied their pleading requirements." *Id.* at 126.

22. The court cites N.Y.E.P.T.L § 11-3.2 which states that "the right of action of a defendant may only be brought by a court sanctioned personal representative of that decedent." *Id.* at 125.

23. *Id.* at 126 (citing Roques v. Grosjean, 66 N.Y.S.2d 348 (Sup. Ct., N.Y. Co. 1946)).

24. The defendant banks moved to dismiss on the ground that plaintiffs had not properly pled a federal question. *Id.* at 127, 128.

be a violation of the Nuremberg Principles,[25] and that Benisti met the requirements for subject matter jurisdiction under the Alien Tort Claims Act.[26]

The court disposed of the banks' argument that it should decline to exercise jurisdiction on the basis of the principles of international comity.[27] The court distinguished its holding from two recent New Jersey cases that dismissed such claims on the basis of international comity.[28] Here, the court found that, because there was no pending litigation in France, and no existing French law or policy that could adequately redress plaintiffs' claims, the doctrine of international comity was inapplicable.[29] The banks' assertion that the Act of State Doctrine should apply was also rejected by the District Court,[30] which held that Bodner and Benisti's action was not a challenge to current French law, and therefore a violation France's sovereign interests.[31]

The court denied the banks' motion to dismiss on the grounds of *forum non conveniens*.[32] It found that defendants had not met the burden of demonstrating that (1) an alternative forum was available to the plaintiffs; and (2) private and public interest favor trial in a public forum.[33] Instead, it agreed with Bodner and Benisti's position that private[34] and public[35] interests dictated that the United States was the more appropriate forum.[36]

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25. The court held that the *Bodner* plaintiffs claims fell under 28 U.S.C. § 1331 federal question jurisdiction, and that any state law claims were governed by 28 U.S.C. § 1367, for which the court invoked its discretion to exercise supplemental jurisdiction. *Id.* at 127.

26. Alien Tort Claims Act, 28 U.S.C.S. § 1350, states:

> Where (1) an alien sues (2) for a tort (3) which was committed in violation of the law of nations. The court should look to construe the law of nations as it has evolved over time, applying contemporary norms of international law to the issues at bar.

Alien Tort Claims Act 28 U.S.C.S § 1350 (2001).

27. *Bodner,* 114 F. Supp. 2d at 130.

28. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 491-92 (D.N.J. 1999) (a federal class action suit accusing Ford Motor Company of forced slave labor in Nazi Germany through its subsidiary Ford Werk A.G.); Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248, 285 (D.N.J. 1999) (plaintiffs accused the company of engaging in slave labor and complained of inhumane conditions where they lived and worked).

29. *Bodner,* 114 F. Supp. 2d at 129.

30. *Id.* at 130-31.

31. *Id.* at 131 (plaintiffs bring an action against "private defendant banks' failure to return looted assets as mandated by postwar French law" and not against the French government).

32. Paribas argues that relevant documents and witnesses are in France. *Id.*

33. *Id.* at 131 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

34. Because traveling to France was difficult at their age, it was a great expense, and it was generally impractical. Considering all parties were represented by U.S. counsel, the court found France would be an impractical forum when compared to the U.S. alternative. *Id.* at 132.

35. The court viewed advances in modern technology and access to information worldwide as considerations that served to undermine defendants' claim of *forum non conveniens*. *Id.*

36. *Id*.

The banks moved to dismiss the action Rule 12(b)(6) of the Federal Rules of Civil Procedure,[37] alleging that Bodner and Benisti's pleadings were insufficient to constitute a claim upon which relief could be granted.[38] The District Court denied the motion, finding that plaintiffs had in fact pled facts sufficient to state a cognizable claim under international law.[39]

Bodner and Benisti argued that their claim constituted a continuing violation of international law, which tolled the limitations period and prevented the action from being time barred.[40] They cited *Banco Nacional de Cuba v. Chase Manhattan Bank*,[41] in which the court held that failure to pay compensation to the victim of an expropriation constituted a violation of international law. Bodner and Benisti also argued they had a claim under the continuing violation doctrine,[42] which permitted the limitation period to be equitably tolled.[43] Plaintiffs' arguments are analogous to a claim of adverse possession. In both instances, extenuating circumstances prevent a party from bringing an action within the time period allotted by statute, so that notions of fairness permit the court to preserve the claim, and therefore toll the statute of limitations.

The banks contended that French and German governments were indispensable parties to these claims pursuant to Rule 19 of the Federal Rules of Civil Procedure.[44] Bodner and Benisti challenged this contention, asserting that the French and German governments were merely

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37. Invoking Fed. Rules Civ. Proc. 12(b)(6) the defendant claims that plaintiffs have failed to state a claim upon which relief can be granted. Fed. Rules Civ. Proc. 12(b)(6) (2001).

38. *Id.* at 133.

39. The plaintiffs referred explicitly to evidence of confiscation and plunder of private property and aiding and abetting genocide as constituting violations of international law under the Nuremberg Principles and Article 46 of the Hague Convention. *Id.* at 134.

40. *Id.*

41. 658 F.2d 875, 891 (2d Cir. 1981).

42. *Id.* (opining that "the limitations period for a continuing offense does not begin until the offense is complete") (citing United States. v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995)). Bodner and Benisti had been "kept in ignorance of vital information necessary to pursue their claims without any fault or lack of due diligence." *Id.*

43. The essence of the doctrine of equitable tolling of a statute of limitations "is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action." *Id.* (citing Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 113 (D. Conn. 1978)).

44. The Rule provides in part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's action complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. Rules of Civ. Proc. 19(a) (2001).

permissible parties under Rule 19, so that their joinder was not essential to effecting the relief requested,[45] and the court agreed.[46]

The decision of the District Court in *Bodner* is pivotal, in that it is one of the few efforts by the court to allow enforcement of individual reparations to Nazi era victims, although it is not certain that enforcement will be carried out. Either way, the court's decision marks a radical deviation from precedents that had consistently granted defendants' motions to dismiss,[47] and had left plaintiffs without any avenue to pursue a remedy for injuries suffered. The traditional basis for the courts' dismissal was that plaintiffs had raised political questions that were improper for judicial resolution,[48] and public policy dictated that the Executive and Legislative branches were better suited to address such grievances.[49] The question was, therefore, whether courts would continue to follow the decision in *Bodner.* Although *Bodner* seemed like a breath of fresh air in that it was a decision to grant well-deserved relief to victims of the Holocaust era, it was a single decision in the face of legal precedent to the contrary.[50]

In the wake of the *Bodner* decision, the United States and German governments instituted the German "Remembrance, Responsibility, and the Future" Foundation (the "Foundation").[51] The Foundation is a collaboration of American plaintiffs' attorneys, representatives of German Industry and numerous foreign governments, including the United States, Germany,

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45. The opinion states that "it is well established federal law that neither joint tortfeasors nor co-conspirators are indispensable parties." *See Bodner,* 114 F. Supp. at 136 citing Continental Kraft Corp. v. Euro-Asia Devel. Group, Inc., U.S. Dist. LEXIS 14672, 1997 WL 642350 (E.D.N.Y. Sept. 8, 1997); Frink America, Inc. v. Champion Road Machinery Limited, 961 F. Supp. 398, 1997 WL 194606 at *7 (N.D.N.Y. 1997) (citing Georgia v. Pennsylvania R. Co., 324 U.S. 439, 463 (1945)).

46. *See id.* at 137.

47. *See Iwanowa*, 67 F. Supp. at 491 (granting defendants' motion to dismiss primarily on the grounds of non-justiciability); *DeGussa*, 65 F. Supp. 2d at 285 (emphasizing statute of limitations and non-justiciability arguments as a basis for denying plaintiffs' claims).

48. *See* Bazyler, *supra* note 3 at 230 (stating that by allowing the courts to intervene in the determination of settlements would demonstrate a lack of respect for the diplomatic history of the past 55 years, and disrupt efforts by the executive branch that conducted negotiations on behalf of the United States, and for the Senate, which ratified the treaties that developed from such negotiations).

49. *See* In re Nazi Era Cases Against German Defendants Litigation: This Matter Relates To: Simon Frumkin et al. v. JA Jones, Inc. et al., No. 98-4104, 2001 U.S. Dist. LEXIS 2018, at *61 (C.D. Cal. Mar. 1, 2001) (stating "It is not the place of the legal system to determine whether treaties in a given area are adequate, or whether they ensure just recovery . . . [when] that power is reserved for the Executive branch, with the oversight of Congress.").

50. Prior precedent was clear about its intention to dismiss these actions. *See Iwanowa*, 67 F. Supp. at 491; *DeGussa*, 65 F. Supp. 2d at 285.

51. The Foundation officially entered into force on October 19, 2000, in accordance with the Executive Agreement. *See* In re Nazi Era Cases Against German Defendants Litigation; This Matter Relates to all Cases in Which Plaintiffs Have Sought Voluntary Dismissal With Prejudice, 198 F.R.D. 429; No. 98-4104, 2000 U.S. Dist. LEXIS 18148, at *11-12 (D.N.J. Dec. 5, 2000).

and Israel, and has been facilitated, in large part, by Stuart E. Eisenstadt.[52] Its objective is to provide money for those plaintiffs that agree to dismiss their claims against German defendants.[53] Eligibility is determined by relaxed standards of proof, and a free appeals process is available.[54] The Foundation serves as a compromise, by offering those who have suffered injuries an alternative basis for recovery that is efficient, secure, and consistent with an agenda that contains the problem to the political arena.[55] The *Bodner* decision was strongly influential in the genesis of a foundation aimed at granting all who suffered monetary loss under the Nazi regime a viable remedy. Were it not for plaintiffs like those in *Bodner*, making demands for relief, it is questionable whether change would ever have come about.

Melissa Monti

52. *See In re*: Nazi Era Cases Against German Defendants Litigation, No. 98-4104 U.S. Dist. LEXIS 18148 at *2-3. *See also* Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT L.J. 447, 486-87 ("Stuart Eisenstadt, the U.S. Undersecretary of State, is the leader of the U.S. team which attends and hosts international conferences which analyze the problems of Nazi-looted property.").

53. In order to be entitled to their portion of the 4.3 billion dollars allotted for reparations, the victims must agree to provide German industry with "legal peace," by dismissing their claims with prejudice. *See id.* at 3.

54. *Id.* at 15.

55. The foundation is an alternative to litigation, which has traditionally resulted in burdensome delays and insurmountable legal obstacles for plaintiffs. *See id.* at 22.