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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law

JOHN J. CAPOWSKI*

Abstract

China's Supreme People's Court has stated its commitment to reform its judicial system, and the linchpin of the reform efforts is the Uniform Provisions of Evidence, which are in the process of becoming China's first procedural and evidentiary code. Incongruously, China, a civil law country, has modeled the Uniform Provisions upon the United States' Federal Rules of Evidence (FRE) and incorporated into the Uniform Provisions principles of the United States' criminal and civil procedure. The parallels between the Uniform Provisions and the FRE are striking, and the adoption of FRE language is extraordinary.

After setting out the traits that distinguish civil law countries, including China, from common law countries, I discuss how the adoption of a common law code, although incongruous, serves China's reform efforts and may ameliorate many of the problems with China's judicial system. I also discuss how the Uniform Provisions, while maintaining the FRE language, will be read differently in the new institutional setting. In making this argument, I discuss the "free evaluation principle" of the civil law system, the Chinese concept of "objective justice," and the influences of Confucianism and the harmonious society on the application of the Uniform Provisions. The Article also describes in detail the Uniform Provisions and compares them with their antecedents in the FRE.

While China's previous reform efforts have been disappointing, the Article ends with the expectation that the seriousness of the reform efforts, combined with China's reemergence as a global power, will create a much improved judicial system.

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INTRODUCTION

In 2001 China's Supreme People's Court committed to achieving "[i]mpartiality and [e]fficiency" in the courts,[1] and China has both adopted and proposed reforms to its legal process.[2] The efforts should bring the increased predictability that is embodied in the rule of law to a once revolutionary system that was in conflict with the stability of a moral legal system.[3] In a society that has historically resolved conflicts informally,[4] the reforms focus on formal dispute resolution and may increase its use in civil disputes.[5]

The most progressive and significant of these procedural reform efforts is the Uniform Provisions of Evidence of the People's Court (Uniform Provisions), which were implemented in six key areas of China[6] and may become the country's first comprehensive evidence, criminal procedure, and civil procedure code.[7] The

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1. Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419, 420 (2003) (citing Xiang Yang, ZUI GAO REN MIN FA YUAN GONG ZUO BAO GAO (最高人民法院工作报告) [THE SUPREME PEOPLE'S COURT'S REPORT TO THE FIFTH SESSION OF THE NINTH NATIONAL PEOPLE'S CONGRESS OF CHINA] (Mar. 11, 2002), *available at* http://www.court.gov.cn/qwfb/gzbg/201003/t20100310_2630.htm).

2. For discussions of various reforms, see generally Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823 (2006); Rule of Law Blue Book Task Force, Inst. of Law, Chinese Acad. of Soc. Sci., *China's System of Harmonious "Rule of Law"*, *in* 2 THE CHINA LEGAL DEV. Y.B. 1 (2009); Peng Haiqing, *Judicial Reform and Development in 2006*, *in* 2 THE CHINA LEGAL DEV. Y.B. 235 (2009); Zhang & Zwier, *supra* note 1, at 419 (describing China's reform efforts at the end of the last and beginning of this century).

3. *See* JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION 163 (3d ed. 2000) (stating that Mao Zedong's belief in "the concept of permanent revolution . . . . militated against the development of a formal legal system, with its implications of predictability"). Beginning with the "Hundred Flowers Movement" in 1957, both the legal profession and legal training were abolished and party policy replaced law. *Id.* at 166–67. The statement of purposes to the Uniform Provisions sets out accurate fact-finding, safeguarding human rights, and judicial justice among the purposes of the provisions. Uniform Provisions of Evidence of the People's Court (promulgated by Inst. of Evidence Law and Forensic Sci., CUPL, Oct. 8, 2007) (China) art. 1 [hereinafter Uniform Provisions]; *see also* LON L. FULLER, THE MORALITY OF LAW 95–151 (rev. ed. 1969) (discussing the characteristics of a moral legal system in relation to natural law, positive law, and philosophy of science).

4. DREYER, *supra* note 3, at 163.

5. *See* Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 935 (2011) (arguing that China is moving away from "formal law and court adjudication").

6. The six areas in which the Uniform Provisions were tried are Beijing, Shenzhen and Shunde in Guangdong Province, Kunming in Yunnan Province, Yanbian in Jilin Province, and Dongying in Shandong Province. E-mail from Liqiang Feng, Assoc. Professor, College of Law, Zhejiang Gongshang University, to author (Nov. 26, 2011) (on file with author).

7. At the request of the Supreme People's Court, the drafting committee is now simplifying the Uniform Provisions. Conversation with Baosheng Zhang, Chief Advisor, Unif. Provisions Drafting Comm., at the Third Int'l Conference on Evidence Law and Forensic Sci., in Beijing, China (July 16, 2011); *see also* Zhang & Zwier, *supra* note 1, at 420 ("China has no unified evidence code, *per se*, and the current evidence law exists in evidence rules that are scattered in the Criminal Procedure Law, Civil Procedure Law (CPL), and Administrative Procedure Law.").

Uniform Provisions also control the trial process, including the introduction of evidence. In reading over the Uniform Provisions' evidentiary rules, one familiar with the Federal Rules of Evidence (FRE)[8] and U.S. procedure is astonished by the similarities between the Uniform Provisions and the FRE and the adoption of principles of U.S. criminal procedure. Because transplanted legal systems are common[9] and Chinese attorneys, including members of the committee that drafted the Uniform Provisions, have studied in the United States,[10] the similarity is in some sense understandable, but the adoption is extraordinarily incongruous.

While there are a number of reasons why the adoption is incongruous, the salient incongruity is that China, a civil law country, is patterning its evidence code on that of a common law system. In explaining why this patterning is incongruous, I first describe the contrasting traits that define civil law and common law systems and set out why China is in the civil law family. In the course of discussing China's classification as a civil law country, I describe its civil and criminal law processes, with an emphasis on the evidence rules. I then summarize the reforms embodied in the Uniform Provisions and set out the similarities between the Uniform Provisions and their antecedents in the FRE. Following this discussion of the similarities between the Uniform Provisions and the FRE, I describe, by looking at the purposes of common law evidence codes, why China's patterning of its code on the common law is incongruous but serves its reform interests. The Article then explains why the Uniform Provisions, although patterned on the FRE, have been drafted with Chinese sensibilities in mind and are both different from and will be read and applied differently than their antecedents. In explaining why the application will be different, I briefly describe the history of China's legal system and the recent reform efforts. I conclude by suggesting that China's adoption of the Uniform Provisions, a part of the larger phenomenon of the convergence of civil and common law systems, should lead to a significant improvement in both the rule of law and human rights.[11]

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8. The FRE is the code that controls the introduction of evidence in the federal courts and almost all fifty states of the United States. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 2–3 (5th ed. 2004). By 2003 forty-two states had adopted versions of the FRE. CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5009, at 348–52 (2005).

9. Turkey is an example of a country whose legal system is considered a legal transplant; it borrowed law from Italy, Switzerland, France, and Germany. Alan Watson, *Legal Transplants and European Private Law*, 4.4 ELECTRONIC J. COMP. L., pt. IV (December 2000), *available at* http://www.ejcl.org/44/art44-2.html. For a general discussion of this phenomenon, see RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 37–42 (6th ed. 1998).

10. For example, Baosheng Zhang, who is vice president of China University of Political Science and Law and the chief advisor to the drafting committee, studied at Northwestern, and Yunlong Man, the member of the committee who translated the Uniform Provisions into English, obtained his Doctor of Law from the University of Indiana, Bloomington. Baosheng Zhang, CHINA-EU SCHOOL OF LAW, http://www.cesl.edu.cn/eng/ecslfacvitae.asp?id=95 (last visited Jan. 21, 2012); Thomas Man, ORRICK, HERRINGTON & SUTCLIFFE LLP, http://www.orrick.com/lawyers/Bio.asp?ID=204577 (last visited Jan. 21, 2012).

11. *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 2–6 (2002) (defining rule of law and explaining the debate over its different conceptions). "At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law." *Id.* at 2; *see also* FULLER, *supra* note 3, at 95–151 (discussing the basic legal principles that create a moral legal system).

I. THE CONTRASTING TRAITS OF CIVIL AND COMMON LAW SYSTEMS

Although classifications are often superficial and both simplify and misrepresent,[12] they are helpful in thinking and speaking about similarities and differences.[13] There are numerous classifications that one may use in describing legal systems; one is "the division of legal systems into two groups: common law and civil law. Almost every legal system presently in existence has at least some characteristics affiliating it, more or less closely, with one or the other (and sometimes both) of these two groups."[14]

Before focusing on the characteristics that distinguish civil from common law jurisdictions, one should recognize not only that common and civil law legal systems are similar in significant ways[15] but also that, given the convergence taking place between civil and common law jurisdictions, these similarities are growing.[16]

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12. *See generally* ISAIAH BERLIN, CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS (1978).

> Of course, like all over-simple classifications . . . , the dichotomy becomes, if pressed, artificial, scholastic, and ultimately absurd. But if [a classification] is not an aid to serious criticism, neither should it be rejected as being merely superficial or frivolous; like all distinctions which embody any degree of truth, it offers a point of view from which to look and compare, a starting-point for genuine investigation.

ISAIAH BERLIN, THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY 1–2 (1957).

13. SCHLESINGER ET AL., *supra* note 9, at 285.

14. *Id.* Others have suggested that:

> The classic templates of civil and common law systems cannot be applied to modern legal systems with the expectation of producing accurate assessments. Many modern systems have taken too many steps toward unification to be evaluated simply using the classic models. Although there is much to be learned about the evolution of these systems by comparing them with the classic models, equal attention must be given to the individual facets which have achieved practical uniformity through evolution, if a true understanding of the systems is to be had.

Joseph E. Sinnott, *The Classic Civil/Common Law Dichotomy and Its Effect on the Functional Equivalence of the Contemporary Environmental Law Enforcement Mechanisms of the United States and Mexico*, 8 DICK. J. ENVTL. L. & POL'Y 273, 284 (1999). For a discussion of jurisdictions that are affiliated with both systems, see William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000). Another framework of analyzing and classifying legal systems, and one that I take up later in this Article (see *infra* note 50 and accompanying text) is set out in MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVIST APPROACH TO THE LEGAL PROCESS (1986).

> [Mirjan Damaska's] analysis culminated in a two-by-two framework (hierarchical versus co-ordinate authority; policy implementing versus conflict resolving state) that has proven useful to scholars, legal and otherwise, searching for a systematic way to organise an almost infinite amount of data concerning systems of justice and governance.

Ronald J. Allen & Georgia N. Alexakis, *Utility and Truth in the Scholarship of Mirjan Damaska*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 329, 330 (John Jackson, Maximo Langer & Peter Tillers eds., 2008).

15. "[T]here are important similarities between common and civil law procedural systems. . . . [I]t is wrong to view them as polar opposites, common law being adversarial and civil law, if not inquisitorial, at least not adversarial." Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 296 (2003).

16. *See infra* notes 46–50 and accompanying text.

> Both traditions distinguish between legal institutions and other kinds of religious, political, and customary institutions. Both entrust legal institutions to a specialized, professional elite, and both support the idea that law is binding on the state itself. Indeed, some argue that in the contemporary world, the main differences between common law and civil legal tradition lie "more in the area of mental processes, in styles of argumentation, and in the organization and methodology of law, than in positive legal norms."[17]

While positive norms are analogous in the civil and common law traditions, there are and, despite harmonization, will continue to be profound procedural differences between the two.[18] One of these is the rules on the admission of evidence.

A. *Rules on the Admission of Evidence*

One characteristic that affiliates common law systems and distinguishes them from civil law ones is the relatively complex set of rules that control the admission of evidence. Common law systems have exclusionary rules, developed through case law and now codified, that limit the evidence juries and also judges may consider in making factual determinations.[19] For example, the FRE have codified exclusionary rules prohibiting the introduction of character evidence,[20] hearsay,[21] and offers to compromise.[22] In keeping with the complex nature of common law evidence rules, the rules also contain codified exceptions.[23] In criminal cases in the United States, exclusionary rules based on specific constitutional provisions complement the statutory exclusionary rules and the exceptions to those rules. These constitutional exclusionary principles are based upon an individual's right against self-incrimination,[24] a defendant's right to confront accusers,[25] and an individual's right to

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17. Emma Phillips, *The War on Civil Law? The Common Law as a Proxy for the Global Ambition of Law and Economics*, 24 WIS. INT'L L.J. 915, 922 (2007) (quoting MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 64 (2d ed. 1994).

18. Charles A. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 3, 62 (2003). Koch argues that "[s]ome observe a convergence of these two systems" (common and civil law systems) but that "[s]urface similarities should not obscure the fundamental ideological difference in the way each system conceptualizes the law." *Id.* at 39–40. Further, he argues that "surface convergence is not likely to relieve the basic tension between the two legal cultures as they vie for place in the global arena." *Id.* at 40–41; *see also* Goldstein, *supra* note 15, at 296–98 (describing the procedural differences between civil and common law systems).

19. *See, e.g.*, FED. R. EVID; *see also* Crawford v. Washington, 541 U.S. 36, 54 (2004) (holding that the Sixth Amendment's confrontation clause excludes the out-of-court statements of a declarant not subject to cross-examination in a criminal case). While the rules limit what evidence juries may consider and judges may generally consider in making factual determinations, the FRE allow judges to consider non-admissible evidence in making admissibility determinations. FED. R. EVID. 104(a); Bourjaily v. United States, 483 U.S. 171, 181 (1987).

20. FED. R. EVID. 404.

21. FED. R. EVID. 802.

22. FED. R. EVID. 408.

23. *See, e.g.*, FED. R. EVID. 404(a)(1)–(3), (b) (establishing exceptions to the exclusion of evidence of the character of the accused, the victim, and witnesses); FED. R. EVID. 803–04, 807 (establishing numerous exceptions to the prohibition against admitting hearsay); FED. R. EVID. 408(b) (allowing for admission of offers of compromise in certain situations not prohibited by 408(a)).

24. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (establishing the inadmissibility of statements of defendants who have not been informed of their right to remain silent).

have evidence excluded where a search is unreasonable.[26] The interpretation of various exclusionary rules, both the codified exclusionary rules and those based on constitutional provisions, is a frequent subject of appellate review.[27]

While some basic exclusionary rules exist in civil law jurisdictions, for example rules prohibiting the admission of illegally obtained evidence,[28] the civil law trial process is characterized by the "free evaluation principle."[29] As the phrase suggests, the free evaluation principle allows for, with few exceptions, the broad admissibility of evidence.[30] The reason most often given for the presence of a complex system of exclusionary rules in common law systems, and conversely the absence of complex exclusionary rules in civil law systems, is the common law jury trial and its absence in civil law.[31] While in common law jurisdictions there is a reverence for the jury trial, a right embodied in the U.S. Constitution,[32] ironically the mistrust of jurors is the major reason for the common law system's complex exclusionary rules.[33] For example, common law systems generally exclude character evidence—evidence of "a person's disposition or propensity to engage or not engage in various forms of conduct"[34]—because of the belief that a juror's attention will be diverted from the issue of what the individual did on the disputed occasion to the individual's conduct on earlier occasions.[35] Similarly, hearsay evidence is excluded under common law rules because of the view that jurors will not understand that statements made outside the court

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25. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); Crawford v. Washington, 541 U.S. 36, 54 (2004) (excluding the out-of-court statements of a declarant not subject to cross-examination in a criminal case).

26. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."); Weeks v. United States, 232 U.S. 383, 393–94 (1914) (establishing the exclusionary rule for evidence seized during an unreasonable search); Mapp v. Ohio, 367 U.S. 643, 654 (1961) (establishing that the exclusionary rule applies to the states).

27. *E.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

28. Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 192 (2002).

29. Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 273 n.36 (2004); *see also* Mirjan Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 345 (1995) (describing the free evaluation of evidence in civil law trial courts).

30. Damaska, *supra* note 29, at 345.

31. Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199, 201–03, 223–27, 238–39, 242 (2008) (acknowledging the historical view that complex evidentiary rules are the result of the common law jury trial but questioning the continued validity of this historical justification). Some civil law countries have begun to increase lay participation in decision making. *See, e.g.*, David T. Johnson, *Crime and Punishment in Contemporary Japan*, 36 CRIME & JUSTICE 371, 385 n.19 (2007) (discussing that Japan's legal reforms generated legislation to create lay judges); Valeria P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 304 (2007) (discussing Korea's legal reform to include citizens as legal decision makers); *see generally* Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J 429, 430 (2007) (discussing how Japan, Spain, Russia, and other countries are rejuvenating lay participation).

32. U.S. CONST. amends. VI, VII.

33. CHRISTOPHER B. MUELLER & L.C. KIRKPATRICK, EVIDENCE 2 (4th ed. 2009); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1194 (1996).

34. MUELLER & KIRKPATRICK, *supra* note 33, at 182.

35. *Id.* at 184.

and not subject to cross-examination may not be as reliable as the statements of in-court witnesses.[36] Conversely, the free evaluation principle in civil law systems assumes that judges, unlike jurors, are able to assess the reliability of evidence and not consider the unreliable and irrelevant evidence in reaching a decision.[37]

In addition to the mistrust of jurors, scholars also point to the strong role of attorneys in the common law and the need for a system of complex courtroom rules that control their trial practice.[38] The disparate role that evidence law plays in common and civil law systems is and will likely continue to be a defining feature distinguishing civil and common law systems.

B. *Adversarial vs. Inquisitorial*

Civil and common law systems also are categorized by which actors more heavily control the pre-trial and trial processes, and some have suggested that the distribution of control is the salient factor in characterizing a legal system.[39] In civil law systems, judges are dominant in framing issues, hiring experts, and questioning witnesses.[40] Because of the judges' strong role in the process, the civil law system is described as "inquisitorial," while the common law system, in which the attorneys frame the issues, engage experts, and call and question the witnesses, is described as "adversarial."[41] The dominance of different roles extends to discovery as well.

> Discovery in the United States, a common law country, is primarily a private matter between the parties. Courts limit their involvement to enforcing applicable rules, resolving procedural disputes, and protecting against abuses. In the United States, the Federal Rules of Civil Procedure permit extremely broad discovery. Federal Rule of Civil Procedure 26(b)(1), for example, allows discovery of anything which "appears reasonably calculated to lead to the discovery of admissible evidence." . . .
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> By contrast, civil law nations do not regard discovery and trial as separate phases in a proceeding; evidence gathering occurs during the course of a trial. Unlike common law discovery, the judge controls the taking of evidence.[42]

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36. Dufraimont, *supra* note 31, at 223–27.

37. *See* MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 12–17 (1997), *as reprinted in* OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 260–62 (Oscar G. Chase & Helen Hershkoff eds., 2007) (discussing the distinctions in Anglo-American and Continental exclusionary rules).

38. *See* Dufraimont, *supra* note 31, at 201–03, 223–27, 238–39, 242 (arguing that the adversarial system is the reason for complex evidentiary rules).

39. *See* Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416 (1979) (noting empirical finding that participants perceived adversarial process, which "assigns a high degree of control over the process to the disputing parties, and control over the final decision to a third party," to be more fair).

40. CHASE, *supra* note 37, at 8–10.

41. *Id.* at 3.

42. Patricia Anne Kuhn, *Societe Nationale Industrielle Aeropastiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U.L. REV. 1011, 1014 (1989).

In France, for example, only judges have the power to control the "inspection of particular sites; the examination or testing of physical evidence; and written reports of oral testimony by expert witnesses." French judges also control the use of expert testimony and the summoning of parties and non-parties

The countries of Continental Europe, including France and Germany,[43] as well as some Asian countries,[44] have dominant judges and are within the civil law category, while countries that have derived their legal systems from England, including the United States, New Zealand, and Australia,[45] have adversarial common law systems. There is a harmonization of civil and common law procedures, which changes the roles of both judges and attorneys. For example, in the United States, the Federal Rules of Civil Procedure now state that judges may be involved in "formulating and simplifying the issues" and ordering the proof to speed the resolution of a case.[46] The Federal Rules of Civil Procedure not only allow but also require judges to exercise a strong supervisory role in class actions.[47] Similarly, England's current Civil Procedure Rules require judges to be more involved in the pre-trial management of cases and give judges more control over the trial process.[48] At the same time that common law countries are increasing the roles of judges, civil law countries are increasing the roles of counsel. For example, in Italy the pre-trial exchange of pleadings and briefs is moving towards being handled exclusively by the attorneys without any contact with the court.[49] Although there is a harmonization of the roles of judges and attorneys in civil and common law systems, the history and inclinations of both systems are likely to continue to influence this allocation.[50]

> to testify orally. When a French judge has completed his interrogation of the witness, he may ask additional questions submitted by the parties. In this process, the parties and their counsel remain, for the most part, silent. They speak only when the judge requests or authorizes them to do so. Indeed, the French Code of Civil Procedure specifically provides that "[t]he parties must not interrupt, interrogate, or seek to influence witnesses who give evidence, nor address them directly, under penalty of being excluded from the Court." Finally, unlike common law practice, a witness's testimony in civil law countries is not transcribed verbatim; rather, the civil law judge prepares a summary of the evidence.

Id. at 1014–15 (citation omitted).

43. *Id.*; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985); SCHLESINGER ET AL., *supra* note 9, at 37–42.

44. *E.g.*, CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 68 (2004).

45. Paul Finn, The Common Law in the World: The Australian Experience, Address at Centro di Studi e Ricerche di Diritto Comparato e Straniero (Feb. 2000), *in* 43 SAGGI, CONFERENZE E SEMINARI 1–3 (2001).

46. FED. R. CIV. P. 16(c)(2).

47. FED. R. CIV. P. 23(d)–(e).

48. Civil Procedure Rules, 1998, S.I. 1998/3132, pt. 1, r.1.4 (U.K.); *see also* OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 64–65 (2005) (noting that the rules grant judges "more power to control the trial, to prescribe the evidence required, and to prescribe the means of its presentation").

49. Michele Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, *in* THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE 224–27 (Nicolo Trocker & Vincenzo Varano eds., 2005), *as reprinted in* CHASE, *supra* note 37, at 257–58. While Italy is an example of the harmonization of the civil and common law, many have written about the resulting discord. *See generally* Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

50. Another dimension is added to the complexity by the inclination of both Anglo-American and Continental lawyers to develop native variations on the theme of adversarial and inquisitorial proceedings. On the Continent, lawyers continue to attribute to the opposition a more technical and descriptive meaning, and they think about the allocation of control over the process—either to the officials or to the parties—within parameters that appear normal to Continentals in light of their historical experience. Matters such as the interrogation of witnesses seem "naturally" to be the responsibility of officials in charge of proceedings, so that alternative ways of proof-taking are not

C. *The Roles of Courts and Legislatures*

Another distinguishing feature is the relative roles that the courts and legislatures have in each system.[51] The courts in civil law countries have been and continue to be less political than those of common law jurisdictions—that is, they are less inclined to be lawmaking bodies,[52] and this trait can be traced to the conceptual beginnings of civil law.[53] According to Joseph Sinnott:

> Scholars developed this system based on the assumption that the most appropriate way to formulate laws was through a rational, intellectual process. They created a set of codes which could be applied to any situation so as to minimize active interpretation by the judiciary. This concept became the cornerstone of the early civil law tradition.[54]

In keeping with the concept of a judiciary that applies the law rather than interprets it,[55] civil law "[j]udges did not interpret incomplete, conflicting, or unclear legislation. They referred ambiguities back to the legislatures for interpretation,"[56] and in this way the doctrine of parliamentary supremacy developed in civil law jurisdictions.[57] Civil law "[c]ourts are not conceived to play a norm-creating function."[58] Conversely, common law courts have significant political/legislative power and this characteristic stems from the relative place of statutes versus judicial decisions in the early common law. Sinnott states that:

> The early common law included very few statutes. The legislature enacted statutes only to address specific problems thought to be inadequately settled by judicial decisions. It did not contain comprehensive principles

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> included in the contrast of adversarial and non-adversarial forms. To Anglo-Americans, on the other hand, the two concepts are suffused with value judgments: the adversary system provides tropes of a rhetoric extolling the virtues of liberal administration of justice in contrast to an antipodal authoritarian process—such as the system of criminal prosecutions on the Continent prior to its transformation in the wake of the French Revolution. Furthermore, matters that can be allocated either to the parties or to the decision maker are imagined in light of Anglo-American experience, so that the adversarial style also includes, among other features, the partisan presentation of evidence.

MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 4 (1986).

51. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 792 (1989) ("In civil law jurisdictions the doctrine of parliamentary supremacy prevails.").

52. CHASE, *supra* note 37, at 106 ("In the civil law systems, constitutional adjudication . . . has too much of a political flavour to be left to 'ordinary' courts and 'ordinary' career judges.").

53. Sinnott, *supra* note 14, at 276–79.

54. *Id.* at 277.

55. In a sense, the disparity between the judicial and legislative functions that distinguish the civil law from the common law mirrors the political controversy that exists in the United States surrounding judicial appointments. Some judges are described as activists making law in contrast to those judges who are said to simply apply the law. This controversy mirrors the battle between the textualists and those who look to the purpose of the law in interpreting it. *See generally* Linda Greenhouse, *The Nation: Judicial Intent; The Competing Visions of the Role of the Court*, N.Y. TIMES, July 7, 2002, § 4 (Week in Review), at 3, *available at* www.nytimes.com/2002/07/07/weekinreview/the-nation-judicial-intent-the-competing-visions-of-the-role-of-the-court.html. To many of us, the controversy seems absurd. "In a somewhat roundabout and latent fashion, the very doctrine of judicial freedom from higher legal opinion has found its spiritual home in the environment of logically legalistic officials: it requires the exaltation of context-free norms and belief that norm creation and norm application can be sharply separated." DAMASKA, *supra* note 50, at 37.

56. Sinnott, *supra* note 14, at 277.

57. Quigley, *supra* note 51, at 792.

58. *Id.*

> because the case law covered the majority of the legal questions, and neither the judges nor parliament, wished to disturb this.[59]

Because judicial reasoning and decision making gave rise to the early common law, the role of the common law court was primary in the law-making process.[60] The most extreme example of the political power of the common law courts is found in the United States. Alexis De Tocqueville wrote that the American judge "is invested with immense political power," and that this power "lies in the simple fact that the Americans have acknowledged the right of judges to found their decisions on the *Constitution* rather than on the *laws.* In other words, [the Americans] have permitted them not to apply such laws as may appear to them to be unconstitutional."[61] The phenomenon of constitutional adjudication is a relatively new concept in the civil law, and when civil law countries have adopted judicial constitutional review, they have established *ad hoc* constitutional courts and not given existing courts and existing judges the constitutional power to review legislation.[62]

Even with the development of constitutional adjudication, often handled by ad hoc courts that in some civil law jurisdictions include legislators and government officials,[63] the comparatively limited role of the courts in lawmaking will continue to define civil law jurisdictions.

D. The Role of Precedent

Closely related to the political/legislative power distinction between civil and common law judicial systems is the role of precedent in each, which very much reflects the analytical bases of the two systems. The civil law developed from the belief that law is best created through an analytical process that results in codes that can be applied to any circumstance needing resolution by the application of law.[64] Judges were not the source of law nor were they to interpret the law when codes failed to cover a specific problem, were ambiguous, or were in conflict.[65] They were to refer the problem back to the legislature or other code-promulgating body.[66] Codes and their legislative development are the bases of civil law. Even the opinions of upper level civilian courts generally have no formally recognized precedential value.[67]

In contrast, the common law was based on the perspective that law was most appropriately developed on a case-by-case basis. Even in situations governed by

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59. Sinnott, *supra* note 14, at 279.

60. *Id.*

61. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 104 (Penguin Classics 1956), *as reprinted in* CHASE, *supra* note 37, at 133–34.

62. CHASE, *supra* note 37, at 106. For a discussion of the development of constitutional courts in civil law countries, see generally John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2003).

63. CHASE, *supra* note 37, at 140–52.

64. Sinnott, *supra* note 14, at 277.

65. *Id.*

66. *Id.*

67. Quigley, *supra* note 51, at 792.

statutory law, judicial interpretation plays a salient role in the law's development.[68] Codes of course provided uniformity in civil law, but uniformity was also important in the common law and was accomplished by the development of the doctrine of stare decisis, the principle that lower level courts follow the decisions of higher level courts.[69] The principle is an important feature of courts in the common law systems of both England and the United States. For example, all English courts are bound by the decisions of England's Court of Appeals and its House of Lords, the highest English courts, and until recently these highest courts were themselves bound by their own decisions.[70]

While stare decisis provides uniformity in the common law, the case-by-case approach provides flexibility. Over time the impracticality of the orthodox civil law tradition of non-binding decisions moved inferior courts of the civil law system to follow the decisions of their higher courts.

> Legislatures could not enact code provisions that would ideally apply to all situations. Judges often found it necessary to resort to the prior reasoning of their colleagues in order to formulate appropriate decisions in difficult areas. Lawyers began citing previous decisions in their arguments, in an attempt to buttress their position and influence the judges. These practices developed into a limited form of precedent which was integrated into the early civil law systems, despite the fact that the civil law tradition does not officially recognize them.[71]

In this fashion, civil law jurisdictions have developed what one might describe as practical stare decisis.[72]

Because of both training and practice, civil law judges will likely continue to view their role as applying rules rather than creating precedent and making law.[73] In contrast, because of their education and the inductive common law approach, which requires judges and lawyers to discern legal principles from cases, common law judges will parse facts and develop fact-specific rulings.

While the civil and common law judicial systems are moving towards harmonization, the historical distinctions in judicial and attorneys' roles, the manner in which evidence is both developed and introduced, and the place of precedent in the two systems will give the two classifications continuing force.

II. CHINA'S CHARACTER AS A CIVIL LAW SYSTEM

I have suggested a binary classification of judicial systems into common law and civil law; up until quite recently, some scholars have argued that socialist legal systems make up a third and separate category.[74] Scholars who have supported this view describe socialist systems as fundamentally different from both civil and

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68. Sinnott, *supra* note 14, at 279.

69. SCHLESINGER ET AL., *supra* note 9, at 668.

70. KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 259–65 (3d ed. 1998), *as reprinted in* CHASE, *supra* note 37, at 156.

71. Sinnott, *supra* note 14, at 278.

72. ZWEIGERT & KOTZ, *supra* note 70, 259–65, *as reprinted in* CHASE, *supra* note 37, at 157.

73. *Id.* at 158.

74. For a discussion of the arguments for and against socialist systems being a separate category, see Quigley, *supra* note 51, at 792.

common law systems because, for example, "a single political party dominates," public law is preeminent, law is "subordinated to creation of a new economic order," and "law is prerogative instead of normative."[75]

I classify socialist systems as a subclass of civil law. First, socialist systems exist in countries that have civil law traditions.[76] Second, socialist systems are not unique in having a single or dominant party, for countries that are paradigms for the civil law system have also existed under monarchies and single-party dictatorships.[77] Third, while socialist systems emphasize public law, the line between public and private is often a hazy one, and significant elements of private law remain even in the most socialist/public law-oriented countries.[78] Perhaps most importantly, socialist countries should be classified as a part of the civil law family because of the "inquisitorial style of trial, the reliance on codes, [and] the division of law into its civil law categories . . . ."[79]

If one accepts a binary classification, China fits squarely within the civil law system.

A. *The Roles of Courts and the Legislature*

The limited role of the court in relationship to the legislature is one of several traits that classify China's judicial system as civilian. As with other civil law systems, the power of China's courts is more limited than those of common law countries. In keeping with one traditional civil law limitation,[80] the Supreme People's Court and the lower courts do not have the power to decide the constitutionality of legislation.[81] Instead, the People's Republic of China (PRC) Constitution and the Resolution on Strengthening the Legal Interpretation of Laws grant to the Standing Committee of the National People's Congress exclusive authority to interpret the Constitution.[82] Similarly, the courts have no official authority to determine whether administrative rules and regulations are valid[83] or to find that government policies are unconstitutional.[84]

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75. *Id.* at 783–84.

76. *Id.* at 781 (citing John N. Hazard, *Is Soviet Russia in a Unique Legal Family?*, *in* UNIV. OF BIRMINGHAM, JUBILEE LECTURES CELEBRATING THE FOUNDATION OF THE FACULTY OF LAW 93, 99 (1981)).

77. *Id.* at 785–86.

78. *Id.* at 786–89.

79. *Id.* at 800; *see also* XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 14 & nn.13–14 (1997) (discussing whether socialist legal systems stand on their own or alongside the common and civil law legal systems).

80. *See supra* note 62 and accompanying text.

81. DREYER, *supra* note 3, at 173. "China uses a constitutional system of democratic centralism. The National People's Congress and its standing committee not only are the legislature, but they also simultaneously supervise the implementation of the constitution and its laws." Rule of Law Blue Book Task Force, *supra* note 2, at 28.

82. Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 396 (2002) (citing XIANFA art. 62, §§(1)–(2), art. 67 (1982) (China)).

83. *Id.* at 428.

84. DREYER, *supra* note 3, at 173.

The Chinese tradition of pursuing objective or individualized justice has created a de facto limit on the lawmaking power of the courts.[85] Courts view their role as applying the law to resolve private disputes rather than issuing normative decisions to settle difficult social questions.[86]

Analogous to the early civil law practice of requiring courts to refer questions to the legislature when codes failed to cover a specific problem, were ambiguous, or were in conflict, the power to interpret law is fragmented in China and the courts may defer interpretation to other bodies.[87] "The legislative body, the executive branch, and the Chinese Supreme Court all possess the power to interpret laws. The consequence of this fragmentary power to make and interpret the law is widespread inconsistency both in enacted law and in the interpretation of law."[88]

In addition to the power of the Chinese courts being limited in this traditional civilian fashion, the lack of a dominant separation of powers doctrine in China further restricts the power of the Supreme People's Court and the lower Chinese courts.[89] While the Supreme People's Court supervises the lower courts and drafts statements on the interpretation and application of the laws,[90] the Chinese constitution provides China's legislative body, the National People's Congress, with the power to supervise the Supreme People's Court[91] and requires the Court to report to the legislative body.[92] The supervision of the courts by the People's Congress supports the concern that China's judiciary lacks independence and may lead to the reluctance of many to use the court system for dispute resolution.[93]

B. *An Inquisitorial Process Lacking a Unitary Trial*

The limited power of the Chinese courts mirrors the historical limits of other civilian courts, and the civil litigation and criminal processes also have civilian characteristics. China has a system in which judges dominate the litigation and trial process,[94] proof-taking is over an extended period, and the "free evaluation principle" applies.[95] These characteristics may be best understood through descriptions of the civil and criminal processes.[96] I will first describe the civil process,

85. Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 582, 588–89 (1999).

86. *Id.* at 582. "Chinese courts have also been more constrained in challenging state infringements, particularly when such infringements are codified or enacted as statutes or regulations." *Id.* The courts are also strongly supervised by the People's Congress, local governing bodies, and the Communist Party. *See* Jianhua Zhong & Guanghua Yu, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 413–16 (2004) (discussing the external supervisions on the court). *See infra* notes 441–442 and accompanying text.

87. Zhong & Yu, *supra* note 86, at 437–38.

88. *Id.* at 437.

89. Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 93 (2002).

90. DREYER, *supra* note 3, at 173.

91. Zhong & Yu, *supra* note 86, at 413.

92. Zhang, *supra* note 89, at 93.

93. *Id.* at 63. *See infra* notes 337–343 and accompanying text.

94. Zhang & Zwier, *supra* note 1, at 431.

95. *See* Clermont, *supra* note 29, at 273 (describing the emergence of the free evaluation principle); *see also generally* Damaska, *supra* note 29.

96. For a more complete description of China's civil litigation process, see Zhong & Yu, *supra* note

while discussing a few characteristics that apply to both civil and criminal cases, and then describe the criminal process.

1. The Civil Litigation Process

As in other legal systems, a civil action may be commenced with a complaint,[97] but the Chinese judges' role in the pleading process demonstrates their comparative dominance of the litigation process versus their common law counterparts. Unlike the common law pleading, a formal system that at one time almost made litigation solely a pleading contest,[98] the Chinese process is characterized by great informality. A plaintiff who is not able to submit a written pleading, perhaps because of illiteracy, may submit a complaint orally.[99] And, unlike the common law process, in which the parties may be limited by their pleadings[100] and constrained by a formal amendment process,[101] "pleadings do not play as crucial a role .... Judges have much more leeway to look beyond the pleadings and as a result, the parties cannot control litigation through pleadings in China."[102] Chinese judges, as in other civil law countries, may raise issues on their own,[103] and the power of Chinese judges to both look beyond the pleadings and raise issues gives them a dominant role in the pleading process that is greater than that of their common law counterparts and is in keeping with their civilian brethren.

Similarly, the informality of the discovery process, or what might seem to a common law litigator as its absence in the Chinese civil litigation process, helps to establish the relative authority of the judiciary. While the extensive discovery rules and devices in common law litigation allow the parties significant control over the process,[104] the lack of a similar discovery process prevents the parties in China from having the control of their common law counterparts.[105] Only recently did Chinese law move towards sharing the judiciary's control of producing evidence in civil cases with counsel and placed the responsibility more squarely upon the parties.[106]

86, 408–09. For a fuller description of China's criminal process, see REN, *supra* note 79, 29–42.

97. Zhong & Yu, *supra* note 86, at 408.

98. RICHARD MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 117 (5th ed. 2009).

99. Zhong & Yu, *supra* note 86, at 408.

100. *See, e.g.*, FED. R. CIV. P. 8(b)(6), (c) (setting out the general requirements for responding to pleadings); *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that pleadings need "enough factual matter" to state a claim for relief).

101. *See, e.g.*, FED. R. CIV. P. 15 (limiting a party's right to amend).

102. Zhong & Yu, *supra* note 86, at 408.

103. *Id.* at 400–01; CHASE, *supra* note 37, at 4–15.

104. For example, the Federal Rules of Civil Procedure require disclosure by both parties, FED. R. CIV. P. 26(a), allow parties to question one another and others, FED. R. CIV. P. 27(a), allow the parties to require opponents to produce documents, FED. R. CIV. P. 34(a)(1), and, when physical or mental condition is an issue, have the other party submit to a physical or mental exam with court approval, FED. R. CIV. P. 35(a).

105. Zhong & Yu, *supra* note 86, at 408–09 (noting that in China "[a]lthough parties in recent years have been exchanging evidence, the law does not require such exchanges").

106. Zhang & Zwier, *supra* note 1, at 429–31. For example, Article 56 of the 1982 Civil Procedural Law states that the court should thoroughly and objectively collect and investigate the evidence. *Id.* at 429 (citing TANG DEHUA, THE LEGISLATION OF CIVIL PROCEDURE LAW AND ITS APPLICATION 1–5 (2002)). In addition to the strong role played by judges in the Chinese system, China continues the method of using trained criminal investigators—a hallmark of civil law criminal procedure. *See* Quigley, *supra* note 51, at

While China's lack of a unitary trial is a characteristic of both civil litigation and the criminal process, I will first discuss this trait in a general fashion and then describe its place in civil litigation and later in the criminal process. This lack of a unitary proof-taking event is another trait that places the Chinese judicial system within the inquisitorial/civilian category.[107] Rather than the common law norm of a single proof-taking event and the admission of all evidence at that event,[108] Chinese judges accept evidence at various stages of the proceeding.[109] In that way, China's process models the civil law one of admission of evidence over a period of time.[110] The manner in which proof-taking occurs also demonstrates the strong role of the Chinese judge. Chinese judges are not constrained in deciding cases by the evidence presented by the parties but, at all stages of the litigation, may actively investigate the case.[111] They may both examine real evidence and inspect the scene where the events that precipitated the action or prosecution occurred.[112] In these ways, the "trial process" is a series of proof-taking events.[113]

In civil cases the courts' right to collect evidence is so strong that it may do so *sua sponte* to investigate the public's interest, the interests of individuals not parties to the litigation, and the possibility of joining third parties.[114] In addition to the power of Chinese judges to gather evidence throughout the litigation, unlike their common law counterparts, for whom it is inappropriate to extensively question witnesses, Chinese judges, as do other civilian judges, take the lead in examining those giving testimony.[115] But, because of the goals of their system, China's judges are even more intrusive.

> [T]he goal of the Chinese civil process is to seek "objective truth" beyond any doubt; that is, the truth ascertained by the court must be completely consistent with the fact. The court must ascertain all the facts relevant to

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800–01 ("The method of investigation of crime—with written documentation compiled by a law-trained investigator—is central to the civil law system of criminal procedure and has been retained in socialist law.").

107. Zhong & Yu, *supra* note 86, at 400–01.

108. *See* CHASE, *supra* note 37, at 33 (describing that in a common law system, unlike civil law systems, evidence is only accepted up to the conclusion of the trial).

109. Zhang & Zwier, *supra* note 1, 430.

110. *Id.*

111. Zhong & Yu, *supra* note 86, at 400–01.

112. *Id.* at 403.

113. For a number of reasons, including the lack of judicial power to require witnesses to appear to testify, factual issues are often resolved outside the courtroom. A well-known Beijing criminal defense lawyer, Xu Lantang, wrote about the "ten difficulties" in Chinese criminal defense, which included the difficulty of getting witnesses to appear in court. CONG. EXEC. COMM'N ON CHINA, ANNUAL REPORT 2011, 112th Cong., 1st Sess., at 83 (2011) (quoting Sun Jibin, *Xingshi bianhu "san nan" weihe bian "shi nan"* [How "Three Difficulties" of Criminal Defense Became "10 Difficulties"], LEGAL WKLY., Jan. 20, 2011, *translated by* DUI HUA FOUND. (Feb. 2, 2011)). Although there are no specific statistics, "[a]ccording to Professor He Jiahong, Professor at Renmin University Law School, witnesses appeared at trial in less than eight percent of the cases." Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School*, 30 FORDHAM INT'L L.J. 356, 359 n.14 (2006). Criminal trials are more often used for sentencing rather than finding guilt or innocence as seen from the 98.12% conviction rate of criminal defendants, according to 2010 statistics from the Supreme People's Court. CONG. EXEC. COMM'N ON CHINA, ANNUAL REPORT 2011, 112th Cong., 1st Sess., at 84 (2011) (quoting Sup. People's Ct., *Table on Circumstances for Accused in 2010 China Court Criminal Case Judgments* (Mar. 24, 2011)).

114. Zhong & Yu, *supra* note 86, at 402.

115. *Id.* at 400.

> the case, even those that are not claimed or undisputed. If any party cannot prove a specific fact, the court should investigate and collect the evidence to prove it.[116]

This trait of an active judge—characteristic of civil law courts—serves the goal of a judicial system that is intended to be "convenient to, maintain close ties with, and serve the masses."[117]

As with other civil law systems, China does not have jury trials, and this adds to the power of the judiciary in that judges do not share fact-finding power with jurors.[118] While China does have laypersons involved in the litigation process, these "assessors" serve in both determining law and facts.[119] The intent of having lay judges was to formulate a form of democratic participation in the adjudication system and have as decision makers persons more likely "to judge a case from the viewpoint of social and moral norms."[120] Some are ineffective in playing a significant role in cases despite their professional knowledge[121] and others are "regarded as 'decorations' in the courtroom."[122]

As one would expect in a non-jury system, China, rather than having an elaborate set of common law exclusionary rules and heavily relying upon oral testimony, mirrors the "free evaluation principle" and has limited exclusion of evidence—both characteristics of civilian law.[123]

While the criminal process in China shares with the civil process the characteristics of a dominant judge and lack of a unitary trial, there are specific procedures that distinguish the criminal process from the civil.

2. The Prosecution Process

The criminal process may begin with the police detaining a suspect at a subbureau, the equivalent of a U.S. police station.[124] During the detention of a suspect, a police officer who is a member of the trial preparation section of the subbureau will interrogate the individual and may also question others about the alleged crime.[125] A clerk will often be present to record the statements of the suspect.[126] Traditionally Chinese law has no principle comparable to the privilege against self-incrimination under the U.S. Constitution, and historically a court could

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116. *Id.* at 400–01.

117. *Id.* at 401.

118. *Id.* at 404.

119. *Id.* at 405.

120. Zhong & Yu, *supra* note 86, at 405.

121. *Id.*

122. *Id.* at 404 (citation omitted).

123. *See* Clermont, *supra* note 29, at 273 n.36 (noting that "modern civilians take pride in their free evaluation principle, contrasting it with the common law's exclusionary rules of evidence, whose evolution is partly attributable to the jury"); *see also* Zhang & Zwier, *supra* note 1, at 452 (describing Chinese judges' discretionary power to evaluate evidence under the Civil Evidence Rules).

124. JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION 28 (1968).

125. *Id.* at 30.

126. *Id.*

not find a defendant guilty absent the defendant's confession.[127] When the member of the trial preparation section believes that there is reliable evidence that the suspect has committed one or more crimes, the subbureau member will draft a "recommendation to arrest."[128] "If both the chief of the trial preparation section and the chief of the subbureau agree that there is reliable evidence that [the accused] has committed a crime, an arrest warrant is issued by the subbureau. . . ."[129] As the process progresses, the standards used to move a case forward rise from "reliable evidence" that the suspect committed a crime to the more stringent standard of "sufficient" and "reliable" evidence; this latter standard is used in deciding both whether to prosecute and later whether the defendant is guilty.[130]

Following the subbureau's decision to arrest, the file is transferred to the prosecutors' office and a procurator will decide whether the case should move ahead and, if it should, will seek approval from the chief procurator for the prosecution.[131] If the chief agrees that the case should be prosecuted, the file, along with a "bill of prosecution," will be sent to the court.[132]

When the case moves to the court system and a judge is assigned, the characteristics of a civil law system are especially apparent. The judge, after reviewing the bill of prosecution and the statements of various witnesses and the defendant, will, often with his or her clerk, interview the defendant.[133] If the defendant does not admit the essential elements of the charges, or the evidence is incomplete or unpersuasive, the judge or the judge's clerk will continue to investigate the charges and perhaps interview witnesses.[134] While the defendant may have counsel during this process, the Chinese have a right to counsel only in a few types of cases.[135] The judge-driven process and informal proof-taking over an extended period show the civil characteristics of the dominance of judges, the lack of a unitary trial, and the absence of a significant system of exclusionary rules.[136]

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127. *Id.* at 6, 30. Not only is there no principle comparable to the privilege against self-incrimination under the U.S. Constitution, the Criminal Procedure Law requires that suspects answer questions truthfully. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Mar. 17, 1996, effective Jan. 1, 1997), art. 93 (Lawinfochina) (China) [hereinafter Criminal Procedure Law] ("When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.").

128. COHEN, *supra* note 124, at 33.

129. *Id.*

130. *Id.* at 34. "Evidence is said to be reliable when it is not subject to doubt. . . . A leading authority seems to suggest that evidence is 'sufficient' when it is 'comprehensive,' that is, when it deals with all the problems in the case that must be resolved." *Id.*

131. *Id.* at 35–36.

132. *Id.* at 36.

133. *Id.*

134. COHEN, *supra* note 124, at 36.

135. Criminal Procedure Law, *supra* note 127, art. 34 (requiring counsel be provided to a criminal defendant when the defendant is a person with certain physical disabilities, a minor, or facing the death penalty).

136. *See supra* notes 28–42 and accompanying text. The lack of an established system of exclusionary rules creates a major problem in achieving correct outcomes. "There is no definite provision in the Criminal Procedure Law to prevent the illegal collection of evidence. Once illegally obtained evidence is used in court, it becomes difficult to ascertain whether the evidence is authentic. Consequently, judgment

Like the fact-finding process in the court of first instance, the appellate process similarly mirrors the characteristics of a civil law system. Unlike the common law appellate process, in which the higher court will review the record for errors of law or lack of evidentiary support, the Chinese courts of second instance may take additional evidence and consult with police and procuracy representatives.[137] This open proof-taking process at the court of second instance is characteristic of the process in other civil law countries, which often allow for the admission of additional evidence and even de novo proceedings.[138]

3. The Lack of Stare Decisis

Another characteristic of China's legal principles that places it within the civil law system is that stare decisis is not a principle of China's jurisprudence.[139] But like many other contemporary civil law countries, the Chinese courts have developed a form of practical stare decisis. The Supreme People's Court, the country's highest court, provides descriptions to the lower courts on how law should be interpreted and applied.[140] There are two major reasons for this. First, while the Supreme People's Court has the power to interpret the law, it shares this power with both the legislative body and the executive branch; this shared responsibility has led to inconsistent interpretations.[141] Second, the Chinese courts are more concerned with substantive justice than with consistent results, so even given the Supreme People's Court's suggested interpretations, precedent is not a concept the Chinese view as dominant.[142]

III. THE UNIFORM PROVISIONS OF EVIDENCE OF THE PEOPLE'S COURT AND THEIR SIMILARITIES WITH THE FEDERAL RULES OF EVIDENCE AND PRINCIPLES OF U.S. CRIMINAL AND CIVIL PROCEDURE

While the drafters of the Uniform Provisions of Evidence (Uniform Provisions) have created a unique code that builds upon the distinct character of China's legal system, a reader of the Uniform Provisions who is familiar with the Federal Rules of Evidence (FRE) and U.S. civil and criminal procedure will find that the drafters of

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from the collegiate bench lacks a truthful foundation." Xiong Xuanguo, *Death Penalty Reform in China*, *in* 3 THE CHINA LEGAL DEV. Y.B. 83, 93 (Li Lin ed., 2009).

137. COHEN, *supra* note 124, at 41.

138. CHASE, *supra* note 37, at 12.

139. Zhong & Yu, *supra* note 86, at 437–38.

140. DREYER, *supra* note 3, at 173; Zhong & Yu, *supra* note 86, at 437; *see, e.g.*, INFO. OFFICE OF STATE COUNCIL, CHINA, ASSESSMENT REPORT ON THE NATIONAL HUMAN RIGHTS ACTION PLAN OF CHINA (2009–2010) 10 (2011), *available at* http://www.chinadaily.com.cn/china/2011-07/14/content_1290 3577.htm (explaining the September 2010 Guiding Opinion issued by the Supreme People's Court on sentencing, which has been uniformly implemented by "courts at all levels throughout the country").

141. Zhong & Yu, *supra* note 86, at 437.

142. *Id.* at 437–38. While a focus on substantive justice may create inconsistency, in a moral and ideally functioning legal system, correct outcomes should merge with consistency. *See* John J. Capowski, *The Appropriateness and Design of Categorical Decision-Making Systems*, 48 ALB. L. REV. 951, 955 (1984) (discussing the basic legal principles that create a moral legal system).

the Uniform Provisions' evidence rules were influenced by and borrowed heavily from the FRE and U.S. procedural law.

The Uniform Provisions are composed of seven chapters, with all but one of the chapters including subsections.[143] In this portion of the Article, I summarize, with an emphasis on the evidentiary rules, various sections of the Uniform Provisions and in remarkable instances analogize and compare the provisions with their antecedents in the FRE and U.S. procedural law.

Chapter I, General Principles, is divided into Section 1, General Provisions, and Section 2, Relevance and Admissibility. Analogous to FRE 102 (Purpose and Construction), Article 1 of Section 1 of the Uniform Provisions summarizes the goals of the rules. The listed purposes of the rules are "[t]o accurately ascertain case facts, realize judicial justice, safeguard human rights, standardize the use of evidence and improve judicial economy . . . ."[144] While the purposes of the Uniform Provisions are not synonymous with FRE 102, for example, they set out "safeguard[ing] human rights" as one purpose,[145] there are provisions that mirror the FRE in their goals of accurate fact-finding and efficiency. Unlike the FRE, the application of the Uniform Provisions is broader in that they apply to civil, criminal, and administrative proceedings at all levels of the People's Courts.[146]

While the scope and purpose provisions of the Uniform Provisions are expected in a code and are simply analogous to comparable provisions of the FRE, other provisions are remarkably similar. For example, striking convergence between the Uniform Provisions and the FRE exists in the rules governing appeals. Chapter I, Section 1, Article 9 (Consequence of Erroneous Ratification of Evidence) provides that the incorrect admission of evidence may serve as a basis for appeal, but the "erroneous ratification"[147] must have "affected a party's substantive rights, resulting in obvious differences in trial results."[148] Article 9 then sets out a requirement that the party claiming an error in the exclusion of evidence must have objected and, by making the court aware of the content of the excluded evidence, preserved the error for appeal.[149]

These articles in the Uniform Provisions are modeled upon FRE 103(a)(1) and 103(a)(2). For example, FRE 103 requires that for a finding of error, the decision to admit or exclude evidence must have affected a substantial right of the party claiming error and a timely objection or motion to strike must be on the record.[150] Similar to the proposed and analogous articles in the Uniform Provisions, FRE 103(a)(2)

143. These seven chapters are: Chapter I, General Provisions; Chapter II, Categories and Forms of Evidence; Chapter III, Exclusion of Evidence and Exceptions; Chapter IV, Discovery; Chapter V, Production of Evidence; Chapter VI, Collection of Evidence by Court and Preservation of Evidence; Chapter VII, Proof; and Chapter VIII, Supplemental Provisions. Uniform Provisions, *supra* note 3.

144. *Id.* art. 1. In addition to the purposes set out in the Uniform Provisions, there are additional reasons for their development and likely adoption. *See infra* notes 364–380 and accompanying text.

145. Uniform Provisions, *supra* note 3, art. 1.

146. *Id.* art. 2.

147. *Id.* art. 9. Because much of the evidence that is "introduced" has been developed during the ongoing "hearing process," the term "ratification" rather than "introduction" is used to describe the introduction/fact-finding process.

148. *Id.* In setting out the Uniform Provisions, I have decided to neither edit the English translation to smooth out the language nor point to grammatical errors.

149. *Id.*

150. FED. R. EVID. 103(a).

requires that, as a condition precedent for an appeal based on the erroneous exclusion of evidence, "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."[151] The Uniform Provisions even adopt the concept of plain error set out in FRE 103(d), which allows an appellate court to excuse a party's failure to object during a trial.[152]

Another remarkable example of the adoption of U.S. evidentiary concepts is Section 2 of Chapter I of the Uniform Provisions, which, in setting out the rules on relevancy and the admissibility of relevant evidence, adopts the U.S. concepts of relevancy, materiality, and pragmatic relevance. In Article 11 of Section 2, the drafters state that "[r]elevant evidence is evidence that has probative value in ascertaining the case facts and therefore is helpful to adjudicators in examining and adjudicating the probability of [the] existence of the case facts."[153] Analogously, FRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[154] While the language of the rules differs, the concepts are similar; the adoption of relevancy in the Chinese code is especially significant since a formal concept of relevancy is new to Chinese jurisprudence.[155] Concerning relevant evidence, Article 12 of Section 2 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by law or these Provisions. Evidence which is not relevant is not admissible."[156] In its English translation, the meaning of the Chinese provision is exactly that of FRE 402, titled "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible," and where the language of the Chinese provision as translated is not exactly that of FRE 402, it is both more succinct and grammatically more correct.[157] Section 2, Article 13 of the Uniform Provisions adopts the concept of pragmatic relevance set out in FRE 403. While FRE 403 balances probative value against prejudicial effect, the Uniform Provisions balance the harm to a party or the unjust impact upon the pending judgment against the logically relevant evidence's probative value.[158]

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151. FED. R. EVID. 103(a)(2).

152. FED. R. EVID. 103(d). Case law requires that a plain error be one that was so basic that the court should have known an error occurred without a party raising an objection and that error compromised a major right of a party. *See, e.g.*, United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (holding that an appellate court may "recognize a 'plain error that affects substantial rights,' even if the claim of error was 'not brought' to the district court's 'attention'").

153. Uniform Provisions, *supra* note 3, art. 11.

154. FED. R. EVID. 401.

155. This conclusion is based on conversations during a meeting among members of the Uniform Provisions' drafting committee, the author, and Professor Ronald J. Allen of Northwestern University, September 16, 2007, Beijing, China. *See also* Criminal Procedure Law, *supra* note 127, ch. V (failing to mention the concept of "relevancy of evidence").

156. Uniform Provisions, *supra* note 3, art. 12.

157. *Compare* Uniform Provisions, *supra* note 3, art. 12 ("All relevant evidence is admissible, except as otherwise provided by law or these Provisions."), *with* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, . . . or by other rules.").

158. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); Uniform Provisions, *supra* note 3, art. 13(1) ("Adjudicators may exercise discretion to exclude relevant evidence if . . . it may cause grossly unjust harm to one or more of the parties or unjustly influence the ensuring judgment and such harm or influence will substantially outweigh its probative value.").

Chapter II of the Uniform Provisions, with two exceptions, contains provisions that are more a part of U.S. common law, practice customs, and local rules than U.S. evidence rules or procedure codes. A significant portion of Chapter II defines various forms of evidence, including testimonial, real, and demonstrative, and sets out some basic procedures for the presentation of this evidence.[159] While I more fully discuss the likely purposes behind the Uniform Provisions in Part V of this Article,[160] one has the sense that many of the provisions, a number of which seem more appropriate for an evidence text than an evidence code, were included to overcome the lack of training of some members of the judiciary, including assessors.[161] In addition, some of the rules are there because some responsibility for the production of evidence shifts from the court to the parties; for example, Article 21 (Registration of Evidence) requires the submission of the categorization and numbering of evidence.[162]

The portions of Chapter II that draw on the FRE are the inclusion of the best evidence rule in Article 16 (Priority of Original Evidence) and rules on authentication in Article 17 (Forms of Certification Opinion) and Article 18 (Forms of Written Statement). The best evidence rule in Article 16 (Priority of Original Evidence) incorporates FRE 1002 (Requirement of Original) and 1004 (Admissibility of Other Evidence of Contents), but Article 16 includes real evidence within its reach. Article 16 states that "[r]eal evidence, documentary evidence and audio-video and electronic evidence collected by investigators[163] shall be the original object or document or in the original medium."[164] The article then, in the fashion of FRE 1004,[165] goes on to state that duplicates are admissible if, among other things, "(1) the original object or document has been lost or damaged; (2) the original object or document is not accessible; (3) the original object or document is not suitable for transport or preservation . . . ."[166] While not adopting the liberal admissibility of duplicates set out in FRE 1003,[167] the contents and language of the Uniform Provisions' best evidence rule is familiar to U.S. attorneys practicing in the federal courts and in states that have adopted the FRE or a variation of them.

Perhaps no other portion of the Uniform Provisions is as surprising and extraordinary in its borrowing of concepts from the FRE as Chapter III, which sets out the rules on the exclusion of evidence and the exceptions to those exclusions.

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159. *See* Uniform Provisions, *supra* note 3, ch. II (Section 1 provides the categories of evidence, and Section 2 provides the forms of evidence.).

160. *See infra* Part V.

161. *See infra* note 338 and accompanying text.

162. Uniform Provisions, *supra* note 3, art. 21. *See infra* notes 243–244 and accompanying text.

163. In the author's opinion, whether this provision is intended to apply only to documentary evidence collected by public investigators or to anyone putting together evidence is an open question.

164. Uniform Provisions, *supra* note 3, art. 16.

165. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponents lost or destroyed them in bad faith; or (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

FED. R. EVID. 1004.

166. Uniform Provisions, *supra* note 3, art. 16.

167. FED. R. EVID. 1003.

The chapter is surprising because of the adoption of the broad exclusion of hearsay—not a principle of civil law, with its free evaluation principle—and because of the parallels to the FRE's definitions and exceptions.

A major parallel is the Uniform Provisions' adoption of the FRE's definition of hearsay evidence and the exclusion of that evidence. The Uniform Provisions state that "[h]earsay refers to [a] statement of a declarant made out of court and offered to prove the truthfulness of the facts asserted."[168] Similarly, FRE 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[169] Chapter III, Section 2, Article 28 of the Uniform Provisions goes on to state, in a fashion very similar to FRE 802,[170] that hearsay evidence is not admissible except as provided by these rules.[171]

The articles following Article 28 set out a series of exceptions to the prohibition on admitting hearsay evidence,[172] which are reminiscent of FRE 803 and 804.[173] Article 30 (Exceptions to Exclusion of Hearsay Due to Reliability) states that hearsay that fits within any of four specific scenarios may be admitted.[174] These four scenario exceptions are present recollection recorded, business records, statements for purposes of diagnosis and treatment, and records preserved for twenty years or more.[175] While the language of the Uniform Provisions is in three of the four instances less elaborate than that of their antecedent hearsay exceptions in FRE 803(5), (6), (4), and (16), there is no mistaking the borrowed exceptions.[176] The introductory language to these Article 30 scenarios, in stating that these four types of hearsay should be admitted because of their reliability, reminds one of the underlying rationales for the common law hearsay exceptions—reliability—and the Confrontation Clause jurisprudence set down by the Supreme Court in *Ohio v. Roberts*[177] and *Bourjaily v. United States.*[178] Overturned by the Court in *Crawford v. Washington*,[179] *Roberts* held that a judge should only admit a hearsay statement absent confrontation, "if it bears adequate 'indicia of reliability.'"[180] The Court later established that "no independent inquiry into reliability is required when the

168. Uniform Provisions, *supra* note 3, art. 28.

169. FED. R. EVID. 801(c). In reading over the English translation of the Uniform Provisions, one might hypothesize that, in light of the marked similarity between the somewhat different language of the Uniform Provisions and the FRE, that the language differences may have been the result of the translation from English to Chinese and the later translation of the Chinese rules to English.

170. FED. R. EVID. 802.

171. Uniform Provisions, *supra* note 3, art. 28.

172. *Id.* arts. 29–32.

173. FED. R. EVID. 803, 804(b).

174. Uniform Provisions, *supra* note 3, art. 30 ("Hearsay having any of the following guarantee for reliability may be admitted . . . .").

175. *Id.*

176. *Compare* Uniform Provisions, *supra* note 3, art. 30, *with* FED. R. EVID. 803(4)–(6), (16).

177. Ohio v. Roberts, 448 U.S. 56 (1980).

178. Bourjaily v. United States, 483 U.S. 171 (1987).

179. Crawford v. Washington, 541 U.S. 36, 54 (2004).

180. *Roberts*, 448 U.S. at 66; *see also* Dutton v. Evans, 400 U.S. 74, 89 (1970) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . .").

evidence 'falls within a firmly rooted hearsay exception.'"[181] Over time, the Court found almost all major hearsay exceptions to be firmly rooted and, absent confrontation, not requiring an analysis of the hearsay statement's reliability.[182] Like Article 30, Article 31 (Other Exceptions to Exclusion of Hearsay) of the Uniform Provisions also takes from the FRE; Article 31 establishes hearsay exceptions for prior statements of identification, prior consistent statements of a witness used to rebut an attack on credibility, and five variations of admissions by a party.[183] While Article 31 treats the "not hearsay" categories in FRE 801(d)(1) and (2) as hearsay exceptions, the borrowing is again striking.[184] In fact, the five categories of party admissions in the Uniform Provisions carry the same lettering in translation as their analogous FRE "not hearsay" provisions.

While there is marked convergence between Chapter III of the Uniform Provisions and the FRE definition of hearsay, exclusion of hearsay, and numerous hearsay exceptions, there is one very significant way in which the hearsay rules in Chapter III differ from the FRE. As do the FRE, the chapter's provisions make hearsay generally inadmissible, except as provided in the provisions or other law, but the provisions, unlike the FRE, give judges and assessors broad discretion to admit hearsay.[185] The discretion may be exercised when the fact-finder considers

> all of the following elements in a comprehensive manner: (1) the hearsay is evidence relating to a material fact of the case; (2) the hearsay is the evidence obtainable by the proponent through reasonable efforts that has the highest probative value; (3) excluding the hearsay will result in substantial impact on rendering just judgment of the case.[186]

While the exclusion of hearsay evidence is contrary to the civil tradition,[187] the drafters, by adding this discretion, have provided an accommodation between the exclusion and past practice. The accommodation is also in keeping with the Chinese tradition of limiting the possibility of procedural justice undermining objective justice.[188]

Chapter III not only borrows much of the FRE's hearsay doctrine but also adopts the FRE's general principles on the exclusion of character and propensity evidence.[189] Although simplified, Article 33 of Chapter III, in similar fashion to FRE 404(a), generally prohibits the introduction of character evidence to prove conduct on a specific occasion.[190] The provision goes on to allow the defendant, in criminal

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181. *Bourjaily*, 483 U.S. at 183 (citing *Roberts*, 448 U.S. at 66).

182. For a discussion of the Court's pre-Crawford confrontation analysis and firmly rooted hearsay exceptions, see John J. Capowski, *An Interdisciplinary Analysis of Statement to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353, 367–69 (1999).

183. Uniform Provisions, *supra* note 3, art. 31.

184. *Compare id.* (listing the hearsay exceptions), *with* FED. R. EVID. 801(d)(1)–(2) (listing statements which are not considered hearsay).

185. Uniform Provisions, *supra* note 3, art. 32.

186. *See id.* art. 32(1)–(3).

187. *See* DAMASKA, *supra* note 37, *as reprinted in* CHASE, *supra* note 37, at 260–62 (discussing the distinctions between Anglo-American and Continental exclusionary rules).

188. *See infra* note 319 and accompanying text.

189. Uniform Provisions, *supra* note 3, art. 33–34.

190. *Compare id.* art. 33 ("Character evidence may not be used to prove that a person's act in a specific situation is consistent with his character."), *with* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .").

proceedings, to submit proof of his good character or of the victim's bad character, but then allows, as does FRE 404(a)(1), for the prosecution to rebut that character evidence.[191]

The Uniform Provisions also prohibit propensity evidence, except when similar acts by a criminal defendant are used to prove modus operandi, knowledge, or lack of accident.[192] Substantively, Uniform Provision Chapter III, in Article 34 (1) and (2), adopts portions of FRE 404 (b).

The remaining portions of Chapter III prohibit certain types of evidence from being offered to prove fault or liability. These prohibitions include subsequent remedial measures (Article 35), settlement offers and statements of fact made in an effort to compromise (Article 36), payment or promise to pay medical expenses (Article 37), and admissions made in mediation proceedings (Article 38).[193] While the language of these provisions differs to some degree from the comparable provisions in FRE 407 (Subsequent Remedial Measures), 408 (Compromise and Offers to Compromise), and 409 (Payment of Medical and Similar Expenses), there are instances in which the similarities are extraordinary.[194] For example, the latter portion of Article 35 states, "[t]his Article is not applicable if evidence on subsequent remedial measures is offered to prove, when a dispute exits, ownership, operating right or the feasibility of preventive measures or to impeach a witness's credibility."[195] The difference between this language and the comparable language of FRE 407 may result solely from the translation of FRE 407 into Chinese and the translation of the Chinese provision back into English.

In addition to adopting provisions and concepts from the FRE, Chapter III also adopts concepts from U.S. criminal procedure. The most significant example is Section 2, Article 23, which sets out a rule that in criminal proceedings the exclusion of illegally obtained evidence is allowed.[196] But, as with the exclusion of hearsay evidence, the Uniform Provisions provide great discretion to a trial judge in deciding whether to admit illegally obtained evidence.[197] In the United States, the basic principle for excluding illegally obtained evidence was articulated by the Supreme Court in *Mapp v. Ohio*,[198] which interpreted Amendment IV to the U.S. Constitution to require the exclusion of illegally obtained evidence and which may have influenced the drafters of the Uniform Provisions.[199] These are examples of the many

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191. *Compare* Uniform Provisions, *supra* note 3, art. 33 ("[I]n criminal proceedings, if defendant first submits evidence to prove good character or the bad character of the victim, the prosecution may produce evidence to rebut the evidence offered to prove the character of the defendant or victim."), *with* FED. R. EVID. 404(a)(1) (providing that "[i]n a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" is admissible).

192. Uniform Provisions, *supra* note 3, art. 34(1)–(2).

193. *Id.* arts. 35–38.

194. FED. R. EVID. 407–09.

195. Uniform Provisions, *supra* note 3, art. 35.

196. *Id.* art. 23.

197. *Id.* While Article 23 allows for discretion in the exclusion of illegally obtained evidence, Article 22 requires that some illegally obtained evidence is absolutely excluded. *Id.* arts. 22–23. The absolute exclusion applies to evidence that is obtained by torture, drugs, and "other cruel, inhumane, or humiliating means." *Id.* art. 22(1)–(3).

198. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

199. *See* U.S. CONST. amend. IV (establishing the right to be free from "unreasonable searches and

similarities between China's Uniform Provisions and the United States' FRE and criminal procedure.

The focus of this Article is on the derivative nature of the proposed Uniform Provisions' evidence rules and other exclusionary rules, but with the expectation that some readers will want to know about other portions of the Uniform Provisions, this section also briefly describes chapters and portions of chapters that lie outside what U.S. attorneys view as evidence law.[200]

Chapter IV of the Uniform Provisions covers discovery, and the chapter, while making changes in China's current practices, is characteristic of both China's current practices and those of other civil law countries. This chapter contains general provisions as well as provisions that are applicable to criminal cases and others that are applicable to civil and administrative proceedings.[201]

While as with earlier discovery reforms, the provisions increase the parties' roles in the discovery process,[202] in keeping with the civilian tradition, the rules retain the strong role of the court in discovery. Article 39 provides that "[d]iscovery shall be administered by the People's Court,"[203] and Article 42 places upon the court clerks the responsibility for keeping "written records of discovery describing in detail the causes of action, time, place and participants of the discovery, category and contents of the evidence in discovery and the evidence in dispute and reasons for dispute . . . ."[204] The general provisions exempt from discovery minor cases in which there is no factual dispute or in which "simplified proceedings are applicable."[205] Other general provisions limit the use of evidence not disclosed by a party during the discovery process but exempt "new evidence" and set out descriptions of new evidence and its use.[206]

Section 2 of Chapter IV contains provisions that apply specifically to discovery in criminal cases. The provisions provide for notice to defense counsel of the opportunity to review the case file when the People's Procuratorate has decided to prosecute.[207] The Uniform Provisions also require that "[t]he prosecution shall present to defense all the evidence related to the case," but there is a nearly parallel responsibility on the part of the defense.[208] Article 48 sets out that "[d]efense counsel shall present to the prosecution the evidence it intends to exhibit in court to prove defendant's innocence, commitment of a lesser crime, or for the purpose of reducing or exonerating defendant from criminal liability."[209]

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seizures").

200. The Chinese use the term "evidence law" to encompass procedure, and some legal scholars challenge the view that procedure and evidence are separate concepts. John J. Capowski, *Evidence Codification and Transubstantive and Bifurcated Evidence Rules*, 2 EVIDENCE SCIENCE 216, 216–17 (2008).

201. Uniform Provisions, *supra* note 3, ch. IV.

202. Capowski, *supra* note 200, at 216.

203. Uniform Provisions, *supra* note 3, art. 39.

204. *Id.* art. 42.

205. *Id.* art. 41.

206. *Id.* arts. 43–45.

207. *Id.* art. 46.

208. *Id.* art. 47.

209. Uniform Provisions, *supra* note 3, art. 47. While the rules do not state a sequence for the criminal defendant's disclosure responsibilities, it seems that the disclosures need to be sequential so as to not compromise the initial determination of guilt or innocence.

The third section of the discovery chapter applies to civil and administrative proceedings. In keeping with the strong role of the court in civil law jurisdictions, the section requires the court to inform the parties of their responsibilities in the discovery process and provides notice that they may request the People's Court to both investigate the case and collect evidence.[210] The remaining articles set out the time limits for discovery, which may be set either by the parties or the court, the rules on extensions of time, and the consequences of late production.[211]

While Chapter IV covers discovery and retains civil law features, Chapter V on the production of evidence moves the hearing process towards the common law trial by requiring a fuller introduction and reexamination of the evidence. And, while Chapter V shares concepts with the FRE and the U.S. trial process, neither the concepts nor the language show the amount of borrowing from U.S. rules and procedure that one sees elsewhere in the Uniform Provisions.

The five sections of Chapter V cover the statements and examination of parties, the testimony of other witnesses, the use of non-testimonial evidence in the fact-finding process, authentication, and expert witnesses.

Section 1 sets out requirements for statements by parties and for party examination.[212] Article 57 provides that, except for defendants in criminal proceedings, parties are to read aloud a signed statement of their testimony, and Article 58, with limited exceptions, treats these statements and those made by them in their pleadings as evidence upon which adjudicators may decide the case.[213]

The rules on witness testimony and examination are in Section 2. Article 61 establishes the competency of witnesses except for "those who are incapable of distinguishing right from wrong" or correctly testifying because of minority or disability.[214] The article goes on to allow the court to make the decision of competency, either on its own or with the assistance of a certification organization or certifier.[215] The term "certifier" in the Uniform Provisions applies to court-appointed experts, the traditional civil law practice, and the term "expert" applies to experts engaged by the parties.[216]

Article 62 makes a major change in Chinese litigation. While a party's right to examine witnesses has existed for some time, surprisingly neither the People's Court nor the parties has been able to compel a witness to appear and testify.[217] Article 62 provides that persons with knowledge about the facts of a case will have an

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210. *Id.* art. 50.

211. *Id.* arts. 51–56.

212. *Id.* arts. 57–60.

213. *Id.* art. 58 (allowing adjudicators to disregard a party's admission in limited situations, including when the party has recanted and there is "evidence sufficient to disprove the self-admission" and when an admission was provoked by threats); *see also id.* art. 60 (providing for the withdrawal of admissions).

214. *Id.* art. 61.

215. Uniform Provisions, *supra* note 3, art. 61.

216. *Id.* arts. 104, 107.

217. The lack of subpoena power was highlighted during the author's discussions with Chinese legal scholars and in presentations at the First International Symposium on Evidence Law and Forensic Science held on September 15–16, 2007, in Beijing, China. *See also* Criminal Procedure Law, *supra* note 127, arts. 48, 50–78 (setting out only the duty of the witness to testify but no compulsory measures to force the witness to testify).

obligation to testify and that the People's Court may compel a witness to appear.[218] Section 2 then sets out the obligation to and exemptions from testifying for various government employees, including adjudicators, intelligence personnel, and state leaders.[219]

Section 2 also sets out a series of exemptions from testifying for attorneys, psychiatrists and physical therapists, spouses, parents, and children.[220] The language of these provisions implies that the privilege from testifying to specific facts, for example, a confidential exchange with a patient, is held by the testifying psychiatrist, attorney, spouse, etc.[221] Perhaps because the power to compel testimony is new, the provisions also set out the rights of witnesses, including advance notice, the right to protection, and the right to be compensated for transportation, lodging, meals, and time lost from work.[222] The rules are so specific as to require that the examination of witnesses with hearing or speech disabilities "shall be conducted by appropriate means."[223]

Specific rules set out the sequence for and manner in which both adjudicators and parties are to question witnesses. Article 80 provides that the witness first will be examined by the entity who has called the witness, for example, if the adjudicator calls the witness, the adjudicator, as in the civil law tradition, will question the witness, and parties who summon witnesses will have the first opportunity to question these witnesses.[224] The provisions also prohibit leading questions on direct examination, except where one might describe the witness as hostile, and allow them on cross-examination.[225] There are also rules dealing with refreshing recollection, requiring witnesses to have personal knowledge, generally prohibiting opinion testimony, and uniformly requiring sequestration.[226] They also prohibit parties from questioning a witness out of court if that witness has already testified and may be called again.[227]

Within Section 3 of Chapter V, there are numerous and detailed rules on the use and introduction of real, documentary, and demonstrative evidence. Under these rules, the admission process follows a series of steps. While each step varies slightly based on the type of evidence, the first step in the process—the exhibition of the evidence—generally requires the proponent to explain the source of the evidence, its contents, and what the evidence will be used to prove.[228] In the case of

218. Uniform Provisions, *supra* note 3, art. 62.

219. *Id.* arts. 63–67.

220. *Id.* arts. 68–70. The inclusion of the parent-child privilege is notable and absent from the privileges recognized in the United States. Shonah P. Jefferson, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429, 430–31 (1999).

221. Uniform Provisions, *supra* note 3, arts. 67–70. For example, Article 70 states: "A witness has the right to be exempt from testimony regarding matters that could subject the witness's spouse, parent or children to criminal prosecution or criminal conviction." *Id.* art. 70.

222. *Id.* arts. 72–75.

223. *Id.* art. 79.

224. *Id.* art. 80.

225. *Id.* arts. 81–82. Cross-examination by the calling party is allowed when "the witness has provided testimony materially unfavorable to the party," the witness may have knowledge that he or she has not disclosed on direct examination, or "the witness's testimony is obviously inconsistent with the witness's prior statement." *Id.* art. 82(1)–(3).

226. *Id.* arts. 83–86.

227. Uniform Provisions, *supra* note 3, art. 87.

228. *Id.* art. 88–93.

demonstrative evidence, the court, in deciding whether to permit the exhibition of the evidence, considers the probative value, the impact on a "just judgment," the possible delay in the trial, and the conditions required for a display or experiment.[229]

Following the "exhibition" stage are the identification and authentication stages.[230] Identification requires a witness with personal knowledge, including makers and custodians, when appropriate, to "identif[y] the source and chain of custody of [the] evidence," to show the evidence's relevancy, to state whether the evidence is an original or a copy, and to describe whether the evidence is in original or altered condition.[231] Authentication is the process of establishing that the evidence, whether real, documentary, or in another form, is genuine,[232] and the provisions allow for the self-authentication of documentary evidence.[233] Unlike the FRE, which list twelve instances in which no extrinsic evidence is needed to authenticate a document,[234] the Uniform Provisions have only five, including notarized documents and others that involve some level of government issuance or oversight.[235] The remaining articles in Section 4 set out the identification and authentication requirements for specific types of evidence, including real evidence, audio-video evidence, and electronic evidence.[236]

The final section of Chapter V of the Uniform Provisions is on expert witnesses.[237] To determine "specialized issues," courts may appoint experts from a "certification organization" or with "statutory qualifications," and parties may engage expert witnesses.[238] When the court engages the expert, the Uniform Provisions use the term "certifier."[239] This can be done both *sua sponte* and when a party applies for certification.[240] In criminal proceedings, certain issues require certification, and the list in the Uniform Provisions gives one a general sense of when experts and certifiers may be used. The issues in criminal cases that are listed as requiring certification include the "inability to recognize or control one's own act due to mental illness," the "reasons for abnormal death," the "class of a cultural artifact," and when "contraband" or "hazardous materials" are involved with the charge.[241] Unless all parties agree, certifiers are to appear in court and testify, and, for the opinion of a party's expert to be introduced on a specialized issue, the expert must testify.[242]

229. *Id.* art. 93(1)–(4).
230. *Id.* art. 94.
231. *Id.* art. 94(1)–(4).
232. *Id.* art. 94.
233. Uniform Provisions, *supra* note 3, art. 95.
234. FED. R. EVID. 902(1)–(12).
235. Uniform Provisions, *supra* note 3, art. 95(1)–(5).
236. *Id.* arts. 96–101.
237. *Id.* ch. V, § 5.
238. *Id.* arts. 102, 104, 107.
239. *Id.* art. 104.
240. *Id.*
241. Uniform Provisions, *supra* note 3, art. 103 (1), (3), (6), (7).
242. *Id.* arts. 105, 107. The requirement of expert testimony resolves in a general fashion an issue that is being litigated in U.S. courts. *See, e.g.*, Bullcoming v. United States, 131 S. Ct. 2705, 2713 (2011) (holding that expert's out-of-court testimonial statement "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness").

Chapter VI of the Uniform Provisions sets out the rules for collecting and preserving evidence. While the Chinese judicial system has moved towards placing a greater responsibility on the parties to collect and present evidence,[243] in keeping with the civilian tradition, under the Uniform Provisions the court retains significant power to collect evidence.[244] This power may be exercised not only when a party, who "for objective reasons" has been unable to obtain specific evidence, applies to the court,[245] but also *sua sponte*.[246] The court may act on its own initiative when the evidence may harm the public interest or individual rights, and to obtain "procedural facts" that might bear on "adding parties, suspending litigation, terminating litigation or recusal."[247] In keeping with the broad power of civilian courts, the Uniform Provisions grant the court the discretion to collect evidence to verify "evidence of significant importance" produced by the parties and to clarify facts that are in dispute.[248] The rules also allow proceedings to be suspended while new evidence is collected and allow parties additional preparation time and application rights when new evidence is produced.[249] Section 1 sets out various tools the court may use in collecting evidence, and these include seizing evidence, freezing assets, and entrusting the "certification" of evidence and the inspection of a site to an individual or organization.[250] Section 1 also grants the parties and others who may be affected by the court's collection the right to be present when evidence is collected or a site is inspected.[251]

Article 116 of Section 1 applies specifically to criminal defendants.[252] It provides that if during a trial the court has doubts about the evidence, it may "adjourn the trial and conduct inspection and verification."[253] The court is to "notify the prosecution and the defense counsel to be present," and if the court collects evidence from the prosecution, whether *sua sponte* or at the request of defense counsel, either exonerating the defendant or showing that the defendant committed a lesser crime, the court is to order the prosecution to transfer that evidence.[254] The last provision in Section 1, which applies to both civil and criminal cases, requires that new evidence collected upon a party's request is to be presented in court and the opponent's view of the evidence shall be heard; the article also allows the opponent to request time from the court to respond to the new evidence and allows the court to adjourn the proceeding to allow for preparation of a response.[255] The article ends by requiring that the "[n]ew evidence collected through out-of-court investigation shall not be admitted as evidence to decide a case unless the evidence has been examined and

243. Zhang & Zwier, *supra* note 1, at 428.

244. *See generally* Uniform Provisions, *supra* note 3, ch. VI, § 1.

245. *Id.* arts. 108–109. Article 109 also allows the court to assist when archival materials kept by organizations that require a court order for release are involved and when the evidence involves state secrets, trade secrets, or issues of personal privacy. *Id.* art. 109.

246. *Id.* art. 110.

247. *Id.*

248. *Id.*

249. *Id.* arts. 111–12, 116.

250. Uniform Provisions, *supra* note 3, arts. 108–17.

251. *Id.* arts. 113–16.

252. *Id.* art. 116.

253. *Id.*

254. *Id.* The rule does not say whether the evidence is to be transferred to the court or to defense counsel. *Id.*

255. *Id.* art. 117.

verified for its truthfulness."[256] In this section and others, the Uniform Provisions take the step of requiring that the evidence is to be presented in court.[257]

Chapter VI provides the court, upon application of a party both before and after the filing of an action or on its own initiative during trial, the power to preserve evidence.[258] Section 2, in addition to setting out the power and timing for preservation of evidence applications and challenges to them, has provisions setting out the court to which an application is to be made, the time by which the court is to make a decision, and, except in criminal cases, that the party requesting preservation bears the cost.[259] While the section provides the court discretion to decide the method for preserving the evidence, Article 121 sets out "sealing the properties, seizure, photographing, video-taping, copying, inquest, [and] making written records" as examples.[260] The article also lists "entrusted certification" as a method,[261] and the final article in Section 2 provides the parties, upon court approval, the right to review and copy preserved evidence.[262]

The penultimate chapter of the Uniform Provisions, Chapter VII, sets out rules on the burdens and standards of proof, judicial notice, and the "examination and ratification of evidence."[263] A later chapter section sets out who has the various burdens of proof, but Section 1 of the chapter sets out what procedural facts must be proven and the substantive proof requirements in criminal, civil, and administrative proceedings.[264] This section is truly an example of how a procedural code may affect substantive law. While the civil and administrative proof requirements set out in the rule are brief and basic,[265] those for criminal proceedings are more numerous and specific.[266] Article 123, entitled "Objects of Proof in Criminal Proceedings," contains a non-exhaustive list of "substantive case facts" that need to be proved in criminal cases. These include the facts of the criminal act, "whether the defendant committed the crime," the defendant's capacity, the defendant's culpability, motive, and intent, whether the crime was a joint crime, the defendant's role, and facts relating to mitigation and enhancement.[267] Article 126 sets out for both civil and criminal proceedings a non-exclusive list of procedural facts that may need to be proved. They include the facts supporting jurisdiction, recusal, the postponement of the trial, and suspension and termination of the litigation.[268]

256. Uniform Provisions, *supra* note 3, art. 117.

257. *Id.*

258. *Id.* arts. 118–20.

259. *Id.* art. 119.

260. *Id.* art. 121.

261. *Id.* art. 121.

262. Uniform Provisions, *supra* note 3, art. 122.

263. *Id.* ch. VII.

264. *Id.* arts. 123–26.

265. *Id.* arts. 124–125. For example, the "Objects of Proof in Civil Proceedings" include "the formation, change and termination of civil legal relations . . . or facts concerning the occurrence of the civil disputes." *Id.* art. 124.

266. *Id.* art. 123.

267. *Id.*

268. Uniform Provisions, *supra* note 3, art. 126.

Section 2 of Chapter VII covers the burdens of proof and standards of proof in criminal cases. The section sets out a presumption of innocence,[269] a privilege against self-incrimination,[270] and a beyond-reasonable-doubt standard.[271] Article 130 not only sets out the general reasonable doubt standard but also provides a detailed definition of beyond a reasonable doubt.[272] The definition requires that possibilities other than the defendant having committed the criminal act "have been reasonably excluded" and that contradicting and inconsistent evidence are lacking.[273] Portions of the definition are so broad in defining reasonable doubt that one expects the courts will read a standard of "reasonableness" into portions of the rule that do not explicitly include it. The section also requires acquittal for "insufficient evidence" and defines that phrase.[274] It ends by stating that the defendant must provide the evidence when claiming the affirmative defenses of "*alibi*, lawful authorization or other justifiable reasons . . ." and that the prosecution must meet a standard of "high probability" in rebuttal.[275]

In addition to creating statutory burdens and standards of proof in criminal cases, the Uniform Provisions in Sections 3 and 4 of Chapter VII set out the burdens and standards of proof in civil cases and administrative proceedings.[276] Most of Section 3's articles contain concepts familiar to civil litigators in the United States. Article 133 (Nature and Distribution of Burden of Proof) states that "[e]ach party has the burden of producing evidence to prove its own claims. If the adjudicators cannot ascertain the case facts with certainty . . . they may render judgment in accordance with the provisions on distribution of burden of proof . . . ."[277] The following sections place the burden of proof on the party proving a legal conclusion, such as the existence of a legal relationship, the formation of a contract, and agency.[278] In contrast to these unsurprising provisions, a few portions of Section 3 are striking. Article 136 (Instances of Reversing Burden of Proof) places the burden of proof upon the defendant in nine instances that involve tort litigation and labor disputes.[279] These include patent infringement claims concerning the manufacturing methods for new products, tort actions for compensation for injuries caused by "high-risk operations" and defective products, and labor disputes involving, for example, rescinding a labor contract or dismissing an employee.[280] Also remarkable

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269. *Id.* art. 127 ("Any person shall be presumed innocent unless having been found guilty by the People's Court pursuant to an effective conviction.").

270. *Id.* art. 128 ("No one shall be compelled to admit a crime by oneself or testify against oneself.").

271. *Id.* art. 130 ("[T]he prosecution shall, in order to prove a defendant guilty, prove beyond a reasonable doubt the essential facts of each element of the accused crime.").

272. *Id.* ("Beyond a reasonable doubt means that: (1) there is no evidence indicating the existence of any circumstances that affect the truthfulness of the case; (2) in terms of common-sense analysis, there exists no possibility of affecting the truthfulness of the case; (3) there exists no contradiction between various pieces of evidence and between evidence and the case facts; (4) with respect to the ascertainment of the facts that defendant committed the criminal act, other possibilities have been reasonably excluded.").

273. *Id.*

274. Uniform Provisions, *supra* note 3, art. 131.

275. *Id.* art. 132; *see id.* art. 141 (defining "high probability"). *See infra* notes 281–282 and accompanying text.

276. Uniform Provisions, *supra* note 3, ch. VII, §§ 3–4.

277. *Id.* art. 133.

278. *Id.* arts. 134–135.

279. *Id.* art. 136 (1)–(9).

280. *Id.* art. 136 (1), (2), (6), (9).

in the rules is the standard used to judge whether a party has met its burden. That standard, "high probability," has long been a part of Chinese law,[281] but a written definition for the term may be new. "High probability means that the probability of the existence or nonexistence of the facts proved by evidence produced by one party is clearly higher than the probability of the existence or nonexistence of facts proved by evidence produced by the other party."[282]

The penultimate section of Chapter VII discusses both judicial notice and presumptions,[283] and, like many other evidentiary portions of the Uniform Provisions, has been inspired by the FRE. Article 149 allows the court to admit "[a] common-sense fact involving no reasonable dispute" without proof.[284] Although the term "common-sense" is not included in FRE 201, the definition of common sense will be familiar: "[a] common-sense fact refers to a fact that is well recognized within the jurisdiction of the [trial] court, or a fact that can be precisely and easily determined by a source the accuracy of which is beyond dispute."[285] Another article related to judicial notice allows for the admission without proof of various Chinese laws, listing among others, "the Constitution, statutes, . . . judicial interpretations[, a variety of regulations,] and local laws . . . ."[286] The section also allows courts to take judicial notice of a judgment of the People's Courts, an arbitration award, or "an effectively notarized document,"[287] but provides a broad right to parties to object to and have a hearing on matters determined by judicial notice.[288]

The remaining articles in Section 5 discuss the nature of a legal presumption,[289] set out examples of facts that may be presumed "unless disproved by sufficient opposing evidence,"[290] and create a factual presumption against a party who refuses to produce evidence.[291] Examples of facts that may be presumed include "the date of birth recorded on [an] identification card," that a correctly addressed and properly mailed letter was received, and that an injury suffered at work during an employment relationship is work related.[292]

The final section of Chapter VII is titled "Examination and Ratification of Evidence." In articles 157 (Requirement of In-court Examination) and 159 (Main Contents of Examination) of Section 6 of this chapter, the Uniform Provisions seem to bring the Chinese trial process very close to that of the common law non-jury trial.[293] While, as in the civilian tradition, trials may take place over an extended

281. Author's discussions with the Uniform Provisions' drafting committee at a meeting of the committee on September 16, 2007, Beijing, China.

282. Uniform Provisions, *supra* note 3, art. 141. Section 4 of Chapter VII sets out the burden and standard of proof in administrative proceedings, which is beyond the scope of this Article. *Id.* ch. VII, § 4.

283. *Id.* § 5.

284. *Id.* art. 149.

285. *Id.*

286. *Id.* art. 150.

287. *Id.* art. 151.

288. Uniform Provisions, *supra* note 3, art. 153.

289. *Id.* art. 154.

290. *Id.* art. 155.

291. *Id.* art. 156.

292. *Id.* art. 155 (1), (2), (4).

293. *Id.* arts. 157, 159.

period of time,[294] Article 157 requires that "all evidence [ ] be presented in court and be examined by all parties,"[295] and Article 159 sets out that "[d]uring the examination, the parties [ ] shall conduct questioning . . . ."[296] Article 160 supplies the sequence for presenting the evidence and recognizes the roles of the parties,[297] but the civilian tradition of an active judge is acknowledged by requiring that the court present the evidence that it has collected "pursuant to its official powers," as opposed to upon a party's application.[298] And Article 161 allows adjudicators to call witnesses *sua sponte* when there is a conflict in the witnesses for the parties.[299]

Section 6 of Chapter VII also details the sequence for questioning a witness about that witness's prior inconsistent statement and the factors the court is to use in deciding on the admission of the prior inconsistent statement.[300] Article 162, reminiscent of the rule in *Queen Caroline's Case*,[301] sets out a sequence that "may" be followed in cross-examining a witness about a prior inconsistent statement.[302] The sequence is to "ask the witness to affirm" the prior statement and the inconsistency, ask the witness which statement the witness is standing by, and then, if appropriate, prove up the impeachment.[303] The Uniform Provisions also set out three factors the adjudicators are to use in deciding on the admissibility of the prior inconsistent statement. These are "whether there is any dispute over the existence of the prior in[con]sistent statement," "whether there is any possibility of falsifying," and whether duress or fraud may have affected "the accuracy or voluntariness of the witness's statement."[304]

After setting out in surprising detail how prior inconsistent statements are to be treated, the chapter discusses "ratification."[305] While not defined in the Uniform Provisions, in the context of the rules, ratification is adjudicator fact-finding—finding certain evidence to be true. Article 167 (Requirements for Ratification) states that adjudicators, in ratifying evidence, shall "apply logical reasoning and rules of experience to examine and verify all the evidence of the case comprehensively, objectively and justly weigh and balance the relevancy, admissibility and probative value of the evidence, and provide explanations for the reasons for ratification."[306] In deciding on ratification, the adjudicators are to consider the relevancy, reliability, and authenticity of the evidence, as well as "whether the admission of evidence meets the requirements of just adjudication and whether the harm to the parties or the unjust influence on the judgment substantially exceeds the probative value of the

294. *See supra* note 95 and accompanying text.

295. Uniform Provisions, *supra* note 3, art. 157. For exceptions to the requirement of in-court examination, see *id.* art. 158.

296. *Id.* art. 159.

297. *Id.* art. 160.

298. *Id.* art. 160(3).

299. *Id.* arts. 160–61.

300. *Id.* arts. 162–63.

301. MUELLER & KIRKPATRICK, *supra* note 33, at 535 (citing Queen Caroline's Case, (1820) 129 Eng. Rep 976 (C.P.) 977) (requiring a cross-examiner to show the witness the prior written inconsistent statement before questioning the witness about it).

302. Uniform Provisions, *supra* note 3, art. 162.

303. *Id.*

304. *Id.* art. 163(1)–(3).

305. *Id.* arts. 167–69.

306. *Id.* art. 167.

evidence."[307] The final three articles in Chapter VII set out rules on the corroboration of evidence. Article 170 prohibits, absent corroboration, the admission and ratification of the "testimony of minors that is inconsistent with their age and mental state," testimony of witnesses who have a "related interest with one of the parties or their counsel," and out-of-court written statements by witnesses.[308] Article 171, which applies solely in criminal cases, states that a defendant's confession, absent corroboration, is insufficient to support a guilty verdict.[309] The final article in the chapter sets out general standards for what may be considered corroborative. It requires that "[c]orroborative evidence shall be drawn from an independent source,"[310] and it prohibits evidence that needs corroboration from being used as corroborative evidence.[311]

The Uniform Provision's final chapter, Supplementary Provisions, states that the Supreme People's Court shall interpret the Uniform Provisions and that "[t]o the extent that other judicial interpretations of related evidentiary rules are inconsistent with these Provisions," the Uniform Provisions are controlling.[312] The chapter concludes by setting out the effective date of the Uniform Provisions and their non-retroactivity.[313]

IV. CRITICISMS OF CHINA'S JUDICIAL PROCESS AND THE POSITIVE INCONGRUITY OF THE UNIFORM PROVISIONS

I expect that most readers will have been surprised by the similarities between many of the provisions in the Uniform Provisions and the FRE. As I mentioned earlier, transplanted codes are a common phenomenon and several members of the drafting committee have studied in the United States, but one is surprised by the incongruity of a civil law country modeling its code on that of a common law system.[314] This sense of incongruity comes in large part from the fact that the purposes behind the common law's complex system of evidence law simply do not apply in a civil law system.[315] The justification most frequently given for the common law's elaborate evidence rules is the mistrust of juries.[316] Common law systems exclude evidence, for example hearsay statements not subject to cross-examination, because of the belief that jurors are not able to evaluate the proper weight to be given to certain types of evidence. The common law adversarial system is the other major justification.[317] Attorneys, the major players in the common law system, need

307. *Id.* art. 168.

308. Uniform Provisions, *supra* note 3, art. 170.

309. *Id.* art. 171.

310. *Id.* art. 172.

311. *Id.* In reading Article 172, one is reminded of the Supreme Court's decision in *Bourjaily v. United States* and the amendment to FRE 801(d)(2) that certain admissions by party opponents are insufficient to serve as the basis for their own admission. FED. R. EVID. 801(d)(2) advisory committee's note.

312. Uniform Provisions, *supra* note 3, art. 173.

313. *Id.* art. 174.

314. *See supra* notes 9–10 and accompanying text.

315. *See* Dufraimont, *supra* note 31, at 208–13 (discussing the justifications for evidence codes).

316. MUELLER & KIRKPATRICK, *supra* note 8, at 2.

317. *See* Dufraimont, *supra* note 31, at 233–38 (discussing the role of adversarial procedure in the development of evidence law).

to be subject to the "rules of the game."[318] Neither of these explanations applies to China's civil law system, which is inquisitorial and does not use juries.

To understand why the adoption of an evidence code based on the FRE serves China's reform interest, one should have some basic understanding of the criticisms of China's judicial process. The frailties of China's judicial system mirror those of others; the problem is one of degree.

A major criticism of China's judicial system is the limited importance of individual rights. While western legal systems emphasize "procedural justice and a fair fight between the parties," China's emphasis is on truth and objective justice.[319]

> [T]he foundation of western law (and western culture) is the guarantee of individual rights, which are to be pursued within the framework of a protective legal system, [while] the focus of Chinese legal tradition is not on individual rights but individual virtues, which are to be cultivated through the performance of duties defined by a hierarchy of relationships to family, friends, community, and government. From this significantly different starting point, Chinese legal traditions have relied more on customs, rites and norms—the rule of social harmony—than on the rule of law.[320]

And following the communist revolution, the government's interest in enforcing state policy sacrificed individual rights in favor of the perceived greater good.[321] While judicial reforms have increased individual rights,[322] the implementation of these reforms and the need for others has continued the criticism over the lack of individual rights.[323]

Other criticisms of China's judicial process are the lack of transparency in the access to existing laws, in the application of law, and in the hearing process. While statutes are published, few regulations are, and there is no unified source for finding court decisions.[324] Further exacerbating the lack of transparency and predictability is some judges' willingness to apply custom in place of the legal authority.[325] While we expect civilian judges to question witnesses, some judges do this outside of the hearing process and in the absence of counsel.[326]

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318. *See id.* at 237 (describing the "advocate control" rationale for evidence law as "stress[ing] the need to control the machinations of adversary lawyers in the interests of accurately finding facts").

319. Peerenboom, *supra* note 2, at 848.

320. Sam Hanson, *The Chinese Century: An American Judge's Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 245 (2002) (citing Herbert H.P. Ma., *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207, 210–11 (1995); Robb M. LaKritz, Comment, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Revolution in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 243 (1997)).

321. Zhang & Zwier, *supra* note 1, at 424.

322. Peerenboom, *supra* note 2, at 844–49 ("The 1996 amendments [ ] provided a number of rights to protect the accused, including earlier access to a lawyer, the right to review documents and call witnesses, the right to post bail, and limits on the length of detention.").

323. *Id.* at 845 (listing the examples of failure in implementing reform).

324. Fang Shen, *Are You Prepared for This Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China*, 72 UMKC L. REV. 215, 217 (2003).

325. *Id.* at 218.

326. Margaret Y. K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 935 (2005).

The ineffectiveness of counsel is another continuing criticism. One coming from the adversarial tradition is troubled by the current limited role of counsel.[327] While recent reforms have increased the role of counsel,[328] judges continue to have a very strong hand in many phases of the process.[329] The continuing strong role of the court in discovery places a parallel limit on the place of counsel during this phase.[330] In addition to the courts' control over the discovery process limiting the effectiveness of counsel, the limited role pleadings play in civil litigation limits the parties' ability to control the litigation.[331] Since civilian judges generally and Chinese judges particularly are not bound by the pleadings, counsel has limited effectiveness in controlling the process through pleading.[332]

The traditional role of counsel in China is another limit on attorney effectiveness. "There is no tradition of zealous advocacy. To the contrary, aggressive argument, raising of issues and propounding of rights, is viewed as being impolite."[333] In addition to the sense of impoliteness with which zealous advocacy may be met, legal education in China may not prepare attorneys to be effective advocates.[334] One hurdle for Chinese law schools is that pre-legal education "proceeds by memorizing materials and imitating the teacher in preparation for examination for the purpose of acquiring substantive knowledge rather than thinking creatively. Efforts to introduce critical thinking at the primary or secondary

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327. *See, e.g.*, Ira Belkin, *China*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91, 104 (Craig M. Bradley ed., 2d ed. 2007) ("Although reliable statistics are hard to come by, most criminal defendants in China are not represented by a lawyer during trial . . . .").

328. *See* Zhang & Zwier, *supra* note 1, at 470 (discussing the need to further develop the lawyer's "role in the gathering and exchange of evidence and in the presentation of law and evidence in the hearing").

329. Zhong & Yu, *supra* note 86, at 400–01.

330. *Id.* at 408–09 ("Strictly speaking, there is no system comparable to discovery in China. Chinese law does not allow the parties to discover any evidence from another party except for the pleadings, which have been submitted to the court. Although parties in recent years have been exchanging evidence, the law does not require such exchanges. Therefore, the parties cannot control the litigation through discovery and the exchange of evidence.").

331. *Id.* at 408 ("[B]ecause Chinese judges do not determine cases solely based upon the pleadings submitted by the parties, pleadings do not play as crucial a role in the Chinese civil process as they do in the American system. Judges have much more leeway to look beyond the pleadings and as a result, the parties cannot control litigation through pleadings in China.").

332. *Id.*

333. Hanson, *supra* note 320, at 251.

> While our team was in China, a newly graduated lawyer . . . was arrested and jailed when he appeared for the first day of trial. He was charged with 'illegally obtaining evidence.' The attorney had interviewed dozens of witnesses, many of whom he had expected to call during the trial. He was detained for five months and was disqualified from practice based upon his resulting criminal record.

Id. at 251–52. In addition, Chinese lawyers practicing in certain areas, such as human rights cases, face the risk of punishment for zealous advocacy, and some lawyers are deterred from taking these "sensitive" cases. *China: Dark Times for Lawyers as Repression Intensifies*, AMNESTY INT'L (June 30, 2011), http://www.amnesty.org/en/news-and-updates/china-dark-times-lawyers-repression-intensifies-2011-06-30.

334. *See* Su Li Zhu, *An Institutional Inquiry into Legal Skills Education in China*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 75, 86 (2009) (arguing that "Chinese legal education has been marching more on the 'academic' road . . . . emphasiz[ing] academic research and publications, while ignoring legal skills training"). *See generally* R. Randle Edwards, *Thirty Years of Legal Exchange with China: The Columbia Law School Role*, 23 COLUM. J. OF ASIAN L. 3 (2009).

education levels . . . are often met with resistance by the school administration."[335] When students reach law school the training in analysis is based upon European civil law tradition rather than the critical analysis that is the linchpin of legal education in the United States.[336]

Because of the strong role of the judge in the civil law system and in China, the problems with ineffective counsel could be ameliorated by a highly competent judge, but the Chinese judiciary has problems as well. While China's judiciary now is more professional than at any time in the country's past,[337] salient among the problems is a lack of judicial training, and some judges, especially assessors, may have no legal training.[338] Adding to the lack of training is the lack of independence among Chinese judges. Many judges come from positions in the Party or from the military and maintain a loyalty to these entities,[339] and rather than prohibiting ex-parte influence, there is an expectation of outside influence on the process.[340] There are instances where, rather than basing a decision upon applicable law, judges will "use 'ideological discretion' to achieve a 'correct' ideological result which is consistent with the [Party] policy. This is not only legal in China, but is actually mandated by the 1982 Constitution."[341] The independence of trial-level judges is further limited by the expectation that trial judges will consult with intermediate and high court judges on pending cases.[342] Their decisions also lack finality, a recurring feature of China's legal system and other civil law systems.[343]

While some legal systems are criticized for excessive lawmaking and regulation,[344] scholars and others have criticized China's for a lack of rules, especially in procedure and evidence.[345] There are a number of reasons for this deficiency.

335. Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 J.L. & EDUC. 60, 78–79 (2009).

336. *Id.*

337. Zhong & Yu, *supra* note 86, at 434.

338. Hanson, *supra* note 320, at 250–51 (citing Stanley Lubman, *Bird in a Cage: Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 395, 397 (2000)). *See also supra* note 161 and accompanying text.

339. *See* Hanson, *supra* note 320, at 250 ("Currently . . . judges are not trained in the law, they naturally maintain loyalties to where they came from, either a party faction or the military.").

340. *Id.* at 250–51 (citing Lubman, *supra* note 338, at 395, 397).

341. Zhong & Yu, *supra* note 86, at 434 (citation omitted).

342. *See* Hanson, *supra* note 320, at 250–51 ("Judges are expected to consult across the levels of a court system, and thus a district court judge may receive direct guidance from an intermediate court judge or high court justice while the case is still before the district court.").

343. *See infra* notes 395–397 and accompanying text. *See also* Stephan Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L.J. 179, 199 (2008) (describing the hierarchical court structure and explaining that lower court rulings are subject to de novo review or may be controlled by an "adjudicative committee"); Hanson, *supra* note 320, at 250–51 (citing Lubman, *supra* note 338, at 395, 397) ("Where a case has particular significance, or where the district court judge fears reversal, the case may be transferred to the next level prior to reaching any decision. Even after a decision, however, the appeal to the next level does not give deference to the decision, but results in a trial de novo. Finally, there are no firmly rooted concepts of finality for judgments of the court. Any case may be reopened within two years after judgment for the simple purpose of reconsidering the merits of the decision.").

344. *See, e.g.*, Damaska, *supra* note 29, at 343–46 (describing European continental legal systems' aversion to excessive rule making and regulation of evidence law under the Roman-canon scheme at the time of the French Revolution).

345. *See* Zhang & Zwier, *supra* note 1, at 420–21 ("The concerns are that the insufficiency of evidence rules has become a great obstacle to achieving justice and fairness of the judiciary and

First, China's legal system is one focused on substantive justice, and the focus on outcome has led to the mistaken view that procedural rules are of minimal importance.[346] Secondly, China's civil law model puts judges in charge of both running the proceedings and deciding upon the weight they should give the evidence.[347] Because of this, procedure was within the discretion of the judge, and, as in other civil law countries, the free evaluation principle leads to minimal exclusionary rules.[348] Thirdly, because of the importance of "state policy" and the limited recognition of individual rights, procedural rights have not been a significant part of Chinese jurisprudence.[349]

The lack of procedural and evidentiary rules has resulted in a number of problems. Chief among these is "that the insufficiency of evidence rules has become a great obstacle to achieving justice and fairness of the judiciary."[350] This lack of rules, and the resulting lack of fairness, includes the problems that result from not having rules that set out standards for proof,[351] establish deadlines for the production of evidence by the parties,[352] or constrain the admissibility of evidence.[353] And, to the degree that evidence rules do exist, they do not exist in one place but are instead "scattered in the Criminal Procedure Law, Civil Procedure Law (CPL), and Administrative Procedure Law."[354]

Fragmented interpretive power is another weakness in China's judicial process. The National People's Congress and its standing committee, which are China's legislative bodies, the State Council, the executive branch, and the Supreme People's Court all have the power to interpret the law.[355] As one might expect, this fragmented interpretative power has resulted in conflicting interpretations, and judges have difficulty deciding which interpretation should apply.[356] The varying interpretations "provide opportunities for judges to arbitrarily apply the law, particularly when they are motivated by personal interests or external pressures."[357] The Supreme People's Court, in contrast to the U.S. Supreme Court, which is statutorily granted the power to promulgate rules of procedure and evidence,[358] has

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consequently there are increasing calls for the adoption of a separate evidence law among scholars and legislators.").

346. *See supra* notes 337–343 and accompanying text. *See also* Zhang & Zwier, *supra* note 1, at 424 (stating that "it had been a very common phenomenon in China to give substantive law more weight than procedural law" because of the perception that substantive law serves to protect the state's interests whereas procedural rules serve to protect individual interests).

347. Woo, *supra* note 85, at 595–99.

348. *See supra* notes 28–37 and accompanying text. *See also* Zhang & Zwier, *supra* note 1, at 424 (describing the discretion given to judges as "State workers").

349. Zhang & Zwier, *supra* note 1, at 424.

350. *Id.* at 421.

351. *Id.* at 420–21.

352. *Id.* at 421; *see also* Zhong & Yu, *supra* note 86, at 440 ("Delay in producing evidence has been one of the major obstacles to efficiency in the adjudication of cases in Chinese courts."); Zhang & Zwier, *supra* note 1, at 430 ("[P]arties to an action may present evidence at any stage of the proceeding, trial or appeal, before the court decision is rendered.").

353. Zhang & Zwier, *supra* note 1, at 420.

354. *Id.*

355. Zhong & Yu, *supra* note 86, at 436–38.

356. *Id.*

357. *Id.* at 437.

358. Rules Enabling Act, 28 U.S.C. § 2072 (2006).

no constitutional or statutory power to create even procedural rules.[359] Still, the Supreme People's Court's judicial interpretations and comments on the law, especially in the areas of evidence and procedure, have brought some greater consistency to the law.[360] The Uniform Provisions of Evidence will bring more.

The Uniform Provisions, while not a panacea for the problems in China's judicial system, if adopted and broadly applied, should ameliorate many. One criticism of the Uniform Provisions is that China, instead of adopting an evidence code based on another country's, should create a code based upon principles that are uniquely Chinese.[361] While, as I mentioned earlier, the adoption is incongruous, it is well suited to China's reform effort. In addition, the drafters of the Uniform Provisions have incorporated many of China's judicial traditions,[362] and Chinese judges will apply and interpret the rules with those traditions and Chinese sensibilities.[363]

The statement of purpose that begins the Uniform Provisions sets out as its goals accurate fact-finding, judicial justice, safeguarding human rights, and consistent evidentiary rulings.[364] While adopting an evidence code is one of many reforms needed to meet these goals, the adoption of a common law inspired code is especially well suited in helping China meet its process goals and create a more normative procedural system.

A. *Limiting the Role of Unreliable and Prejudicial Evidence*

Because of the common law jury system, common law evidence codes have rules that limit the use of evidence, often because of the questionable reliability[365] and sometimes because of the prejudicial effect of that evidence.[366] In contrast, the free evaluation principle in civil law assumes the ability of the fact-finder to understand unreliability and remain logical in the face of evidence of a highly emotional character.[367] The Uniform Provisions, in limiting the admission of evidence, remove to a significant degree the unreliable and the prejudicial as bases for decision making.[368] Of course in many instances judges and assessors will find it difficult or

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359. Zhang & Zwier, *supra* note 1, at 421 n.11.

360. *Id.* at 421–22; *see also* Zhang Lihong, *The Latest Developments in the Codification of Chinese Civil Law*, 83 TUL. L. REV. 999, 1006 (2009) ("[J]udicial interpretations clarify the meaning of the provisions stipulated by law and guide the judges and other legal operators to implement the civil law efficiently in China for the purpose of resolving concrete legal problems.").

361. *See, e.g.*, Liqiang Feng, *Rational Reflection on the Value of Borrowing from Anglo-American Evidence Law*, *in* COLLECTIONS OF THE INTERNATIONAL SYMPOSIUM ON EVIDENCE LAW AND FORENSIC SCIENCE 190, 190–91 (Inst. of Evidence Law and Forensic Sci., China Univ. of Political Sci. & Law ed., 2007) ("Although borrowing from Anglo-American law is to some extent inevitable and helpful for us to realize the modernization of Chinese legal system, the aforementioned trend is disquieting because the value of borrowing from Anglo-American evidence law is questionable and needs to be reappraised.").

362. *See infra* notes 381–442 and accompanying text.

363. *See infra* notes 381–442 and accompanying text.

364. Uniform Provisions, *supra* note 3, art. 1.

365. *See supra* notes 28–38 and accompanying text.

366. *See supra* notes 31–36 and accompanying text.

367. *See supra* notes 28–38 and accompanying text.

368. *See supra* notes 28–38 and accompanying text.

impossible to ignore the excluded evidence,[369] but even if the inadmissible creeps into the decision-making process, the presence of the exclusionary rules will at a minimum point out the frailty of that evidence.

B. *Providing Transparency*

Another way in which procedural justice should be aided by the adoption of a significant procedural and evidentiary code is improved transparency.[370] Evidence codes are especially important for judges and trial attorneys because they need readily available rules,[371] but procedural and evidentiary codes are also important in setting out all the rules that govern the judicial process.[372] China, in considering the adoption of a comprehensive procedural code that mirrors the common law, is joining a movement among civil law countries in Eastern Europe, Latin America, and parts of Asia that is mainly driven by the desire for the greater transparency that such codes provide.[373] This move towards transparency accompanies a move towards increased rule of law and greater limitations on the executive in the judicial system.[374]

C. *Increasing Consistency in Decision Making*

One of the great normative tensions in law is between rules and discretion.[375] While discretion handled well may provide accurate, individualized decision making, codified evidentiary and procedural laws help make decisions across cases more uniform and consistent.[376] In a well-functioning system of evidence law, decisions on

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369. *See, e.g.*, United States v. Bruton, 391 U.S. 123, 126 (1968) (finding a jury instruction limiting a confession's applicability to one defendant ineffective because the jury would still "look[ ] to the incriminating extrajudicial statements in determining [ ] guilt"); *see* Liqiang Feng, *Options for Choosing the Mode of Evidence Examination*, Conference Thesis, *in* THE 2ND INTERNATIONAL CONFERENCE ON EVIDENCE LAW AND FORENSIC SCIENCE 357, 363 (2009) (arguing that to limit the prejudicial effect of inadmissible evidence, one judge should decide major admissibility issues, for example the admission of a confession, and another judge or panel should make the decision on guilt or innocence).

370. For a discussion of the lack of transparency criticism, see *supra* notes 324–326 and accompanying text.

371. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 105 (1987) ("Rules of evidence that must be applied instantaneously in the courtroom need to be as clear and specific as possible.").

372. *See generally* FULLER, *supra* note 3, at 95–151.

373. Phillips, *supra* note 17, at 919. While recognizing the goal of greater transparency in the adoption of common law inspired codes by civil systems, Phillips argues that a "[c]loser examination of instances of common law transplant, however, indicate that a considerable part of what looks like an argument about civil law versus common law is actually a proxy for a different kind of ideological debate—one which counter-poses different conceptions about the function of law and the role of the state." *Id.* at 919–20. In China the dramatic changes being proposed by the drafters of the Uniform Provisions evince the move towards a judicial system that more fully recognizes the rule of law and shows a willingness on the part of the executive to cede power to the judicial branch. *See supra* notes 1–7 and accompanying text.

374. *See* Phillips, *supra* note 17, at 928–29, 956 (describing that rule of law as a basis for improving transparency and that preventing the executive's undue influence on judges increases judicial independence and thus improves transparency).

375. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8:7, at 186 (2d ed. 1979) (discussing the relative roles of rules and discretion in legal systems).

376. *See* FULLER, *supra* note 3, at 81–91 (discussing the tension between the necessity of interpreting

the admission of similar evidence in similar cases, other things being equal, should be consistent, and in a well-functioning procedural system, similar cases should proceed similarly. Effective procedural and evidentiary codes, in establishing consistent evidentiary rulings and consistent procedure, should create a system in which like cases are more apt to be decided similarly. By limiting discretion, codified evidentiary and procedural rules should increase both the accuracy and consistency of court decisions.

D. Increasing Individual Rights

Another key advantage for China in adopting a code based on common law evidence and procedure should be increased individual rights. While China's judicial process has placed a premium on objective truth,[377] the common law system, and especially the U.S. judicial system has "pragmatic truth" as its goal.[378] "The 'pragmatic truth' sought by the adversarial system does not denote apathy towards what really occurred in a transaction . . . ," but the system is willing to compromise objective truth in favor of other values.[379] "Specifically, in the criminal fact-finding context, proponents of the American adversarial system will accept that clear evidence of the defendant's guilt should be suppressed if illegally obtained. In the United States, a premium is placed on individual rights and deterring the police from interfering with them."[380] The adoption of rules and principles that give great importance to individual rights should assist China with greater recognition of these same individual rights.

V. THE UNIFORM PROVISIONS WERE DRAFTED AND WILL BE INTERPRETED WITH CHINESE PRINCIPLES AND SENSIBILITIES

A. The Uniform Provisions Will Be Interpreted with Chinese Sensibilities

1. Similar Rules Are Interpreted Differently in Different Settings

Some have suggested that China should develop a uniquely Chinese code and that the adoption of a partially common law inspired code will undermine the positive and uniquely Chinese characteristics of China's judicial system.[381] This concern is reasonable but not as great as one might initially fear. One reason is that "[e]ven textually identical rules acquire a different meaning and produce different

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rules and the need for consistency in application of rules).

377. *See supra* note 319 and accompanying text.

378. King, *supra* note 28, at 188–89.

379. *Id.*

380. *Id.* at 189.

381. Feng, *supra* note 361, at 190–91. "China cannot and should not substantially reform its judicial system by copying indiscriminately the experience of other systems, including the American system. As part of a legal order, a judicial system does not exist in a vacuum but in the combination of 'political arrangements, social relations, interpersonal practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values.'" Zhong & Yu, *supra* note 86, at 443.

consequences in the changed institutional setting. The music of the law changes, so to speak, when the musical instruments and the players are no longer the same."[382] This is true because, in the new setting, the rules will absorb values different from those of the setting from which the adoption was made.[383] "The social outcome of implementing a codified law is often determined not by the form and language used in the statute or process that executes law but by the people's attitudes, expectations, and value systems regarding what ought to be restrained and what otherwise ought to be rewarded or compromised."[384] One reason the Uniform Provisions, despite mirroring the FRE and principles of U.S. procedure, will be read differently in China is the strong differences between the common and civil law traditions.

2. The Differences Between the Common and Civil Law Are Significant and Entrenched

China's adoption of the Uniform Provisions is one example of the convergence of the common and civil law systems, but the widespread convergence of these systems, which has created similarities of language and procedure, may not be as dramatic as the changes in language and procedure suggest.[385] The "[s]urface similarities should not obscure the fundamental ideological difference in the way each system conceptualizes the law."[386] With the adoption of the Uniform Provisions, China's legal system will show greater similarities with the United States', but the main differences between the two may lay "more in the area of mental process, in styles of argumentation, and in the organization and methodology of law, than in positive legal norms."[387] The absence of a doctrine of precedent and a focused concern for substantive justice also will differentiate these systems.[388]

In addition to the differences between civil and common law systems being significant in ways that will not be altered simply by the adoption of similar language and procedures, these differences also are firmly established and will not be easily replaced.[389]

382. Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839–40 (1997).

383. REN, *supra* note 79, at 7.

384. *Id.*

385. *See generally* Koch, *supra* note 18.

386. *Id.* at 39–40.

387. *See* Phillips, *supra* note 17, at 922. For a fuller discussion of the ways that civil and common law systems differ in methodology and mental process, see *supra* note 385 and accompanying text. Although I have suggested that China's adoption of common law based rules and principles will not destroy what is unique and positive about the system, I do not intend to suggest that the changes are not significant. In the process of adopting common law based rules and procedures, China is changing both "the function of law and the role of the state." Phillips, *supra* note 17, at 920. By incorporating common law principles into its legal system, China is increasing individual rights and, in that sense, limiting state discretion. *See supra* notes 355–360 and accompanying text.

388. Zhong & Yu, *supra* note 86, at 437–38.

389. *See generally* Goldstein, *supra* note 15, at 295–302.

B. The Uniform Provisions Were Drafted to Maintain the Characteristically Civil Law Features of China's Legal System

The differences in the civil and common law traditions are both significant and firmly entrenched, and the drafters of the Uniform Provisions, while adopting common law rules and principles, have maintained the basic structures of their civil law system. One of these many characteristics is the strong role of the civil law judge,[390] and, as discussed earlier, the rules continue the active role of the civilian judge.[391] "Chinese judges may conduct an independent investigation, collect their own evidence, and even hold the hearing at the scene of the incident,"[392] and these practices are retained in the Uniform Provisions.[393] In addition, the Uniform Provisions, while granting attorneys an increased role in the hearing process, continue the civilian practice of the inquisitorial judge.[394] Another typically civil practice adopted in the Uniform Provisions is the tradition of a series of proof-taking hearings,[395] and, again in keeping with the civilian tradition, new evidence may be introduced during the appellate process and actively sought by the appellate court.[396] The rather casual introduction of new evidence at the appellate stage evinces, in contrast to the common law, the low value both the civilian tradition and China's judicial process place upon finality.[397]

C. The Drafters of the Uniform Provisions Maintained the Unique Character of the Chinese Judicial System

The Uniform Provisions' drafters incorporated into the rules the hallmarks of China's civilian tradition and also the unique characteristics of China's judicial system.

Objective justice has been and continues to be the dominant theme of Chinese law, and the drafters of the Uniform Provisions, while increasing procedural rights and procedural justice, have maintained this characteristic.[398] "Because China's civil process is fundamentally an inquisitorial system and its goal is to seek 'objective' rather than 'legal' truth, Chinese judges have more extensive powers than their U.S. counterparts."[399]

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390. "Chinese law allows judges to play a more active role in adjudication than the U.S. Federal Court System permits." Zhong & Yu, *supra* note 86, at 393.

391. *See supra* notes 40–42 and accompanying text.

392. Zhong & Yu, *supra* note 86, at 394.

393. *See infra* notes 398–413 and accompanying text.

394. *See supra* notes 40–42 and accompanying text. "The judge may also question and examine witnesses." Zhong & Yu, *supra* note 86, at 400.

395. *See supra* notes 107–113 and accompanying text. *See also* Kuhn, *supra* note 42, at 1014–17 (describing the difference between common law and civil law in gathering evidence).

396. REN, *supra* note 79, at 48; COHEN, *supra* note 124, at 48–49. *See supra* notes 137–138 and accompanying text.

397. COHEN, *supra* note 124, at 48–49.

398. *See infra* notes 433–437 and accompanying text.

399. Zhong & Yu, *supra* note 86, at 401. "It is fair to state that the Chinese civil procedural system is designed primarily to ascertain the truth. One of the fundamental tasks of the Law of Civil Procedure of the People's Republic of China [ ] is to ensure the courts establish the truth based on the facts." *Id.* at 393.

The Uniform Provisions' drafters have continued the goal of objective justice by incorporating into the provisions the strong judge model of civil law systems.[400]

> The main feature of the inquisitorial system is that judges conduct "an active and independent inquiry into the merits of each case." ... Under the Chinese system ... a judge's adjudication is not limited to the pleadings and arguments, but focuses on actual investigation and study. The adjudication system and the style of work of Chinese courts are intended to be convenient to, maintain close ties with, and serve the masses. Only after the court has discovered the whole truth of the case and collected sufficient evidence can it make its judgment. Chinese courts have the power to acquire other evidence by conducting their own investigations of relevant organization and individuals.[401]

While the parties are given greater procedural rights under the Uniform Provisions, Chinese judges continue to have the strong powers that have been a part of the civilian process and China's process, and these powers support the goal of objective justice.[402]

D. *Discretion in Admitting Evidence*

The Uniform Provisions, while adopting exclusionary rules, also support the goal of objective justice by granting adjudicators discretion in applying the exclusions.[403] This discretion ameliorates what first appears to be a radical departure from China's judicial tradition, and the discretion is written into the Uniform Provisions in several ways.

1. Discretion in Admitting Illegally Obtained Evidence

While providing for the exclusion of illegally obtained evidence,[404] the Uniform Provisions also incongruously allow adjudicators to consider this evidence if needed to ensure a just outcome.[405] In this fashion the Uniform Provisions continue the strong role of the Chinese judge who can not only collect needed evidence but also has great discretion in including all evidence the adjudicator believes necessary to reach objective justice.[406]

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400. *See* Uniform Provisions, *supra* note 3, arts. 110–17 (discussing the authority of the People's Court to investigate and collect evidence under the Uniform Provisions); *see also* Zhong & Yu, *supra* note 86, at 400 (discussing the considerable power and discretion of judges in the Chinese legal tradition).

401. Zhong & Yu, *supra* note 86, at 400–01 (citation omitted).

402. *See infra* notes 433–437 and accompanying text.

403. *See infra* notes 433–437 and accompanying text.

404. *See supra* notes 196–199 and accompanying text.

405. *See supra* notes 196–199 and accompanying text.

406. "Also, a court 'shall investigate and collect' evidence which the court deems necessary to the hearing. If evidence is relevant to any fact that is likely to damage 'the interest of the state, the public interest ... or the lawful' rights and interests of the individual, or relevant to procedural issues in joining third parties, suspending litigation, terminating litigation and recusal, such evidence is necessary to litigation and the court therefore can collect it by itself. The court may also investigate and collect its own evidence if the evidence offered by the parties is conflicting and unascertainable, or in any other situations where the court believes it should collect evidence by itself." Zhong & Yu, *supra* note 86, at 402.

2. Discretion in Admitting Hearsay Not Fitting an Exception

As one would expect from a system that frowns upon the admission of illegal evidence but allows its consideration, the Uniform Provisions, while excluding hearsay, allow for its admission upon the adjudicators' discretion even when the statements are outside the Provisions' codified exceptions.[407] This discretion continues the tradition of judges with extensive powers and great discretion and continues the tradition of finding objective rather than "legal" truth.[408]

3. Ideological Discretion

In addition to the broad admission of evidence, a trait common in civilian systems, Chinese judges continue to use ideological discretion.[409] While in civil cases provisions require judges to base their decisions on the law and facts,[410] the strength of the Party presses Chinese adjudicators to apply the Party's ideological views in reaching their decisions.[411] In criminal cases, social norms and Party ideology likely play a role. This is in part because, even though China's substantive criminal law sets out specific illegal acts, the criminal law also has statutorily allowed adjudicators to find acts criminal that are not specifically set out in the code.[412]

The discretion written into the Uniform Provisions allowing judges to use hearsay outside the established exceptions and illegally obtained evidence in reaching their decisions, along with ideological discretion, are features of the Uniform Provisions that continue the strong role that Chinese judges have had both generally under civilian systems and specifically under the Chinese judicial process.[413]

E. The Application of the Uniform Provisions Will Be Influenced by Chinese Traditions

In addition to the drafters of the Uniform Provisions having written the code to incorporate characteristics of China's judicial system, the Uniform Provisions will be interpreted with Chinese sensibilities. Legal systems have traditions that can be described as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be

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407. *See supra* notes 185–188 and accompanying text.

408. *See* Zhong & Yu, *supra* note 86, at 400–02 (describing the great power and discretion awarded judges, including the ability to question witnesses during trial).

409. *Id.* at 434 ("While Chinese judges are more professional now than at any other time in China's history, it is still not uncommon for a judge to 'use "ideological discretion" to achieve a "correct" ideological result which is consistent with the [Party] policy. This is not only legal in China, but is actually mandated by the 1982 Constitution.'" (citation omitted)).

410. *Id.*; Zhang & Zwier, *supra* note 1, at 432.

411. Zhong & Yu, *supra* note 86, at 434 ("[T]he law is not the only criterion. The courts must accept the leadership of the Party and the guidance of the Party's ideology.").

412. COHEN, *supra* note 124, at 6 ("The substantive criminal law, which was entirely published, increased the magistrate's power over the defendant. In addition to proscribing a broad spectrum of conduct in highly specific terms, the Ch'ing code permitted those proscriptions to be applied by analogy to conduct that was not specifically described.").

413. *See supra* notes 345–354 and accompanying text.

made, applied, studied, perfected, and taught."[414] The words of the Uniform Provisions in many places mirror those of the FRE, but the legal traditions of China will be the construct in which these provisions will be understood and applied.[415] "There is no doubt that the society's desire for modernization will reshape the law and social control mechanisms in China; but the legal culture and traditions will continue to provide much influence in shaping the foundations of modernization and in dictating the direction and magnitude of the modernization process."[416]

1. The Concept of a Harmonious Society

One value that will strongly direct the interpretation of the Uniform Provisions is the Chinese tradition of the harmonious society. I have no simple definition of "harmonious society," but the concept includes a societal preference for both social stability and conformity to social norms.[417] The emphasis on these values contrasts with the post-Lockean western focus on individual rights,[418] and this dichotomy between Chinese and U.S. values is a source for much of the U.S. criticism of Chinese human rights and other policies.[419]

The Chinese concept of a harmonious society comes in large measure from Confucianism.[420] While those of us with a minimal knowledge of Confucianism gleaned perhaps from a college course in Far Eastern Religions may view it as a series of thoughtful aphorisms and reflections on life,[421] a dominant theme of Confucianism is respect for authority, whether governmental or paternal.[422] Confucianism has served to enforce social norms and the preference for social

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414. Sinnott, *supra* note 14, at 276. *See generally id.* at 276–79.

415. *See* REN, *supra* note 79, at 7 ("The social outcome of implementing a codified law is often not determined by the form and language used in the statute or process that executes law but by the people's attitudes, expectations, and value systems regarding what ought to be restrained and what otherwise ought to be rewarded or compromised.").

416. *Id.* at 13. For a general discussion about the difficulties in transplanting legal concepts into China, see generally Peerenboom, *supra* note 2 (exploring the various problems with transplanting legal concepts from other countries into China: the social value of law, economic factors, the "nature of the political regime," ideological barriers, and "lack of institutional capacity" and institutional culture).

417. Kin-man Chan, *Harmonious Society*, *in* INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 821, 821, *available at* http://www.cuhk.edu.hk/centre/ccss/publications/km_chan/CKM_14.pdf.

418. Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 656 (1992). *See supra* notes 319–320 and accompanying text.

419. *See generally* LYNDA S. BELL, ANDREW J. NATHAN & ILAN PELEG, NEGOTIATING CULTURE AND HUMAN RIGHTS (2001).

420. Peerenboom, *supra* note 2, at 825–26. Many Chinese leaders have used Confucian principles instrumentally in promoting government policy. *See* XIAOLIN GUO, REPACKAGING CONFUCIUS: PRC PUBLIC DIPLOMACY AND THE RISE OF SOFT POWER 28–32 (2008) (discussing China's use of Confucianism in "soft power building").

421. *See generally* JAMES R. WARE, THE SAYINGS OF CONFUCIUS (1955).

422. *See* Rita Mei-Ching Ng, *The Influence of Confucianism on Chinese Conceptions of Power, Authority, and the Rule of Law*, *in* 1 CHINESE PERSPECTIVES IN RHETORIC AND COMMUNICATION 45, 46–47 (D. Ray Heisy ed., 2000) (describing the importance of respect for authority in Chinese culture, both within families and between citizens and the government).

stability,[423] and Chinese law has been subservient to this dominant political philosophy, and later to communism.[424]

Several features of China's legal system are the result of the law being subservient to the dominance of political philosophy. Because of the dominance, China has relied more on a system of persuasion and moral example than on positive law.[425] One result of this reliance is the preference, even in the criminal sphere, for mediation as the dominant means of dispute resolution.[426] At one time, this preference for alternative dispute resolution essentially required defendants' confessions as a condition precedent to a finding of guilt.[427] When formal legal proceedings were used, they included a strong judge, which is not only a feature of the civil law system,[428] but also in keeping with the Confucian principle of respect for authority.[429] This respect for authority is certainly one of the reasons for the lack of zealous advocacy in China's legal process.[430] Another result, and perhaps the most troubling, is that in formal criminal proceedings, Chinese law has created repressive criminal procedures, harsh penalties, and little opportunity for effectively presenting a defense.[431] These features, while troubling, show the Chinese preference for social stability and the subservience of individual rights.[432]

2. The Influence of Objective Justice

While U.S. law is based in large measure upon a post-Lockean vision of individual rights,[433] Chinese law focuses on the principal of objective justice; that is, Chinese law is a system that seeks the truth, "while the United States adversarial

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423. COHEN, *supra* note 124, at 5.

424. Peerenboom, *supra* note 2, at 844–49. "[T]raditional Chinese law was mainly an instrument for enforcing status-oriented Confucian social norms and for bending the will of an unruly populace to achieve the purposes of an authoritarian government." COHEN, *supra* note 124, at 5.

425. COHEN, *supra* note 124, at 5.

426. *See* Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 256 (1991) ("In addition to deciding cases by adjudication, courts can and indeed are encouraged to lead the parties to a mediated agreement."); *see also* Ng, *supra* note 422, at 47 ("Confucians were concerned with human affairs, and they preferred the ethical-moral order that was based upon relationships between people rather than upon laws.").

427. *See* Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 LAW & SOC'Y REV. 549, 550 (2003) ("Traditionally, both the legal structure and the wider Chinese culture have actively encouraged, if not almost required, defendants to confess to criminal wrongdoing.").

428. Zhang & Zwier, *supra* note 1, at 455. *See supra* notes 39–41 and accompanying text.

429. *See supra* note 422 and accompanying text. *See also* Russell Menyhart, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture*, 10 IND. J. GLOBAL LEGAL STUD. 157, 186 (2003) (stating that respect for authority is one of the main concepts under Confucianism).

430. Hanson, *supra* note 320, at 251.

431. COHEN, *supra* note 124, at 5. "The harsh treatment of criminals is also the result of cultural factors, including majoritarian preferences for social stability, a tendency to favor the interest of the group over the individual, and the lack of a strong tradition of individual rights. The traditional Chinese emphasis on substantive justice also makes it harder to take the procedural rights of criminals seriously." Peerenboom, *supra* note 2, at 846.

432. Peerenboom, *supra* note 2, at 848 ("Nevertheless, the inquisitorial system, with its longer detention periods that reduce threats to society at the expense of individual liberty, fits more readily with the public's desire for social stability. With its emphasis on truth, it also conforms more closely to the traditional Chinese emphasis on substantive justice than does the adversarial system, which stresses procedural justice and a fair fight between the parties.").

433. *See supra* notes 319–323 and accompanying text.

system will settle for a more pragmatic, or compromised, truth."[434] One can describe the Chinese legal system and inquisitorial systems generally, as "having a hierarchical structure of values. Atop the courts' list is Truth, so only in extreme circumstances will it lose out as the end goal of judicial proceedings."[435] This "inquisitorial search for Truth can be described as teleological. Punishing wrongdoers is good; there is no right system, except that which leads to this good. So, as long as a suspected criminal is found out and punished, the methods of doing so are generally considered right, or just."[436] While the Uniform Provisions are intended to increase individual rights and one expects they will,[437] adjudicators are likely to apply these rules with the principle of objective justice in mind.

3. Resolving Individual Disputes and Not Controversial Social Issues

The U.S. courts, in large measure because of both the individual rights set out in the U.S. Constitution and the Constitution's statement on court jurisdiction,[438] have been enmeshed in complex social issues.[439] To civilians the U.S. courts seem to have lawmaking powers.[440] "Unlike courts in the U.S., civil litigation has not yet been used in the Chinese intermediate courts to settle competing social norms. Courts remain primarily the arbiter of individual disputes rather than a means to resolve controversial social issues or to police illegal corporate conduct."[441] Because of the incorporation of greater individual rights into the Uniform Provisions,[442] Chinese courts may become more involved in making value judgments and interpreting and applying social norms, but because of the historical role of the Chinese courts, complex social issues will likely continue to be the province of the other branches of government.

The drafters of the Uniform Provisions have created a code that will substantially reform China's legal process, but that code has been drafted to and will be interpreted in a way that continues many of the traditions that are part of China's litigation process.

CONCLUSION

I have suggested that China's proposed adoption of a common law based code and common law principles of civil and criminal procedure is incongruous,[443] but it is part of the harmonization of civil law and common law systems that has been taking

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434. King, *supra* note 28, at 187.

435. *Id.* at 188.

436. *Id.*

437. *See supra* notes 377–380 and accompanying text.

438. *See* U.S. CONST. amends. I-XXVII; U.S. CONST. art. 3.

439. *See, e.g.*, McDonald v. City of Chi., 561 U.S. 3025 (2010) (gun rights); Snyder v. Phelps, 131 S.Ct. 1207 (2011) (free speech); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

440. MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 132–49 (1989), *as reprinted in* CHASE, *supra* note 37, at 144–47.

441. Margaret Y. K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 937 (2005).

442. *See supra* notes 377–380 and accompanying text.

443. *See supra* Part IV.

place in other countries.[444] In addition, while the adoption is incongruous in that China, a civil law country, is adopting an evidence code modeled after the FRE and U.S. procedural principles, that adoption serves China's interest in normatively reforming its legal system.

The adoption will serve the reform effort in part because the common law, in addition to its complex system of exclusionary rules, has rules that limit the roles of judges in the civil litigation and criminal prosecution processes and also control attorney behavior within the adversarial model.[445] Because of both the common law jury and the adversarial process, procedural norms are salient in the common law systems and the mirroring of these norms by a civil law system is both reform-oriented and a step towards greater procedural justice. In a system in which judges have great discretion and a society where persons are deferential to authority, the Uniform Provisions should both limit judicial authority and create greater room for the role of counsel in the process.

As the Uniform Provisions are implemented, those hoping for significant normative procedural changes will look to the degree to which the Uniform Provisions move China towards greater procedural justice. Because of the entrenchment of the civil law system,[446] "institutional inertia,"[447] and failed past reforms,[448] one may be cynical about the Uniform Provisions having a significant and positive impact. But given the recent and dramatic reemergence of China, there is reason for optimism that the Uniform Provisions will improve procedural justice while China retains the characteristics of a system that is uniquely Chinese.

444. For a general discussion of the harmonization of civil procedure, see NICOLO TROCKER & VINCENZO VARANO, CONCLUDING REMARKS, THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE 243, 244–63 (2005), *as reprinted in* CHASE, *supra* note 37, at 589–98.

445. *See supra* Part V.

446. *See generally* Goldstein, *supra* note 15, at 295–302 (arguing the differences between civil and common law are extremely entrenched and unlikely to be easily combined).

447. Peerenboom, *supra* note 2, at 844–49. "Some of these problems are due to institutional inertia. For example, the Chinese criminal system has long emphasized confessions. Similarly, long periods of detention, lengthy interrogations, limited participation by legal counsel in the pretrial phase, less reliance on oral evidence at trial, brief trial before a judge without a jury, less concern for evidentiary rules (including greater reliance on hearsay evidence), and narrower exclusions of tainted evidence are all deeply embedded features of the civil law tradition." *Id.* at 847.

448. *Id.* at 823. "The central authorities hailed the changes as a milestone on the road to rule of law and issued the usual notices to the relevant state actors, urgently encouraging them to faithfully implement the reforms. Unfortunately, implementation has proven exceedingly disappointing. Lawyers have been routinely denied access to the clients, prosecutors have refused to turn over exculpatory evidence or provide defense counsel access to all the information in the dossier, defense counsel have been unable to question key witnesses who fail to appear at court, the high rate of confession has reduced the role of lawyers to the seeking of leniency, and allegations of torture remain common." *Id.* at 845.

Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission

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Abstract

The NAFTA Environmental Commission's citizen petition process is an important experiment in "new governance" because of its emphasis on citizen participation, accountability, and transparency as strategies to enhance government legitimacy and improve government performance. Its focus on promoting compliance and enforcement adds to its importance for those interested in those central aspects of the regulatory process. The procedure has had a rocky start in many respects, although there are signs that in some cases it has had a positive impact.

This Article sets forth what we perceive to be the promise of the process, the pitfalls that have undermined its effectiveness to date, and adjustments that would equip it to make a meaningful contribution to North American environmental governance. More generally, the Article provides a framework for evaluating such citizen petition processes and explains how lessons from an analysis of the North American procedure may contribute to assessments of the design and implementation of similar mechanisms in other international and domestic legal regimes.

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INTRODUCTION

The North American Agreement on Environmental Cooperation (NAAEC), the side agreement to the North American Free Trade Agreement (NAFTA), is intended to promote environmental protection throughout North America.[1] The NAAEC contains a series of provisions that highlight the importance the parties attach to effective enforcement of their environmental laws as a linchpin of environmental protection.[2] In addition to the goal of enhanced environmental protection, the NAAEC emphasizes the importance of principles often associated

1. NAFTA and the NAAEC, along with a companion labor agreement, entered into force together in 1994. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC]; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057. A key purpose of the NAAEC is to "foster the protection and improvement of the environment [in North America] for the well-being of present and future generations." NAAEC, *supra*, art. 1(a).

2. *See, e.g.*, NAAEC, *supra* note 1, art. 5 (obligating the parties to effectively enforce their environmental laws in order to achieve high levels of environmental protection and compliance); *id.* art. 6 (requiring the parties to provide private access to remedies); *id.* art. 12 (requiring the parties to report annually on their compliance with enforcement-related obligations). The view that effective enforcement is critical to successful regulation is widely accepted. *See infra* note 47 and accompanying text.

with "new governance," including facilitating public participation and increasing government transparency.[3]

The NAAEC established a new institutional body, the Commission for Environmental Cooperation (CEC or Commission) to advance these objectives.[4] The CEC consists of three key actors: the Council, comprised of the environmental ministers of the three countries; a quasi-independent Secretariat of international civil servants, based in Montreal; and the Joint Public Advisory Committee (JPAC), a body of fifteen citizen representatives, five from each country.[5]

The parties to the NAAEC also created a toolbox for this new set of actors on the North American stage. Perhaps the most important of these new tools is an innovative citizen petition process that can shine a spotlight on the parties' enforcement of their environmental laws.[6] This procedure empowers any resident of any country in North America (Canada, Mexico, or the United States) to file a submission with the CEC Secretariat claiming that a party is failing to effectively enforce one or more of its environmental laws.[7] In effect, this new mechanism was designed to use a "new governance-like" approach (notably substantial citizen engagement and a commitment to transparency) to improve environmental protection by promoting environmental enforcement, a perceived Achilles heel for environmental regulation on the continent, particularly in Mexico.[8]

Since the CEC began to operate in 1994, there have been many appraisals of its performance, several of which have focused on the submission procedure.[9] The three

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3. *See* NAAEC, *supra* note 1, pmbl., arts. 1(h), 4, 5(1)(d)–(e) (expressing an intention to focus on principles beyond simply environmental protection, including "public participation in conserving, protecting, and enhancing the environment," "promot[ing] transparency," and other methods of increasing public access to compliance information). While there are many versions of new governance, three oft-referenced features are citizen empowerment, transparency, and accountability. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 432, 466–70 (2004) (describing the three overarching goals of new governance as "economic efficiency, political legitimacy, and social democracy," which include the above features); Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J.L. & SOC'Y 145, 146–150 (2009) (U.K.) (discussing the characteristics of new governance in the environmental context).

4. NAAEC, *supra* note 1, art. 8.

5. *Id.* arts. 9, 11, 16.

6. *See* CEC, INDICATORS OF EFFECTIVE ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF A NORTH AMERICAN DIALOGUE, at v (1999) (citing the citizen submission process as one of the NAAEC's means of "examining the effectiveness of the Parties' enforcement actions"); David L. Markell, *The Citizen Spotlight Process*, 18 ENVTL. F. Mar./Apr. 2001, at 33 ("The primary purpose of the citizen submission process is to enhance *domestic* environmental enforcement through the placement of an *international* spotlight on such practices.").

7. NAAEC, *supra* note 1, art. 14. Many commentators have characterized the citizen petition process as the central feature of the CEC. *E.g.*, Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 395 (2004) [hereinafter Raustiala, *Police*]; Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 227 (2008).

8. David L. Markell & John H. Knox, *The Innovative North American Commission for Environmental Cooperation*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 1, 4–6, 9 (David L. Markell & John H. Knox eds., 2003) [hereinafter *Innovative CEC*].

9. *See, e.g.*, JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS (2008); GARY CLYDE HUFBAUER &

governments are currently reviewing the procedure again, with a view to considering changes at the Council meeting in the summer of 2012, and the JPAC recently undertook its own review of the procedure.[10]

Our hope in this Article is to contribute constructively to these ongoing reviews. In addition, we want to strengthen the theoretical and empirical foundations for future assessments of this and similar procedures. To that end, we propose a set of metrics for evaluating the process, which are based in part on other citizen petition experiments, the literature on procedural justice, and efforts used to evaluate enforcement performance.[11] We then apply those metrics to the CEC procedure in light of its record over the eighteen years since its adoption. Finally, we offer a series of specific, implementable recommendations for improving the process.[12]

JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 153–98 (2005); TEN-YEAR REVIEW AND ASSESSMENT COMM., TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION: REPORT OF THE TEN-YEAR REVIEW AND ASSESSMENT COMMITTEE (2004) [hereinafter TRAC REPORT]; KEVIN GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND (2004); GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8; LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION (John J. Kirton & Virginia W. Maclaren eds., 2002); JPAC, LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, FINAL REPORT TO THE COUNCIL OF THE CEC (2001), http://www.cec.org/Storage/40/3253_rep11-e-final_EN.PDF [hereinafter JPAC, LESSONS LEARNED]; Joseph DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998). For perspectives of three submitters, one from each North American country, see generally Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004); Randy Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165 (2004); Gustavo Alanís, *Public Participation within NAFTA's Environmental Agreement: The Mexican Experience*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION, *supra*. For a critical article by a former director of the CEC Secretariat's Submissions on Enforcement Matters Unit who is now a member of the JPAC, see Geoff Garver, *Tooth Decay*, 25 ENVTL. F., May/June 2008, at 34.

10. *JPAC Recommends Review of CEC Citizen Submission Process and Examination of the Transboundary Movement of Used Lead-Acid Batteries in North America*, CEC (Dec. 22, 2011), http://www.cec.org/Page.asp?PageID=122&ContentID=25155&SiteNodeID=655.

11. We readily acknowledge the difficulty in assessing the "success" or "effectiveness" of any process. For one helpful synthesis of some of the literature that addresses the complexity of such assessments, see David Marsh & Allan McConnell, *Towards a Framework for Establishing Policy Success*, 88 PUB. ADMIN. 564 (2010). With the caveat in mind that policy evaluation remains a matter of art as well as science, we identify below at least one set of metrics that appears to us to be helpful and consider the process in those terms. *See infra* Part II for a discussion of the challenges in evaluation.

12. As is clear from our discussion, we not only offer our own analysis of this track record, we also endorse and synthesize some of the more significant findings about the process documented in previous work. *See infra* Parts II–V. For better or worse, each of us has devoted considerable scholarly effort to the CEC. *See generally* GREENING NAFTA: THE COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8; John H. Knox, *Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391 (2010) [hereinafter Knox, *Neglected Lessons*]; John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359 (2004) [hereinafter Knox, *Separated at Birth*]; John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001) [hereinafter Knox, *A New Approach*]; David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425 (2010) [hereinafter Markell, *Spotlighting Procedures*]; David L. Markell, *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. NEWS & ANALYSIS 10362 (2007); David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years:*

Our assessment of the CEC citizen petition process should be of value for the design, implementation, and assessment of a wide range of new governance procedures intended to promote citizen participation, including in trade, human rights, and environmental agreements.[13] Thus, the experience of the CEC citizen petition process offers fertile soil for consideration of the promises and pitfalls of the substantial number of such processes that now dot the landscape of international and domestic regimes around the world. Issues that we incorporate in our analysis, such as attention to metrics, procedural fairness (including demarcation of roles), and the need for attention to process design and process implementation, are fundamental to review of such processes. Our case study of the CEC petition process is an attempt to enrich understanding of such processes at a conceptual level through a granular as well as theoretical assessment.

The Article proceeds in five steps. First, we explain why the parties adopted the CEC procedure and describe it in more detail. Next, we identify metrics that we think have significant potential to contribute to informed evaluations of the process. The process's citizen-driven character makes the procedural justice literature particularly relevant as a source of insight for assessing its performance. In addition, because the CEC citizen petition process focuses specifically on enforcement failures, we suggest that evaluations should consider it in that context.

Having provided this conceptual landscape, our third Part applies these metrics to the CEC process, taking into account not only its structural features, but also how its actual operations have evolved since the inception of the process and the track record of use and results that has emerged. We conclude that while the process has demonstrated its effectiveness in some respects, it has not realized its potential. We offer a series of recommendations to substantially improve the process's prospects for success in the future. In Part V, we suggest that the design and implementation issues salient to the CEC's performance are relevant to assessments of the performance of other citizen petition processes as well.

I. THE CEC CITIZEN PETITION PROCESS: ORIGINAL PURPOSES AND PROCESS DESIGN

The NAAEC citizen submission procedure was designed to promote effective enforcement of the environmental laws of the three North American countries.

Lessons About Institutional Structure and Public Participation in Governance, 26 LOY. L.A. INT'L & COMP. L. REV. 341 (2004); David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 667 (2006) [hereinafter Markell, *Citizen Perspectives*]; David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000) [hereinafter Markell, *Citizen Submission Process*]; David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759 (2005); David L. Markell, *The Citizen Spotlight Process*, *supra* note 6.

13. *See, e.g.*, Svitlana Kravchenko, *Giving the Public a Voice in MEA Compliance Mechanisms*, *in* COMPLIANCE AND ENFORCEMENT IN ENVIRONMENTAL LAW: TOWARD MORE EFFECTIVE IMPLEMENTATION 83 (Leroy Paddock et al. eds., 2011) (noting that there is "increasingly significant [public] participation in environmental compliance and enforcement" under multilateral environmental agreements (MEAs)). Such processes also exist domestically, such as the process empowering citizens to petition the Environmental Protection Agency (EPA) to withdraw a state's authorization to administer various environmental regulatory programs. *See infra* note 39 and accompanying text.

During the NAFTA negotiation in the early 1990s, environmental groups and some members of Congress argued that by removing barriers to international trade and investment, NAFTA would lead U.S. and Canadian companies to move to Mexico to take advantage of its lower environmental standards.[14] As written, Mexican environmental laws were comparable to those of the other countries, but they were far less consistently enforced.[15] Environmental advocates believed that corporations' search for "pollution havens" in Mexico would harm the Mexican environment, contribute to the loss of U.S. and Canadian jobs, and pressure all three countries to weaken their environmental laws.[16]

To address these concerns, the U.S. government proposed the NAAEC, a side agreement to NAFTA that would improve environmental enforcement in Mexico as well as the other two countries.[17] As eventually negotiated by the three NAFTA parties, the agreement requires each country to "effectively enforce its environmental laws,"[18] provides for cooperation and assistance to that end,[19] and establishes two formal compliance mechanisms. One is a traditional intergovernmental method of dispute resolution that allows any party to seek arbitration over whether another party has engaged in a "persistent pattern of failure . . . to effectively enforce its environmental law."[20] In principle, the arbitration may eventually lead to sanctions against the accused party.[21]

The other compliance mechanism is a procedure through which any person or non-governmental organization in any of the three countries may file a submission with the CEC Secretariat claiming that one of the NAFTA parties is failing to effectively enforce its environmental law.[22] If a submission meets certain requirements, then the Secretariat may prepare an investigative report, dubbed a "factual record," on the allegations.[23] Although a factual record cannot result in a legally binding judgment of non-compliance, the drafters hoped that shining a spotlight on a failure to effectively enforce domestic law would encourage better enforcement.[24] The procedure could have a specific deterrent effect—to avoid negative publicity, a government might respond to a submission by increasing its enforcement efforts in the area identified—and a more general effect, in that governments might try to reduce the number of submissions by raising their overall

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14. *Innovative CEC*, *supra* note 8, at 4–6.

15. *Id.*

16. *Id.*; Wold, *supra* note 7, at 203. The history of the NAAEC negotiation has been recounted many times. *E.g.*, FREDERICK MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 165–204 (1998).

17. Raymond MacCallum, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 395 (1997).

18. NAAEC, *supra* note 1, art. 5(1). To avoid backsliding, the agreement also requires each party to "ensure that its laws and regulations provide for high levels of environmental protection." *Id.* art. 3.

19. *E.g.*, *id.* art. 10(3)–(4) ("The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations . . . .").

20. *Id.* arts. 22–24.

21. *Id.* arts. 32–36 (stating that a panel may impose an action plan, monetary assessment, or even suspension of NAFTA benefits).

22. NAAEC, *supra* note 1, arts. 14–15. *See generally* Knox, *A New Approach*, *supra* note 12, at 26–32; Markell, *Citizen Submission Process*, *supra* note 12, at 550–54.

23. NAAEC, *supra* note 1, art. 15.

24. *See* Knox, *A New Approach*, *supra* note 12, at 120 (discussing "the sunshine effect resulting from identification of cases of ineffective enforcement").

level of enforcement. Increased attention to a problem could also facilitate other NAAEC mechanisms: its cooperative programs could be brought to bear on situations identified by submissions and, if submissions identified a "persistent pattern" of ineffective enforcement, a NAAEC party could seek sanctions through intergovernmental arbitration.

For submissions to result in factual records, they must clear several hurdles. First, to be considered by the Secretariat at all, a submission must satisfy certain minimal requirements, including that it "provides sufficient information to allow the Secretariat to review the submission."[25] If the Secretariat determines that the submission is admissible, it must then decide whether to request a response from the party concerned in light of four additional factors: (1) whether "the submission alleges harm to the person or organization making the submission," (2) whether it "is drawn exclusively from mass media reports," (3) whether it "raises matters whose further study in this process would advance the goals of this Agreement," and (4) whether "private remedies available under the Party's law have been pursued."[26]

Even submissions that merit a response may receive an investigation of their claims only if they survive two further steps. First, the Secretariat must decide, in light of the submission and the party's response, whether a factual record is warranted.[27] The NAAEC does not indicate which factors the Secretariat should consider at this stage, beyond stating that the Secretariat may not proceed if the state concerned advises the Secretariat that the matter is the subject of a "pending judicial or administrative proceeding."[28] The Secretariat has indicated that it takes into account "whether, after considering the Response in light of the Submission, there are any 'central open questions' which a factual record could shed light on."[29] Second, if the Secretariat believes that an investigation should take place, it must ask the Council for approval.[30] For the Secretariat to proceed, at least two of the three members of the Council must vote to authorize preparation of the factual record.[31] Again, the NAAEC does not specify the factors the Council should take into account.

Once a report is authorized, the Secretariat may draw on a wide range of sources, including the parties and the public, as well as develop its own information.[32] The Secretariat submits the factual record in draft to the Council and the state parties have an opportunity to comment on it, although they cannot require the

25. NAAEC, *supra* note 1, art. 14(1)(c). Other requirements include that the submission "a) is in writing in a language designated by that Party in a notification to the Secretariat; b) clearly identifies the person or organization making the submission; . . . d) appears to be aimed at promoting enforcement rather than at harassing industry; e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and f) is filed by a person or organization residing or established in the territory of a Party." *Id.* art. 14(1).

26. *Id.* art. 14(2).

27. *Id.* art. 15(1).

28. *Id.* art. 14(3)(a).

29. *Skeena River Fishery*, SEM-09-005, Determination Pursuant to Article 15(1) that Development of a Factual Record Is Not Warranted, para. 34 (Aug. 12, 2011). This and all other documents filed with respect to submissions are available on the CEC website, see *Registry of Citizen Submissions*, CEC, http://www.cec.org/Page.asp?PageID=751&ContentID=&SiteNodeID=250&BL_ExpandID=156.

30. NAAEC, *supra* note 1, art. 15(1)–(2).

31. *Id.* art. 15(2).

32. *Id.* art. 15(4).

Secretariat to change its analysis.[33] The Council does have another point of control, however: it decides, again by a two-thirds vote, whether to make the factual record public.[34] After publication, the CEC makes no effort to follow up the factual record or to evaluate its effects.

It should be noted that the original concern that gave rise to the emphasis on promotion of environmental enforcement has proved to be largely without foundation. Studies have indicated that the marginal costs of abating pollution in Canada and the United States are not high enough to justify decisions by corporations to move their operations to Mexico in search of lower-cost environmental standards.[35] Nevertheless, the emphasis on effective enforcement of environmental laws remains of critical importance to the promotion of more general goals, notably sustainable development.[36]

II. SITUATING THE CEC CITIZEN PETITION PROCESS WITHIN A LARGER FRAMEWORK OF CITIZEN PETITION PROCESSES AND ENFORCEMENT MECHANISMS AND THE SEARCH FOR APPROPRIATE METRICS

The CEC citizen petition process is only one of many similar mechanisms that international and domestic governance bodies have created in recent years.[37] At the local level, for example, thousands of police review boards have been created to monitor the actions of police departments.[38] At the national level, Congress

33. *See id.* art. 15(5)–(6) ("The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.").

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

35. *See* GALLAGHER, *supra* note 9, at 25–33 (detailing empirical evidence showing that costs to reduce pollution are so small that they are not a major factor corporations consider when choosing a location); Secretariat of the CEC, FREE TRADE AND THE ENVIRONMENT: THE PICTURE BECOMES CLEARER 13 (2002) (discussing studies showing that "[t]he importance of environmental regulations in determining where investments are located is, on average, secondary when compared with other factors"); Knox, *Neglected Lessons*, *supra* note 12, at 398 n.38 (explaining that firms may be too large to move, or alternately, have incentives to move other than environmental regulations); HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 37 (WTO Publications 1999), *available at* www.wto.org/english/news_e/pres99_e/environment.pdf (discussing a study finding "no systematic evidence that a good environmental performance comes at the expense of reduced profitability").

36. Knox, *Neglected Lessons*, *supra* note 12, at 408–12.

37. Beyond citizen petition processes of the CEC variety, there has been a great deal of emphasis given to citizen participation in recent years. *See, e.g.*, Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE: INT'L J. OF POL'Y, ADMIN. & INSTITUTIONS 529, 530, 532–33 (2009) (describing how citizen recommendations influenced government transparency during the early Obama Administration); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–75 (1997) ("Greater [citizen] participation is generally viewed as contributing to the democracy, and also to the quality, of decisions by otherwise out-of-touch bureaucrats." (footnote omitted)). *See also generally* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon & Odus V. Elliott eds., 2002) (surveying "the new governance" framework).

38. NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 288–89 (Wesley Skogan & Kathleen Frydl eds., 2004) ("External citizen oversight agencies have been growing steadily since the late 1970s."). The National Research Council suggests that "[t]here is very limited evidence regarding the effectiveness of citizen oversight agencies.... The published literature generally fails to take into account the multiple goals of oversight agencies; these

incorporated a petition process into the cooperative federalism structure it created for the major environmental regulatory statutes, empowering citizens who think a state is doing a poor job of administering an environmental law to petition the Environmental Protection Agency (EPA) to investigate the state's performance and potentially withdraw state authorization.[39] Internationally, a wide range of petition processes have been created under a variety of environmental, human rights, labor, and trade regimes.[40]

The growing number of these procedures suggests a heightened interest in providing citizens with a formal entry point into governance. More generally, it raises several questions of fundamental importance to contemporary governance. Whether characterized as "fire alarms" or in some other way,[41] the creation of citizen petition processes suggests a belief that allowing individuals and groups to voice their views through such procedures may improve the way our polity functions. For example, a citizen petition process may enhance how government institutions operate by providing them with information they may have overlooked or not been aware of otherwise.[42] Similarly, it may strengthen ties between government and the people it serves and thereby enhance legitimacy.[43] Some argue that it can help to keep government honest, to the extent that government decision-makers may be subject to capture by regulated parties.[44] On the other hand, a poorly functioning citizen petition process may undermine effective governance. For instance, it may

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include . . . conducting . . . investigations of citizen complaints and building citizen confidence in the complaint process." *Id.* at 289.

39. *See, e.g.*, 33 U.S.C. § 1342(c) (2010) (authorizing public hearings for the Clean Water Act National Pollutant Discharge Elimination System program). The EPA has adopted regulations to implement this process. 40 C.F.R. §§ 123.61–123.64 (2010).

40. Following in the footsteps of NAFTA and the NAAEC, several other U.S. free trade agreements have established citizen submission procedures. *E.g.*, Dominican Republic-Central America-United States Free Trade Agreement, ch. 17, Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text; United States-Peru Trade Promotion Agreement, ch. 18, Apr. 12, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; United States-Colombia Trade Promotion Agreement, ch. 18, Nov. 22, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text; United States-Panama Trade Promotion Agreement, ch. 17, June 28, 2007, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text. Monitoring mechanisms have long been an integral part of human rights and labor institutions, and many of them are triggered by submissions filed by individuals or groups. *See generally* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 2004). The best known and most active is probably the procedure established by the First Optional Protocol to the International Covenant on Civil and Political Rights. Such procedures are much rarer in international environmental law, with the important exception of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, a European agreement that includes a robust system of complaint-based monitoring. *See* Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements Compliance Mechanisms*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 10 (2007) ("[C]itizens and NGOs have gained the formal right to file complaints and to participate in preparation of national reports.").

41. Raustiala, *Police*, *supra* note 7, at 390.

42. David L. Markell, *"Slack" in the Administrative State and Its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 10 (2005).

43. *Id.*

44. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685, 1776–77 (1975).

divert attention from more important to less important issues[45] and leave citizens feeling frustrated rather than empowered.[46] For our purposes, a key takeaway point is that assessments of the process should account for its citizen-driven character.

A second critical aspect of the CEC petition process is its focus on a particular part of the regulatory process: effective enforcement. Enforcement has long been viewed as an essential part of regulatory governance. As Senator Joseph Lieberman observed during one of many oversight hearings Congress has held on EPA enforcement, without enforcement "most of the rest of environmental protection lacks meaning, lacks teeth, lacks reality."[47] Reflecting the importance of enforcement, the EPA has structured its organization to include an office dedicated to it, the Office of Enforcement and Compliance Assurance (OECA).[48] The EPA has developed a number of metrics for evaluating the performance of its enforcement programs and the performance of enforcement programs of EPA-authorized state environmental regulatory regimes.[49] The CEC procedure's underlying purpose of bolstering domestic enforcement is a second key feature for assessments of its performance.

Four metrics stand out as especially promising tools to assess performance of the citizen petition process in light of its citizen-driven character and its focus on the effectiveness of government enforcement.[50] One is the extent to which citizens are

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45. Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 WIDENER L. REV. 63, 71 (2003).

46. The text is intended to be illustrative, not comprehensive. There are a wide range of purported benefits and risks associated with citizen engagement beyond those listed. Regarding the latter, for example, some have raised concerns about the lack of accountability of NGOs. *See, e.g.*, Ann M. Florini, *The Third Force: The Rise of Transnational Civil Society* 232–33 (2000) ("[T]roubling questions about legitimacy and accountability remain. Transnational civil society networks by definition operate at least in part beyond the reach of the specific governments, businesses, and individuals they most affect."). Others have identified downsides from "too much transparency." Coglianese, *supra* note 37, at 536.

47. *Oversight of the Environmental Protection Agency's Enforcement Program: Hearings Before the Subcomm. on Toxic Substances, Environmental Oversight, Research, and Development of the Comm. on Environment and Public Works*, 101st Cong. 2–3 (1989) (statement of Sen. Joseph I. Lieberman); *see also* Michael M. Stahl, *Enforcement in Transition*, ENVTL. F. Nov./Dec. 1995, at 19 ("The use of enforcement authority to ensure compliance with environmental statutes is one of the most important aspects of the current national dialogue about the scope of government regulation and the future of ecological protection.").

48. The OECA shares enforcement authority with the EPA regional offices. EPA OFFICE OF INSPECTOR GEN., EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT, Report No. 12-P-0113, at 1 (Dec. 9, 2011). The EPA has revamped the structure of the OECA over time. *See id.* at 3 (describing changes being made to the OECA).

49. For a recent review of the EPA's efforts to establish and implement enforcement measures, see *id.* at 6–8. The EPA's State Review Framework has been a significant initiative to create greater consistency in such measures. *See Compliance & Enforcement Through State Government: State Review Framework*, U.S. ENVTL. PROT. AGENCY (Jan. 23, 2012), http://www.epa.gov/compliance/state/srf (identifying "recommendations for improvement to ensure fair and consistent enforcement and compliance programs across the states"). For another review of "the state/EPA enforcement relationship," see generally CLIFFORD RECHTSCHAFFEN & DAVID MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 98–124 (2003).

50. The four metrics we discuss in the text seem especially salient to us in evaluating the performance of a citizen-driven petition process that focuses on effective enforcement. Additional metrics could provide additional insights. Ten years ago, one of us applied a multifactor assessment framework for supranational adjudication developed by Laurence Helfer and Anne-Marie Slaughter to the CEC submission procedure, modifying it to reflect the way that the CEC mechanism relies on non-adversarial monitoring and managerial methods to promote compliance. *See generally* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997);

using it.[51] If citizens are using a process frequently, that is a sign of vitality, at least in the eyes of key stakeholders. Growth in use over time is another signal that a process has value. We suggest that there is a presumption of failure for a citizen petition process that citizens do not use, or that they use less and less as time passes.[52]

A second measure involves operation of the process and, in particular, treatment of petitions. In our view, the work on procedural justice is particularly helpful in assessing how petitions have been treated.[53] That literature suggests that it is important to consider the "procedural justness" of a procedure as well as the outcomes it produces.[54] Procedural justice includes features such as the nature of opportunities to participate in a process, whether the authorities are considered to be neutral, the extent to which people trust the authorities, and the degree to which people are treated with dignity and respect during the process.[55] We also consider

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Knox, *A New Approach*, *supra* note 12. More generally, the literature on "policy success" contains many formulations concerning appropriate measures of performance, while acknowledging that to some degree the "criteria for establishing success are contested." Marsh & McConnell, *Towards a Framework for Establishing Policy Success*, *supra* note 11, at 565, 567; *see, e.g.*, Allan McConnell, *Policy Success, Policy Failure and Grey Areas In-Between*, 30 J. PUB. POL. 345, 346, 349–50 (2010) (suggesting that there are at least three forms of policy success—process success, program success, and political success—but also noting that "[a]ssumptions of what constitutes success take many forms" and "[t]he policy sciences lack an over-arching heuristic framework which would allow analysts to approach the multiple outcomes of policies in ways that move beyond the often crude, binary rhetoric of success and failure"). To some extent metrics must be contextual. While the metrics we use in this Article are obviously most relevant to other processes that incorporate important roles for citizens and focus on enforcement, they may be helpful in other contexts as well. For example, procedural justice concepts have been applied to a broad range of decision-making processes. *See, e.g.*, Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 538 (2010) (assessing the application of procedural justice in land-use regulation through factors such as "overall acceptability ex ante; robustness; consensus; procedurality; and their ranking on nonfairness issues").

51. We have urged citizen use as a performance measure for citizen petition processes in previous work. Markell, *Spotlighting Procedures*, *supra* note 12, at 433; Knox, *Separated at Birth*, *supra* note 12, at 379–80; Markell, *Citizen Perspectives*, *supra* note 12, at 665–76.

52. Of course, a default presumption that citizen use of a citizen petition process is an important performance measure may be overcome by other indicia of performance. For example, a single use of the process, or a handful of uses, may have enormous value in terms of environmental protection or government enforcement policies and practices. Or, similarly, even limited use may somehow dramatically transform citizen confidence in governance efforts and in compliance with environmental requirements more generally. As a general matter, however, we suggest that it is reasonable to consider the extent to which citizens are using a citizen-driven petition process in evaluating the success of such a process.

53. *See generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103 (1988) (measuring citizens' satisfaction with legal procedure). For two previous efforts that use procedural justice concepts to assess the CEC process, see Markell, *Citizen Perspectives*, *supra* note 12, at 682–707 (containing a detailed assessment of the CEC citizen petition process using the lens of the procedural justice literature), and Markell & Tyler, *supra* note 12, at 22–27 (comparing the CEC process and several other citizen-driven processes from a procedural justice perspective).

54. TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 75–102 (1997).

55. *Id.*; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 117 (2000) (finding that "people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair"). There are different formulations for evaluating the procedural justice of a process, and it also appears that the precise criteria and the weight they receive vary depending on the circumstance; the discussion in the text is intended to provide a sense of the kinds of features that may be important in assessing procedural justice.

the issue of timeliness in reviewing treatment of petitions.[56] It seems obvious that a procedure that does not reach timely results is likely to be considered less effective and attractive than one that does, all else remaining equal.

A third measure involves outcomes or results. Ultimately, a key purpose of the citizen petition process is to spotlight ineffectual government enforcement in order to prod government enforcers to improve performance in this arena. Thus, the key question here is what impact, if any, the CEC citizen petition process has had on the effectiveness of domestic enforcement.

Defining effective government performance, and effective enforcement in particular, is no simple task.[57] Wrestling over the years with the substantial challenge of developing effective measures,[58] the EPA has identified and used several, both to evaluate its own enforcement personnel and to assess state enforcement performance.[59] For our purposes, the key point is that the effects the CEC citizen petition process has had on government enforcement performance represent an important metric for evaluating the value of the procedure. For example, have submissions led parties to change their enforcement policies and practices (for example, by increasing the number of inspections or the number of enforcement actions), contributed to improved compliance with the law, or helped produce reductions in amounts of pollution released into the environment? Again, the key

56. The issue of timeliness does not necessarily fit neatly into the procedural justice literature, but procedural justice and timeliness both relate to treatment of petitions, and for our organizational purposes, we believed it sensible to treat them together for that reason.

57. A recent Canadian Auditor General audit noted that "[m]easuring the performance of environmental enforcement programs is difficult." OFFICE OF THE AUDITOR GEN. OF CAN., REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: CHAPTER 3, ENFORCING THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999, at 20 (2011). In 1993, Congress adopted the Government Performance and Results Act (GPRA) in an effort to "shift the focus of government performance and accountability away from . . . the activities being performed to the *results* and *outcomes* of those activities," and it "modernize[d]" this Act in 2010. OFFICE OF THE INSPECTOR GEN., EPA'S PROGRESS IN USING THE GOVERNMENT PERFORMANCE AND RESULTS ACT TO MANAGE FOR RESULTS 1 (June 13, 2001) [hereinafter EPA'S PROGRESS]. *See generally* GPRA of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993); GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011). There have been a variety of evaluations of implementation of the GPRA over the years, including of the EPA's progress. *See, e.g.*, EPA'S PROGRESS., *supra* (discussing EPA efforts to implement the GPRA).

58. The EPA is not the only agency to tackle this challenge. The Organisation for Economic Co-operation and Development (OECD) has developed a list of measures, which includes compliance rates, repeat violations and duration of non-compliance, pollution releases, and changes in environmental quality, among others. OFFICE OF THE AUDITOR GEN. OF CAN., *supra* note 57, at 21 (Dec. 2011) (citing EUGENE MAZUR, OUTCOME PERFORMANCE MEASURES OF ENVIRONMENTAL COMPLIANCE ASSURANCE: CURRENT PRACTICES, CONSTRAINTS AND WAYS FORWARD, OECD ENVIRONMENTAL WORKING PAPER NO. 18 (2010)).

59. For a recent assessment, see EPA OFFICE OF INSPECTOR GEN., *supra* note 48. For book-length treatment of the effort to develop and implement performance measures for environmental enforcement and compliance promotion efforts, among other topics, see generally RECHTSCHAFFEN & MARKELL, *supra* note 49 (noting that one typology of enforcement measures divides them into four categories: inputs (the level of resources invested), outputs (the level of activity, such as numbers of inspections undertaken or cases brought), outcomes (penalty dollars assessed, value of injunctive relief imposed, etc.), and environmental results (changes in environmental conditions resulting from enforcement activity)). In its most recent annual report on enforcement and compliance results, the EPA focuses primarily on outputs (levels of activity) and outcomes (results from enforcement cases), while also including one measure of environmental or public health benefits estimated to result from such cases. EPA, FISCAL YEAR 2011 EPA ENFORCEMENT & COMPLIANCE ANNUAL RESULTS (Dec. 8, 2011).

question is whether the CEC process has spurred changes in enforcement practices and, if so, whether these changes have improved the quality of the environment.[60]

Finally, we suggest the value of a somewhat less obvious metric: the effect the process has had on the public. A key purpose of the NAAEC is to promote constructive civic engagement in environmental issues across the continent.[61] Beyond participation in the citizen petition process itself, therefore, we believe it worth asking whether the process has contributed to deeper or more extensive and helpful civic engagement. Establishing parameters for such a metric is obviously a challenging task. We nevertheless include such a metric because we think that, despite the obvious challenges, it is worth considering given the attention that civic participation has attracted and the importance the drafters of the NAAEC (and many other legal regimes) attach to it. We also are aware of the extraordinary declines in trust in governance institutions in recent years and believe that ideas to reverse or at least slow these declines, including outside-the-box performance measures of this sort, are extremely important for those interested in bolstering a vibrant civil society.[62] We offer below some observations about performance of the process in light of this metric that we do not view in any way as complete, but which we hope enrich the conversation about the value of including a performance metric of this sort and the viability of doing so.

Our experience with the CEC process suggests another element of the analytical frame beyond the search for value and the appropriate metrics for conducting this search: the extent to which it is possible to separate the contribution of process design and process implementation to performance successes and deficiencies. This strikes us as an important, albeit difficult, inquiry. Taken to the extreme, design flaws may be fatal to a process's prospects, especially if redesign is unlikely. In contrast, stumbles in implementation may be much easier to fix.[63] As we indicate below, although there are certainly structural problems with the CEC procedure, we believe that shortcomings in its implementation are responsible for many of the failures ascribed to it. Thus, the challenge is to identify these

60. Alternatively, the process could have value even if it did not lead to such changes if it caused the government to explain why its extant enforcement approaches were reasonable.

61. NAAEC, *supra* note 1, art. 1(h) (listing as an "objective" of the NAAEC "promot[ing] transparency and public participation in the development of environmental laws, regulations and policies").

62. *See, e.g.*, Lydia Saad, *Americans Express Historic Negativity Toward U.S. Government*, GALLUP (Sept. 26, 2011), http://www.gallup.com/poll/149678/americans-express-historic-negativity-toward-government.aspx (reporting a September 2011 Gallup poll finding that "[a] record-high 81% of Americans are dissatisfied with the way the country is being governed, adding to negativity that has been building over the past 10 years"); Stanley B. Greenberg, *Why Voters Tune Out Democrats*, N. Y. TIMES, July 31, 2011, at SR1 (finding that trust in government has diminished significantly, noting that "[j]ust a quarter of the country is optimistic about our system of government—the lowest since polls by ABC and others began asking this question in 1974").

63. Analysis of this question in the CEC context may shed light on an issue that has captured attention on a broader scale: whether NGOs tend to allocate a disproportionate portion of their energy and resources in efforts to influence policy design and give implementation issues relatively short shrift. *See, e.g.*, David G. Victor et al., *Introduction and Overview*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 1–2 (David G. Victor et al. eds., 1998) (noting that although "most analysts . . . focus on . . . [treaty] formulation, negotiation, and content[,] . . . it is not legislation alone, but rather the implementation process that determines whether a commitment has any practical influence" (citations omitted)).

shortcomings in implementation, and then to identify, adopt, and implement strategies that will address them.

III. APPLYING THE METRICS TO THE CEC CITIZEN PETITION PROCESS

Part III explains how the procedure has worked in practice over the eighteen years since its creation and evaluates the procedure in light of the four metrics identified in Part II: success at attracting submissions; timeliness and fairness; effectiveness at meeting its environmental aims; and promotion of public involvement generally.

A. *The Procedure in Practice*

The CEC received its first submission in 1995.[64] Through the end of 2011, it has received 78 submissions, an average of 4.6 a year.[65] The number of submissions filed each year has varied from 2 to 7. More than half of the submissions—40—have been directed against Mexico, 29 against Canada, and only 10 against the United States.[66] As Chart One indicates, the number of submissions received annually against Canada and Mexico has not greatly changed over time, but the number against the United States dropped precipitously after the first few years.

Chart One: Number of Submissions by Year[67]

	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11
CN	0	2	5	1	0	1	1	2	2	3	0	1.5	3	1	2	2	2
MX	0	1	2	5	0	3	2	3	4	3	3	4	2	2	3	2	1
US	2	1	0	1	2	2	0	0	0	1	0	0.5	0	0	0	0	0
Total	2	4	7	7	2	6	3	5	6	7	3	6	5	3	5	4	3

The submissions, nearly all of which have been submitted by environmental groups, have identified a wide range of alleged failures of enforcement on the part of the three countries, including failures to enforce laws concerning air and water pollution, environmental impact assessment, toxic waste, and protection of endangered species. Chart Two sets out the disposition of the submissions received through 2011.

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64. *Spotted Owl*, SEM-95-001, Submission, at 13 (June 30, 1995).

65. The average has stayed between 4 and 5 since the early years of the procedure. Markell, *Citizen Perspectives*, *supra* note 12, at 667. When not otherwise noted, figures are calculated from information available at the CEC *Registry of Citizen Submissions*, *supra* note 29.

66. One of the submissions was directed at both Canada and the United States. *Devils Lake*, SEM-06-002, Submission, at 1 (March 24, 2006).

67. *Devils Lake*, SEM-06-002, which was directed at Canada and the United States, is treated as 0.5 against each. *Id.*

Chart Two: Disposition of Submissions

Submissions against . . .	Canada	Mexico	US	Total	Pending
Filed	28.5	40	9.5	78	
Response Requested	14	27	6	47	5
Factual Record Requested	11	13	2	26	1
Factual Record Authorized	9	8	2	19	2
Factual Record Published	7	7	1	15	3

Most have not cleared the first three hurdles: the Secretariat decisions on whether a submission is admissible, merits a response by a party, and warrants a factual record. The Secretariat has found about one-third of the submissions inadmissible or otherwise not meriting a response. Of those to which party responses have been requested, the Secretariat has decided not to recommend factual records for almost 40%.[68] In sum, and taking into account submissions that have been removed for other reasons (for example, withdrawal by the submitters), the Secretariat has recommended a factual record in 26 cases, about one-third of all the submissions it has received. For reasons that are unclear, the percentage of submissions resulting in a Secretariat recommendation has decreased in recent years. The last Secretariat recommendation for a factual record was in May 2008; since then, it has decided not to recommend a factual record for any of the 6 submissions that have reached this stage of the procedure.

Of the 26 Secretariat recommendations for factual records, 21 have resulted in Council decisions through the end of 2011.[69] The Council has approved 19 Secretariat requests for factual records and denied only 2. The Council's apparent deference to the Secretariat is deceiving, however. Of the 19 Council approvals, more than half have narrowed the scope of the factual record.[70]

The Secretariat has prepared 15 factual records, 7 each on Canada and Mexico and 1 on the United States, and it is currently preparing 3 more, 1 on each country.[71] Each report, which is usually more than 100 pages, reviews in great detail the law and facts pertaining to the situation identified by the submission. Factual records do not

68. Of the 47 submissions found to merit a response, 2 were withdrawn by the submitters before a Secretariat decision on whether to request a factual record, 1 was consolidated with another, and 1 still awaits a decision. Of the remaining 43, the Secretariat decided to request a factual record for 26, or 60.5%.

69. Of the other 5, 2 were withdrawn by the submitters before the Council made a decision, 1 was consolidated by the Council with another submission, and 2 await Council decision.

70. *See infra* Part III.B.2.b.

71. The nineteenth approval was later terminated after the submitters withdrew their request for a factual record. *See infra* note 117.

include judgments as to whether a party has failed to effectively enforce its environmental law, although it is possible to draw conclusions on that issue from the information presented. To date, the Council has decided to publish every factual record, albeit sometimes after a lengthy delay.

B. *Applying the Metrics*

In this section, we apply the four metrics previously identified: (1) Is the procedure attracting submissions? (2) Is it timely and procedurally fair? (3) Is it effective? (4) Is it promoting public involvement?

1. Is the procedure attracting submissions?

For the United States, the answer is clearly no. Only 2 submissions concerning U.S. law have been filed since 2000, and none since 2006.[72] In contrast, the procedure has received a steady flow of submissions directed at Canadian and Mexican enforcement. This difference is often attributed to the greater availability of domestic legal remedies in the United States than in Canada and Mexico.[73] Many of the submissions directed at Mexico, in particular, concern failures to enforce domestic law against individual projects.[74] Canadian environmental groups, in contrast, have often used the procedure to allege program-wide failures to enforce. Such a "programmatic" submission resulted in the first Canadian factual record, in *BC Hydro*, a comprehensive look at environmental damage caused by hydroelectric dams in British Columbia.[75] The submitters found the report valuable[76] and it was followed by a series of similar submissions, several of which have also resulted in factual records.[77]

It has been suggested that the CEC procedure may be a useful way to draw attention to similar problems in the United States,[78] and two programmatic submissions have been targeted at the U.S. government.[79] Although they both resulted in Secretariat recommendations for factual records, the Council narrowed the first so drastically as to make it virtually worthless,[80] and the second has yet to

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72. The first was *Coal-fired Power Plants*, SEM-04-005, which was approved for a factual record that has not yet been published; the second was *Devils Lake*, SEM-06-002, which was also directed against Canada and was dismissed by the Secretariat as inadmissible in August 2006.

73. *E.g.*, Christensen, *supra* note 9, at 171–72; GRAUBART, *supra* note 9, at 143.

74. *See, e.g.*, *Cozumel*, SEM-96-001 (proposed terminal for tourist ships); *Aquanova*, SEM-98-006 (shrimp farm); *Metales y Derivados*, SEM-98-007 (abandoned lead smelter); *El Boludo Project*, SEM-02-004 (gold mine); *ALCA-Iztapalapa*, SEM-03-004 (footwear materials factory); *Coronado Islands*, SEM-05-002 (natural gas terminal).

75. *BC Hydro*, SEM-97-001, Final Factual Record (June 11, 2000).

76. Christensen, *supra* note 9, at 174–75.

77. *E.g.*, *BC Mining*, SEM-98-004; *BC Logging*, SEM-99-004; *Ontario Logging*, SEM-02-001.

78. Marirose J. Pratt, *The Citizen Submission Process of the NAAEC: Filling the Gap in Judicial Review of Federal Agency Failures to Enforce Environmental Laws*, 20 EMORY INT'L L. REV. 741, 772–76, 783 (2006); Wold et al., *supra* note 9, at 423–24.

79. *See, e.g.*, *Migratory Birds*, SEM-99-002 (1999); *Coal-fired Power Plants*, SEM-04-005 (2004).

80. *See* Wold et al., *supra* note 9, at 425–29 ("The Council's decision to narrow the scope of the factual record prevented the Secretariat from obtaining exactly the type of information submitters sought in order to achieve positive environmental results from the process.").

result in a factual record more than seven years after it was filed.[81] When it is eventually published, the report could conceivably reawaken interest in the relevance of the procedure to the United States.

That is an optimistic perspective. A more negative one would warn that the interest of Canadian and Mexican environmental groups in the procedure may be declining. Although it is too early to identify a clear trend, there are some troubling signs. As Chart One indicates, the 7 total submissions received by the CEC in 2010–11 were the fewest filed in any consecutive two years since 1995–96. The procedure received only 1 submission directed at Mexico in 2011, the lowest number since 1999, and the 3 submissions concerning Mexico filed in 2010–11 were the fewest in any two consecutive years since 1999–2000. The Canadian environmental group that has filed the most submissions resulting in factual records withdrew its most recent submission after the Council narrowed its scope in December 2010.[82] And at a JPAC meeting in the fall of 2011, submitters complained about a variety of problems with the procedure, including lengthy delays, Council interference, and the lack of follow-up of factual records.[83] In response to a survey of submitters asking whether the mechanism "needs to be revised and amended," almost every submitter said yes.[84]

2. Is the submissions procedure timely and fair?

The short answer is no. The submission procedure has been strongly criticized on these grounds almost from its inception, and the criticisms have grown louder and more justified over time.

a. Timeliness

In response to early criticisms that the procedure was taking too long, the JPAC conducted a thorough review that concluded that the Secretariat should take no more than six months from the time a submission is filed to the decision whether to request a factual record, the Council should take no more than three months to decide whether to authorize it, and the Secretariat should take no more than thirteen months to plan and develop the factual record.[85] Emphasizing the importance of completing factual records "while the conditions that prompted their development are still current and when the available policy options have not been narrowed by the passage of time," the JPAC said that the entire process should be completed within no more than two years.[86] The Council agreed, stating that it is "commit[ted] to

81. *Coal-fired Power Plants*, SEM-04-005.

82. *Species at Risk*, SEM-06-005, Withdrawal (Jan. 17, 2011).

83. JPAC, *Re: Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America*, Advice to Council 11-04 (Dec. 7, 2011), http://www.cec.org/Page.asp?PageID=122&ContentID=25148&SiteNodeID=656&BL_ExpandID=1 [hereinafter JPAC, Advice to Council 11-04].

84. JPAC, *Summary of Responses to the JPAC Questionnaire on Submitters' Experiences with the Citizen Submission Process Under NAAEC Articles 14 and 15*, CEC, 10, http://www.cec.org/Storage.asp?StorageID=10150 [hereinafter JPAC, *Summary of Responses*]. Of 24 responses, 92% answered "Yes," none answered "No," and 8% answered "Don't Know."

85. JPAC, LESSONS LEARNED, *supra* note 9, at 15.

86. *Id.*

making best efforts, and to encourage the Secretariat to make best efforts, to ensure that submissions are processed in as timely a manner as is practicable, such that ordinarily the submission process will be completed in no more than two years following the Secretariat's receipt of a submission."[87]

In fact, "[t]he average length of time from the filing of a submission to the issuance of a factual record . . . [has been] 4.5 years."[88] Worse, the process has become much slower over time. The first 3 factual records, published in 1997, 2000, and 2002, were published about two years and nine months, on average, after the submission was filed.[89] The next 6, all of which were published in 2003, took nearly five years, and the most recent 6, published from 2004 to 2008, averaged almost exactly five years.[90] In recent years, the procedure has slowed even more. Of the 3 factual records being prepared when this Article went to press, 2 were filed more than seven years ago and the third was filed *nine* years ago.[91]

Much of the delay and, in particular, the recent increase in the delay, is due to the Council. From 1996 to 2004, the Council considered 16 recommendations for factual records and took, on average, about five months to decide whether to authorize them.[92] While that fell short of the JPAC's suggested standard of three months, it was far more timely than what has come since. Since 2004, the Council has decided whether to approve only 5 recommendations, and its decisions have come, on average, more than *two years* after the Secretariat recommendations. The trend is worsening: the 3 most recent decisions were made 36, 30, and 39 months after the Secretariat recommendations.[93] These are the longest delays in CEC history, but the record is already certain to fall again. Two pending Secretariat recommendations for factual records have been awaiting Council decision since May 2008 and April 2007, nearly four and five years ago.[94]

The Council has also taken longer to decide whether to make the final factual records public.[95] Here, the NAAEC provides a specific guideline: that the Council

87. CEC Council, *Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned Regarding the Articles 14 and 15 Process*, Res. 01-06 (June 29, 2001), http://www.cec.org/Page.asp?PageID=122&ContentID=1127&SiteNodeID=272.

88. Markell, *Spotlighting Procedures*, *supra* note 12, at 442. The average length of time between points in the submission process is calculated from information available at the CEC *Registry of Submissions*, *supra* note 29.

89. Markell, *Spotlighting Procedures*, *supra* note 12, at 443 (showing that the average number of days between submission and publication was 1006).

90. *Id.* (showing that the average number of days was 1784 and 1825, respectively).

91. *Quebec Automobiles*, SEM-04-007, Acknowledgement (filed November 2004); *Coal-fired Power Plants*, SEM-04-005, Acknowledgement and Annex (filed September 2004 and, after revision, January 2005); *Lake Chapala II*, SEM-03-003, Acknowledgement (filed May 2003).

92. The Council reviewed 16 Secretariat recommendations in this period. The calculation includes the decision in *Oldman River II* to delay consideration of the request while a domestic case was pending. *Oldman River II*, SEM-97-006, Council Res. (May 16, 2000). It does not include the eventual decision by the Council to authorize a factual record in that case. *Id.* Council Res. (Nov. 16, 2001).

93. *Lake Chapala II*, SEM-03-003 (recommendation made on May 18, 2005, and decision made on May 30, 2008); *Coal-fired Power Plants*, SEM-04-005 (recommendation made on Dec. 5, 2005, and decision made on June 23, 2008); *Species at Risk*, SEM-06-005 (recommendation made on Sept. 10, 2007, and decision made on Dec. 20, 2010).

94. *Ex Hacienda II*, SEM-06-003, Recommendation (May 12, 2008); *Hermosillo II*, SEM-05-003, Recommendation (Apr. 4, 2007).

95. The NAAEC requires the Secretariat to submit a draft factual record to the Council and the governments to provide any comments within 45 days. NAAEC, *supra* note 1, art. 15(5). Reception of

must decide "normally" within 60 days after the Secretariat submits the report.[96] Except for the decision on the very first factual record, which exceeded that limit by about a month, the Council complied with the 60-day rule for the first 10 factual records, through 2004. For the 5 more recent factual records, the Council has violated the rule every time, averaging more than five months and twice taking seven.[97]

The Secretariat has also contributed to the delays. Recall that the 2001 JPAC report suggested that the Secretariat should take no longer than 13 months to prepare a draft report.[98] Of the first 9 factual records—those issued before 2004—only 2 met that standard, but they generally came close, averaging fewer than 16 months.[99] The next 6, issued from 2004 to 2008, averaged more than 27 months, an increase, on average, of almost a year.[100] Again, the situation has gone from bad to worse: the factual records currently in preparation are going to exceed the previous averages by far. The Secretariat presented 1 of the 3 pending reports, *Quebec Autos,* in draft to the Council in March 2011, nearly *five years* after it was authorized in June 2006.[101] (Making the situation worse, the Secretariat has yet to present the final report to the Council despite having received government comments in May 2011.)[102] Meanwhile, the Secretariat has spent more than three years each on the other 2 pending factual records, *Lake Chapala II* and *Coal-fired Power Plants*, without presenting a draft to the Council.[103]

The Secretariat's delays appear to be extending to earlier stages in the submission procedure as well. Since the beginning of the process, it has taken, on average, under five months to decide whether to request a response from a party.[104] For the submissions filed in 2010 and 2011, it has taken an average of almost one year to decide whether a response is warranted.[105]

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these comments has not been a significant source of delay.

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

97. *See Tarahumara*, SEM-00-006 (nearly five months, from July 26, 2005, to December 21, 2005); *Ontario Logging*, SEM-02-001 (seven months, from June 20, 2006, to January 31, 2007); *Pulp & Paper*, SEM-02-003 (seven months, from June 28, 2006, to January 31, 2007); *ALCA-Iztapalapa II*, SEM-03-004 (over six months, from November 16, 2007, to May 30, 2008); *Montreal Technoparc*, SEM-03-005 (nearly three months, from March 28, 2008 to June 23, 2008).

98. JPAC, LESSONS LEARNED, *supra* note 9, at 15.

99. *See Cozumel*, SEM-96-001 (8.75 months); *BC Hydro*, SEM-97-001 (21 months); *Rio Magdalena*, SEM 97-002 (16 months); *Oldman River*, SEM-97-006 (17 months); *BC Mining*, SEM-98-004 (16.5 months); *Aquanova*, SEM-98-006 (15.75 months); *Metales y Derivados*, SEM-98-007 (16.5 months); *Migratory Birds*, SEM-99-002 (12.5 months); *BC Logging*, SEM-00-004 (17 months).

100. *See Molymex II*, SEM-00-005 (24 months); *Tarahumara*, SEM-00-006 (23.5 months); *Ontario Logging*, SEM-02-001 (27.75 months); *Pulp & Paper*, SEM-02-003 (27.5 months); *ALCA-Iztapalapa II*, SEM-03-004 (26.5 months); *Montreal Technoparc*, SEM-03-005 (39.5 months).

101. *See Quebec Automobiles*, SEM-04-007 (factual record authorized in June 2006, and draft presented in March 2011).

102. *Id.* (showing in timeline dates comments received from Mexico and Canada).

103. *See Lake Chapala II*, SEM-03-003, Resolution (May 30, 2008); *Coal-fired Power Plants*, SEM-04-005, Resolution (June 23, 2008).

104. This number includes the time the Secretariat spent considering filings before making a decision either to reject a submission under Article 14 or to request a response from a government, on average, for each of the 72 cases in which the Secretariat made such a decision. This average is calculated from information available at the CEC *Registry of Submissions*, *supra* note 29.

105. This average includes a submission that has been awaiting a decision for nearly two years. *Alberta Tailings*, SEM-10-002 (filed April 2010). To arrive at an average time, this submission was treated

Unsurprisingly, when the 2011 JPAC survey asked submitters whether they believed that the time the CEC took in their case was "a reasonable amount of time for processing submissions," 22 of 23 respondents answered no.[106] These lengthy and growing delays must make the procedure less attractive to potential submitters.[107] Why should anyone try to use a mechanism for investigating cases of ineffective enforcement if the mechanism will not produce a result for many years?

b. Fairness

Studies of the submission procedure have consistently concluded that the Secretariat makes objective decisions based on a careful review of the submissions and the relevant factors set out in the NAAEC.[108] The criticisms of the procedure as unfair have been directed at the governments, both in their individual capacities and acting collectively through the Council.

The procedure is structurally biased in favor of the governments. It provides them rights that the submitters do not have: the governments may comment on a draft factual record before it is finalized; they may decide whether it may be published at all; and, most important, they may choose not to authorize it in the first place.[109] Moreover, the governments have used their powerful position to tilt the playing field even more in their favor. Individual governments have sometimes declared part or all of their responses to be confidential[110] or failed to cooperate with Secretariat inquiries in the course of preparing the factual record.[111] Acting together in the Council, they have often delayed making decisions, as explained above, so that factual records are finally released many years after the submissions on which they were based.[112]

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as if it were decided in March 2012. Obviously, the average will rise the longer it remains undecided.

106. JPAC, *Summary of Responses*, *supra* note 84, at 7.

107. *See* Garver, *supra* note 9, at 38 (discussing current examples of extreme delay).

108. *See, e.g.*, GRAUBART, *supra* note 9, at 127–28 ("The secretariat has followed a principled and professional standard of review, which includes . . . justifying decisions according to legal provisions."); TRAC REPORT, *supra* note 9, at 45 ("Submitters and outside observers by and large believe that the Secretariat has performed its obligations well."); Wold et al., *supra* note 9, at 421–23 ("Scholars, NAAEC review committees, and members of the public are virtually unanimous in applauding the Secretariat's rigorous review of submissions for eligibility and for determination on whether a factual record is warranted."); CEC, FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE § 3.3.3 (1998) ("While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.").

109. *See supra* notes 26–34 and accompanying text; *see also* NAAEC, *supra* note 1, arts. 39, 42 (giving government parties the ability to prevent disclosure of certain confidential and sensitive information).

110. *See, e.g.*, *Crushed Gravel in Puerto Penasco*, SEM-05-001, Party Response, at 2 (May 12, 2005) (requesting that a portion be kept confidential); *Metales y Derivados*, SEM-98-007, Final Factual Record, at 9 n.1 (Feb. 7, 2002) (stating that Mexico had designated its response confidential and later rescinded the designation).

111. *See, e.g.*, *Tarahumara*, SEM-00-006, Final Factual Record, at 83–84 (July 26, 2005) (describing Mexican failure to provide information about enforcement actions); Christensen, *supra* note 9, at 175 (describing Canadian refusal to cooperate with Secretariat investigation in *BC Hydro*, SEM-98-001).

112. The Council also has potential points of control over the Secretariat's decisions through its appointment of the Secretariat's Executive Director and its authority to veto staff appointments by the Executive Director. NAAEC, *supra* note 1, art. 11(1), (3). The NAAEC requires each party to "respect the international character of the responsibilities of the Executive Director and the staff and . . . not seek to influence them in the discharge of their responsibilities," *id.* art. 11(4), and the Secretariat's conduct of

Although the Council has only rarely exercised its authority to deny a Secretariat's request for a factual record, it has often narrowed the scope of the factual record.[113] In some cases, the narrowing left intact the bulk of the Secretariat recommendation, but in others, the Council decision vitiated the report before it was prepared. A striking example is the *Migratory Birds* case, in which the submission alleged a systematic failure on the part of the United States to enforce its laws prohibiting the taking of migratory birds by logging activities.[114] The Secretariat recommended a factual record to look at the broad allegations, which potentially concerned thousands of takings.[115] The Council directed the Secretariat to investigate only two specific instances mentioned in a footnote in the submission, with the result that the Secretariat spent months carrying out a formal investigation into the alleged deaths of a few birds.[116] Similarly, the most recent Council authorization of a factual record, the December 2010 decision in the *Species at Risk* case, restricted the Secretariat proposal so much that the submitter withdrew the submission on the ground that the limits imposed by the Council would "frustrate objective evaluation of Canada's failure to enforce" its law.[117]

Each of these actions has been criticized by the JPAC, independent reviewers, environmental groups, and academics, and in response the Council has sometimes backed down. For example, in the spring of 2000, the Alternative Representatives—lower-ranking government officials appointed by the Council ministers to represent them between Council sessions—denied one Secretariat request for a factual record, indefinitely postponed consideration of another, and proposed that the Council establish a governmental working group to oversee the Secretariat's procedure for preparing factual records.[118] The decisions provoked a surge of criticism, and at its June 2000 meeting, the Council ministers abandoned the idea and instead gave the JPAC a greater role in advising the Council on the procedure.[119] After the Council narrowed the scope of several factual records in November 2001, including the *Migratory Birds* submission against the United States described above, there was another wave of criticism, culminating in a 2003 "advice letter" from the JPAC "strongly recommend[ing] that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat."[120] Again, the attention

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its responsibilities under the procedure has appeared to be independent of the Council's influence. *See* Markell, *Citizen Perspectives*, *supra* note 12, at 693 ("[T]he Secretariat's track record in performing these central functions in the citizen submission process certainly does not reflect that the Secretariat has 'rubber-stamped' submissions.").

113. *E.g.*, *Species at Risk*, SEM-06-005, Council Res. (Dec. 20, 2010); *Lake Chapala II*, SEM-03-003, Council Res. (May 30, 2008); *Montreal Technoparc*, SEM-03-005, Council Res. (Aug. 20, 2004); *Oldman River II*, SEM-97-006, Council Res. (Nov. 16, 2001); *Aquanova*, SEM-98-006, Council Res. (Nov. 16, 2001); *Migratory Birds*, SEM-99-002, Council Res. (Nov. 16, 2001); *BC Mining*, SEM-98-004, Council Res. (Nov. 16, 2001); *BC Logging*, SEM-00-004, Council Res. (Nov. 16, 2001).

114. *Migratory Birds*, SEM-99-002, Submission, at 4 (Nov. 17, 1999).

115. *Id.*, Recommendation, at 2, 11 (Dec. 15, 2000).

116. Garver, *supra* note 9, at 36; Wold et al., *supra* note 9, at 426–37.

117. *Species at Risk*, SEM-06-005, Withdrawal, at 2 (Jan. 17, 2011).

118. Knox, *A New Approach*, *supra* note 12, at 71–73.

119. *Id.* at 71–73. One result was JPAC, LESSONS LEARNED, *supra* note 9, a report published the following year.

120. JPAC, *Re: Limiting the Scope of Factual Records and Review of the Operation of CEC Council Resolution 00-09 Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Advice to Council 03-05 (Dec. 17, 2003), http://www.cec.org/Page.asp?PageID=122&Content

seemed to have some effect: in 2004, the Council approved the preparation of a programmatic factual record examining claims that Canada failed to effectively enforce its protections for migratory birds against logging operations throughout Ontario.[121] In 2008, a coalition of environmental groups and academics signed a letter complaining about the undue Council delays in making decisions on Secretariat recommendations,[122] and the Council shortly thereafter approved two factual records that had been pending since 2005.[123]

As this brief history indicates, however, after the negative attention from the JPAC and outside reviewers decreased, the governments returned to the same types of conduct, including narrowing the scope of factual records and delaying their approval and publication. As described above, delays in Council decisions are at all-time lengths, and the Council's most recent decision on a Secretariat recommendation, in December 2010, narrowed the scope of the submission so much that the submitter withdrew it.[124]

Another round of external pressure is currently building. The JPAC held a public meeting on the submission procedure in November 2011 at which the participants "overwhelmingly voiced concern that the SEM process is not being administered consistent with the spirit and intent of the NAAEC."[125] In December 2011, the JPAC informed the Council that "citizens and environmental groups who have tried to put the process to good use are finding it increasingly difficult to justify using the process because the considerable effort required to prepare submissions does not reliably lead to timely and useful information," and stated that it "supports the public's perspective that the SEM process is, for the most part, unduly time-consuming and that the Parties are insufficiently responsive to the information it produces."[126]

The Council has established a "SEM Modernization Task Force," composed of government officials, which is preparing recommendations on the procedure for Council action at its meeting in the summer of 2012.[127] The JPAC has advised the Council that "its focus, through the SEM Modernization Task Force, should be on the timeliness and accessibility of the process, on giving more deference to the

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ID=1274&SiteNodeID=295&BL_ExpandID= [hereinafter JPAC, Advice to Council 03-05]; *see generally* David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8, at 274 (analyzing the November 2001 decisions to examine the NAAEC's "allocation of authority issue").

121. *Ontario Logging*, SEM-02-001, Council Res. (Mar. 12, 2004).

122. The letter also criticized other Council actions, including the narrowing of Secretariat recommendations. Letter from Ecojustice to Hon. John Baird, Minister of the Env't, Les Terrasses de la Chaudière, Adm'r Stephen L. Johnson, EPA, and Juan Rafael Elvira Quesada, Secretario, Secretaría de Medio Ambiente y Recursos Naturales (Apr. 23, 2008), http://www.ecojustice.ca/media-centre/media-release-files/CEC.LTR.INTERFERFENCE.FINAL.2008.04.23.pdf/at_download/file. One of the authors was among the signatories.

123. *Lake Chapala II*, SEM-03-003, Council Res. (May 30, 2008); *Coal-fired Power Plants*, SEM-04-005, Council Res. (June 23, 2008).

124. *Species at Risk*, SEM-06-005, Withdrawal (Jan. 17, 2011).

125. JPAC, Advice to Council 11-04, *supra* note 83.

126. *Id.*

127. Letter from Michelle DePass, Alternate Rep. for the U.S., Council of the CEC, to Dr. Irasema Coronado, JPAC Chair, CEC (Aug. 21, 2011), http://www.cec.org/Storage/136/16075_Council_to_JPAC_Aug_21_2011-lr.pdf.

Secretariat's independent recommendations and interpretations in the process, and on follow-up to factual records."[128]

3. Is the procedure effective at closing the gap between laws on the books and in practice?

In some cases, the submission procedure has certainly resulted in greater attention to environmental problems and increased levels of environmental protection. While it may seem counterintuitive to suggest that a process that does not result in a legally binding decision can have much effect, increased transparency and public attention can cause governments to change their behavior, and studies have demonstrated that such changes have occurred as a result of CEC factual records.

In one study of the effectiveness of the procedure, Jonathan Graubart looked at all submissions filed before 2003 and followed their development through 2006.[129] Of the 10 factual records published to that point, he found that 7 had resulted in "significant" success, which he defined as "actual policy changes."[130] The other 3 had had "modest" success, defined as "formal advancement of the cause onto the government's agenda."[131] In another study, which concentrated on factual records concerning Mexico, Jonathan Dorn identified specific improvements in 4 of the 6 he reviewed.[132] For example, the very first factual record, in the *Cozumel* case, resulted in a reduction in the size of the proposed project and the establishment of a marine park.[133] Later reports have spurred greater attention to the environmental effects of dams in British Columbia,[134] reduced the environmental impacts of a commercial shrimp farm in the Mexican state of Nayarit,[135] helped to lead to the cleanup of an abandoned lead smelter in Tijuana,[136] and contributed to greater efforts by Mexico to reduce illegal logging in the Sierra Tarahumara.[137]

128. JPAC, Advice to Council 11-04, *supra* note 83.

129. GRAUBART, *supra* note 9, at 123.

130. *Id.* at 124–25.

131. *Id.*

132. Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 130–138 (2007). The four cases were *Cozumel*, SEM-96-001, *Aquanova*, SEM-98-006, *Metales y Derivados*, SEM-98-007, and *Tarahumara*, SEM-00-006. The seventh factual record concerning Mexico, *ALCA-Iztapalapa II*, SEM-03-004, was published after Dorn's study. Earlier, a review of the CEC's performance in its first decade, conducted by outside experts appointed by the CEC Council, also identified concrete improvements resulting from several of the first factual records, and concluded that it "has had a modest but positive environmental impact." TRAC REPORT, *supra* note 9, at 46.

133. Dorn, *supra* note 132, at 131; Alanís, *supra* note 9, at 186.

134. Christensen, *supra* note 9, at 174–75 (discussing *BC Hydro*, SEM-97-001, Final Factual Record (June 11, 2000)).

135. Dorn, *supra* note 132, at 133–34 (discussing *Aquanova*, SEM-98-006, Final Factual Record (May 5, 2003)); TRAC REPORT, *supra* note 9, at 46.

136. Dorn, *supra* note 132, at 134–35 (discussing *Metales y Derivados*, SEM-98-007, Final Factual Record (Feb. 7, 2002)).

137. Dorn, *supra* note 132, at 137–38 (discussing *Tarahumara*, SEM-00-006, Final Factual Record (July 26, 2005)).

The procedure may contribute to environmental protection by providing more information about environmental problems; validating the submitters' concerns through careful, objective investigation; and increasing pressure on the government to justify its inaction. As Graubart emphasizes, these benefits do not operate in isolation; rather, they provide opportunities that "require political mobilization from activists to be of use."[138] In every successful case, the submitters "expended considerable effort to promote their cause, substantiate their allegations, mobilize supporters, and lobby governments."[139] In other words, the factual record is useful as part of a broader campaign. As a result, it may be difficult to distinguish the particular effects of the factual record from other efforts by the submitters and their allies.[140] The problem is made more difficult by the lack of any organized follow-up by the CEC itself. Nevertheless, submitters have often pointed to the factual records as providing an important contribution to the final result.[141]

4. Has the submission procedure led to greater public involvement generally?

Although the exact effects are hard to determine, it seems likely that the procedure has contributed to greater public participation in international and domestic institutions in three ways. First, the procedure provides opportunities for environmental activists from different countries to work together. Many of the submissions are filed by multiple environmental groups, including organizations from more than one country.[142] In the words of one Canadian submitter, the procedure helps to build international coalitions "by providing a clear and visible effort that other organizations can support."[143] Moreover, environmental groups have cooperated in activities related to the procedure, such as JPAC meetings, and joint letters advocating changes in the procedure.[144]

Second, the submission procedure may strengthen environmental activists' domestic networks. On the basis of interviews with Mexican activists, Minsu Longiaru concluded that many of them "reported greater success in expanding their domestic [than their transnational] ties through the CEC."[145] In particular, the organizers of the two *Lake Chapala* submissions "used the citizen [submission] process to help form two civil society coalitions, each of which roughly corresponded to the two CEC petitions."[146] Even though the Secretariat dismissed the first submission as inadmissible, "activists considered it successful because they were able to use the process to expand their domestic networks."[147] The environmentalists used the submission to draw attention to the problem within Mexico, and the "[w]idespread media attention" the submissions received "caused Lake Chapala

138. GRAUBART, *supra* note 9, at 131.

139. *Id.* at 123.

140. *See, e.g.*, Dorn, *supra* note 132, at 137–38 (explaining the difficulty of determining the contribution of the *Tarahumara* factual record to the greater Mexican attention to illegal logging).

141. Alanís, *supra* note 9; Christensen, *supra* note 9, at 174, 183–84; Dorn, *supra* note 132, at 133–34.

142. *See* Christensen, *supra* note 9, at 173, 178 (describing petitions filed by coalitions of NGOs).

143. *Id.* at 183.

144. *See supra* notes 118–126 and accompanying text.

145. Minsu Longiaru, *The Secondary Consequences of International Institutions: A Case Study of Mexican Civil Society Networks and Claims-Making*, 37 CAL. W. INT'L L.J. 63, 100 (2006).

146. *Id.* at 101.

147. *Id.* at 103.

activists to be invited by other Mexican groups to speak at their events and to network and build alliances with them."[148] In turn, these ties enabled the groups to make the second submission stronger, resulting in its approval for a factual record.[149]

Finally, and most generally, scholars have suggested that the procedure, together with other elements of the CEC, have raised the expectations of Mexican citizens as to the proper levels of transparency and public participation in public institutions. Greg Block, a former official of the CEC, has argued that this has helped to lead to demands by Mexicans for greater openness and transparency in their domestic environmental agencies in particular.[150] And Jonathan Graubart suggests that Mexican activists have used the procedure to help them try to develop "a legal rights culture."[151]

IV. IMPROVING THE SUBMISSION PROCEDURE

The previous Part suggests that the procedure has real strengths. It can increase public participation and help to improve environmental protection in North America. But it also has serious and growing weaknesses. In particular, it seems to have become less timely and less fair in recent years, largely as a result of actions by the governments acting through the Council. In this Part, we propose improvements to the submission procedure and briefly explain how each proposal would strengthen the procedure in light of the metrics identified above. The proposals are principally aimed at improving the procedure's timeliness, fairness, and effectiveness. We believe that a more timely, fair, and effective procedure would also attract more submissions and promote wider public participation.[152]

Our list does not include proposals that would require amending the NAAEC. For example, we do not suggest, as some have, that the submission procedure should result in binding decisions or that individuals and environmental groups should be able to trigger the arbitration process under Part V of the agreement.[153] Although such changes might make the submission procedure more effective, we believe that it is unrealistic to expect the governments to renegotiate the NAAEC. Fortunately, substantial improvements to the procedure are possible without such amendments.

The proposals are directed at four stages: (a) from the initial filing of a submission to the Secretariat decision whether to recommend a factual record; (b) from the Secretariat recommendation to the Council decision whether to approve it; (c) from the Council authorization to the publication of a factual record; and (d) actions concerning a factual record taken after publication.

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148. *Id.* at 102.

149. *Id.* at 108; *Lake Chapala II*, SEM-03-003.

150. Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 516 (2003).

151. GRAUBART, *supra* note 9, at 142.

152. Besides strengthening the procedure itself, another way to encourage submissions might be for the CEC to more actively disseminate information about the procedure to potential submitters. On the other hand, after eighteen years of operation, the procedure is well known among North American environmental groups, which have been the main sources of submissions.

153. *E.g.*, Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 COL. L. REV. 443, 495–96 (2005).

A. *From Filing a Submission to Recommending a Factual Record*

1. *The Secretariat should update the guidelines for using the procedure.* In general, one of the strengths of the procedure is its accessibility to submitters. In the 2011 JPAC poll of submitters, 95% of the respondents indicated that it was easy to gather information about the procedure.[154] Almost all of the submitters consulted the "Guidelines for Submissions on Enforcement Matters," a short guide prepared by the CEC, and all of those who did found it helpful.[155] Nevertheless, the Guidelines, which were adopted in 2000, could be brought up to date to reflect Secretariat decisions that have clarified some points of the submission procedure. For example, the Guidelines should set out the factors the Secretariat takes into account in deciding whether to recommend a factual record.[156]

2. *The Secretariat must meet reasonable deadlines.* As noted above, the JPAC suggested in 2001 that the Secretariat should take no longer than six months to decide whether a submission warrants a factual record. Experience with the procedure since then has demonstrated that this timeline is probably unrealistic. Delays may result from causes beyond the Secretariat's control, such as insufficient information provided by the submitters or late responses from governments. Even apart from such factors, the Secretariat has never been able to meet this deadline consistently.

The Secretariat has taken, on average, about four and one-half months to decide whether to request a response from a government.[157] That number may be misleadingly high, however, inflated by delays in submissions filed in the first years of the procedure and in the most recent two years. For submissions filed from 1999 to 2008, the Secretariat averaged less than three months to make its decision. After a response is received, the Secretariat has taken an average of nearly eleven months to decide whether to recommend a factual record.[158] Here, too, the average has dropped after the early years. For all submissions filed after 1998, the average is just under nine months.[159]

It seems reasonable to expect the Secretariat to aim to improve on these averages except in unusual cases. Reasonable deadlines, therefore, would require the Secretariat to spend no more than two months to decide whether a response is warranted and no more than eight months on whether to recommend a factual

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154. JPAC, *Summary of Responses*, *supra* note 84, at 2. Of the twenty-four respondents, none said that it was difficult; three did not answer.

155. *Id.* at 3. *See* SECRETARIAT OF THE CEC, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 11–24 (2007), http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf (providing the "Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" developed by the CEC).

156. *See, e.g.*, *Skeena River Fishery*, SEM-09-005, Determination Pursuant to Article 15(1) that Development of a Factual Record Is Not Warranted, paras. 34–47 (Aug. 12, 2011) (providing the reasoning for its determination that a factual record need not be developed).

157. *See supra* note 104 and accompanying text.

158. This is an average of the time the Secretariat has taken to make its 42 decisions whether to request a factual record, with the exception of one outlier, *Rio Magdalena*, SEM-97-002. The decision in that case took three and one-half years, nearly one and one-half years longer than the next longest decision. Including *Rio Magdalena* would raise the average by almost one month.

159. This calculation does not include *Wetlands in Manzanillo*, SEM-09-002, a pending case in which the Secretariat has yet to make a recommendation more than a year after the government response.

record. If necessary in exceptionally difficult cases, the Secretariat could extend these deadlines by up to one-half, allowing it to take three months and one year, respectively, for these decisions.

3. *Government responses should be timely and public.* For the most part, governments have filed responses no more than two or three months after receiving the Secretariat request. Governments should strive to meet the earlier, two-month deadline, taking three months only if necessary. Governments should also refrain from declaring all or significant parts of their submissions to be confidential.[160]

4. *Submitters should have the right to reply to government responses.* A fundamental point of unfairness in the procedure is that governments can respond to submissions but submitters do not have a similar opportunity to respond to governments. Submitters should have a period of time, no more than two months, to file a written reply.[161]

B. *From Recommendation to Authorization of a Factual Record*

1. *The Council should always authorize Secretariat recommendations.*[162] The problem at the root of the criticisms of the procedure as unfair is the dual role that the submission procedure assigns the governments: as party to a dispute and as judge of the same dispute.[163] The procedure threatens governments with embarrassment. That is not a byproduct of the procedure; it is how the procedure is supposed to work. The potential embarrassment of a report showing that a government is failing to enforce its environmental law effectively is the engine that drives the government to explain its actions and improve its performance.[164] However, the dual role of the governments on the Council allows them to respond to this incentive by weakening the process that produces the embarrassing reports rather than by strengthening their laws.

This problem is made worse by the adversarial approach the governments have usually taken to submissions. Rather than treating submissions as an indication of a problem or potential problem and offering to work cooperatively to resolve it, they

160. *See* JPAC, LESSONS LEARNED, *supra* note 9, at 11, 17 (discussing the need to limit confidentiality to encourage public participation and for a timely disclosure of non-confidential information); Yang, *supra* note 153, at 493 (proposing "formalizing and opening up the factual record development process").

161. The JPAC has recommended a 30-day submitter response period. JPAC, LESSONS LEARNED, *supra* note 9, at 16.

162. This suggestion has been made many times. *See* Wold, *supra* note 7, at 249 ("As many have proposed, the easiest way to transform the citizen submission process would be to eliminate the governments' role in determining whether a factual record is warranted.").

163. *See* JPAC, Advice to Council 03-05, *supra* note 120 (referring to "an emerging perception of Council being in conflict of interest"); Letter from Jean Perras, Chair, Canadian Nat'l Advisory Comm., to Hon. David Anderson, Minister of the Env't, Les Terrasses de la Chaudière, Hon. André Bolsclaire, Ministre d'État à l'Environnement et à l'Eau, Gouvernement du Québec, Hon. Lorne Taylor, Minister of Env't, Gov't of Alberta, Hon. Steve Ashton, Minister of Conservation, Gov't of Manitoba (Mar. 17, 2003), http://www.naaec.gc.ca/eng/nac/adv032_e.htm (noting "the potential for an apparent conflict of interest") [hereinafter Canadian NAC Advice Letter].

164. Of course, embarrassment is not an *inevitable* product of the procedure. Not all submissions are well-grounded, and even those that point to failures to enforce may give the government an opportunity to provide a reasonable explanation why effective enforcement has not occurred.

have generally acted as if they are defendants accused of violating the law.[165] Then, after filing their brief contesting the claimant's allegations, they move to the judge's chair and decide whether to allow the case to proceed.[166] While they have usually resisted the temptation to dismiss the indictment altogether, so to speak, they do often reduce the charge by narrowing the scope of the recommended factual record, delaying its authorization, or both.

The best way to avoid this problem is for the governments to get out of the business of deciding which reports to authorize and which to avoid. It is not necessary to amend the NAAEC to achieve this result. The Council could adopt a resolution authorizing in advance all factual records proposed by the Secretariat. The resolution would not bind the Council from changing its mind in the future. But it would represent a political commitment that would be difficult to reverse, especially with the passage of time. For the United States, it would reflect the commitment it made shortly after the entry into force of the NAAEC, in an Executive Order, that "[t]o the greatest extent practicable, . . . where the Secretariat of the [CEC] informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record."[167]

In addition to strengthening the procedure, such a decision would benefit governments. Summoning the political will to adopt a blanket authorization would be difficult but, once the decision was taken, it would spare the government representatives to the CEC the need to confront repeatedly, into the indefinite future, similarly difficult political decisions.[168] If the Council removed itself from the procedure, then governments would remain free to criticize reports, but they would no longer face the decision whether to approve reports as judges that they opposed as defendants. Moreover, the Council could combine this step with a quid pro quo, in the form of a declaration that the parties would not trigger the sanctions

165. The submitters, too, typically see the process as accusatory. *E.g.*, Wold, *supra* note 7, at 205, 232, 249. It is possible to imagine steps that would make the process less adversarial. The Ten-year Review and Assessment Committee recommended that the Council, working with the JPAC and the Secretariat, consider including a mediation step in the procedure, at which the concerned government and the interested parties could try to resolve the underlying problem amicably. TRAC REPORT, *supra* note 9, at 54; *see also* Letter from Aldo A Morell, Acting Chair, U.S. Nat'l Advisory Comm., to Hon. Lisa P. Jackson, Adm'r, U.S. EPA (Oct. 29, 2006), http://www.epa.gov/ofacmo/nac/pdf/2009_10_nac_advice_letter.pdf (recommending that the U.S. government propose such a mechanism). The Council has not taken up this suggestion.

166. It is true that no one state party can block a decision to authorize a factual record, but in practice the governments have never voted to override the objection of the party accused. Each of the other parties is undoubtedly reluctant to cause ill-feeling in a close ally, and mindful that (at least for Canada and Mexico) the next submission brought to the Council may well be directed against it.

167. Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (May 13, 1994), at § 2(d)(1). Similarly, Canada's environmental minister recommended to the Council in 1996 that to avoid appearances of conflict of interest, the Council should vote to approve Secretariat recommendations. Canadian NAC Advice Letter, *supra* note 163.

168. This difficulty is more pronounced since, as a practical matter, most Council decisions are taken not by the environmental ministers, who meet only once a year, but rather by lower-ranking officials who may have less discretion to make decisions that might be seen as leading to embarrassment of their government. *See* TRAC REPORT, *supra* note 9, at 31 ("Because the [government officials with day-to-day responsibility] do not have the ability to communicate direction when none has been provided by the Council, their default role has become primarily a defensive one: to protect the interests of their respective countries or agencies . . . .").

mechanisms of Part Five of the NAAEC in any cases brought to the submission procedure.[169]

2. *If the Council does not remove itself from the procedure entirely, then it should make the following commitments:*

a. *to take no more than three months to decide whether to authorize a factual record.* As described above, the JPAC suggested in 2001 that the Council should decide whether to authorize a factual record within three months of the Secretariat recommendation.[170] Until 2005, the Council averaged five months for its decisions, not much more than the suggested deadline. Since then, the delays in reviewing Secretariat recommendations have reached unjustifiable lengths, averaging more than two years. The two Secretariat recommendations currently awaiting Council decision, which are not included in that average, have been pending for nearly four and five years. There is no possible excuse for delays of this magnitude.

To restore basic public confidence in the procedure, the Council should immediately authorize factual records in *Ex Hacienda II*[171] and *Hermosillo II*,[172] the two cases with pending Secretariat recommendations, and it should pledge to make future decisions within three months, in line with the JPAC recommendation. To enforce this pledge against itself, it should pre-authorize the Secretariat to proceed with factual records in any case in which the Council has not acted within three months of the Secretariat recommendation.

b. *to stop narrowing the scope of factual records and otherwise interfering with Secretariat decisions.* The NAAEC gives the Secretariat the authority to decide whether to recommend factual records.[173] The Council does not have the authority to instruct the Secretariat to prepare a factual record, only to approve or disapprove a request.[174] It would seem to follow that it is beyond the scope of the Council's authority to instruct the Secretariat to prepare a factual record with a different scope than the one proposed.[175] The Council's 2001 decisions narrowing several factual records were roundly criticized at the time, including in a 2003 advice letter from the JPAC.[176] Although the Council appeared to refrain from narrowing for some time, it returned to the practice in December 2010.[177] The Council should recommit to deciding on the requested factual record as proposed.

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169. NAAEC, *supra* note 1, arts. 34–36. Although it seems unlikely that the mechanism will ever be used, it is not hard to imagine, in a worsening economic climate, growing dissatisfaction with NAFTA of the type expressed during the 2008 presidential campaign. In many ways, the submission procedure is a safety valve for pressures to use sanctions to address environmental issues. If the valve is not working, the pressure to use sanctions may increase.

170. The U.S. National Advisory Committee has also strongly endorsed a 90-day rule. *See, e.g.*, U.S. NAC Advice 2008–9 (Dec. 15, 2008), http://www.epa.gov/ofacmo/nac/response/index.html.

171. *Ex Hacienda II*, SEM-06-003.

172. *Hermosillo II*, SEM-05-003.

173. NAAEC, *supra* note 1, art. 15(1).

174. *Id.* art. 15.

175. *See* Wold et al., *supra* note 9, at 440–41 (describing the Council's limited scope of authority regarding the development of factual records).

176. *Id.* at 417.

177. *See* Species at Risk, SEM-06-005, Council Res. (Dec. 20, 2010) (narrowing the factual record). *See also supra* notes 82, 117, 124 and accompanying text.

c. *to explain its decisions if it does disapprove or narrow a recommendation.* If the Council does disapprove or narrow a Secretariat recommendation, it should explain its reasoning in detail, as the JPAC suggested ten years ago.[178]

C. *From the Authorization to the Publication of the Factual Record*

On the whole, the Secretariat has received high marks for its preparation of factual records. One recurrent criticism, however, is that the end result should be more conclusive and authoritative. Again, making the report legally binding would require a major change to the agreement, one that the parties would not accept. But the submission procedure could be more definitive without becoming legally binding: factual records could reach conclusions as to whether the government has failed to effectively enforce its laws, much as the reports produced by the NAFTA labor side agreement's submission procedure do.[179]

While such conclusions could be useful, we believe that factual records already provide a clear picture of the situation. We recognize that the governments are entrenched in their view that including clear conclusions would be *ultra vires* the agreement. While we disagree with that view, we doubt that the addition of formal conclusions would necessarily justify the political effort necessary to obtain them. Instead, we focus in this section on the importance of improving the timeliness of the factual records.

1. *The Secretariat should greatly shorten the amount of time it takes to produce a factual record.* As Part III describes, the Secretariat has taken longer and longer to develop a factual record. In 2001, the JPAC recommended that the Secretariat take no more than thirteen months to submit a draft factual record to the Council, and the first 9 factual records averaged less than sixteen months to prepare.[180] The next 6 averaged more than two years,[181] and the 3 currently in development were all authorized more than three years ago.[182] Indeed, one was authorized nearly *six* years ago, in June 2006.[183]

The Secretariat can and should do much better. It should return to the earlier standard. We propose that it normally take no more than twelve months from Council authorization (or the time that the Secretariat decides to prepare a factual record, if the Council adopts our suggestion that the Council generally authorize all Secretariat recommendations) to prepare a draft factual record. In exceptional cases, and with an explanation of why the additional time is necessary, the Secretariat could take up to eighteen months.

2. *The Council should adopt a one-time authorization to the Secretariat to publish all factual records.* To give the Council its due, it has never decided not to publish a factual record, but it has often delayed approving their publication, and the

178. JPAC, LESSONS LEARNED, *supra* note 9, at 15–16.

179. *See, e.g.*, U.S. NAT'L ADMIN. OFFICE BUREAU OF INT'L LABOR AFFAIRS, REPORT OF REVIEW OF U.S. NAO SUBMISSION NO. 2003-01, at 80–87 (Aug. 3, 2004), http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2003-01.pdf (detailing conclusive findings by the U.S. National Administrative Office pursuant to the North American Agreement on Labor Cooperation).

180. *See supra* notes 98–103 and accompanying text.

181. *See supra* notes 98–103 and accompanying text.

182. *See supra* notes 101–103 and accompanying text.

183. *See supra* notes 101 and accompanying text.

delays have again grown longer in recent years. After meeting the NAAEC's 60-day rule without exception for the 9 factual records published from 2000 through 2004, the Council has failed to meet the rule every time since.[184]

As with the decision to authorize factual records, it would be far preferable for the Council to remove itself from the procedure entirely. Here, the justification is even clearer. There is no reason for the Council ever to refuse to publish a report. Governments are free to express their disagreements with the Secretariat; indeed, they have the right to include their comments in the factual record itself. Moreover, it seems inconceivable that the Council would ever decide not to publish a factual record. The decision to do so would result in an enormous outcry from the JPAC, the national advisory committees, and the public, as well as a correspondingly intense interest in seeing the report whose publication was forbidden.

3. *Alternatively, the Council should never exceed the 60-day period.* At a bare minimum, the Council should immediately return to its previous practice of publishing factual records within the 60-day period stated in the NAAEC. The history of the procedure demonstrates that the governments can easily decide to publish a factual record within 60 days. Moreover, routinely delaying publication beyond that period is flatly contrary to the terms of the agreement.[185]

D. *After the Publication of the Factual Record*

Our principal suggestion here is that there should be regular follow-up of factual records. We do not mean the response of the government, if any, to the report. Obviously, if the report reveals failures in effective enforcement, then the responsible government should respond by correcting the problem. By "follow-up," however, we refer to a process for examining what happened after a factual record was published.

Following up factual records offers several important benefits. First, it increases knowledge of the effects of the submission procedure. Was the underlying problem satisfactorily addressed? If so, how? If not, why not? Careful examination of these questions will benefit those directly affected by the problems as well as others facing similar problems. Second, follow-up can increase the engagement of those affected by the problem that gave rise to the factual record. Those directly concerned—the people who live near the project, or who use the ecosystem, or who are supposed to be protected by the law that is the subject of the factual record—should have the opportunity to explain how the factual record process affected, or failed to affect, that problem.

Finally, follow-up can lead to concrete improvements in the situation that gave rise to the original submission, and in the submission procedure itself. This advantage follows from the first two. An objective analysis of the effects of a factual record, combined with the participation of those directly concerned, should lead to concrete recommendations for improvements of the situation that gave rise to the factual record and, more generally, improvements to the procedure that could lead to better factual records in the future.

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184. *See supra* note 97 and accompanying text.

185. NAAEC, *supra* note 1, art. 15(7).

As noted above, scholars have reviewed the effects of some factual records,[186] but their research, while valuable, does not provide all of the benefits of a more regularized system of follow-up. Academic studies reflect the particular interests and expertise of those carrying them out; the studies typically do not have sufficient resources to facilitate public engagement; and their recommendations do not necessarily receive government attention or lead to concrete changes.

One fairly minimal method of institutional follow-up would be for governments to report through the CEC on what they have done in response to factual records. The JPAC suggested in 2001 that the governments adopt this approach.[187] Another method entailing a greater degree of commitment would be for the Council to use the CEC's cooperative mechanisms to address problems identified by factual records.[188] In 2003, in response to a suggestion from the U.S. National Advisory Committee, the U.S. government recommended to the other parties that they consider following up factual records through the CEC intergovernmental working group on enforcement.[189] The Council did not adopt that suggestion, but it did commit in its 2005–2010 Strategic Plan to "exploring ways for each Party to communicate how matters raised in factual records may be addressed over time."[190]

The Council has not implemented this commitment. In 2008, in response to renewed attention from the JPAC to the need to follow up factual records, the Council stated merely that follow-up should be left to individual governments.[191] Each government does have the resources and the responsibility to ensure that its laws are effectively enforced, and each is well-placed to explain what it did (or did not do) in response to a factual record, although it may find it difficult to be objective in evaluating how successful its response was at addressing the problems, if any, identified by the report. In any event, the same considerations that cause these governments to resist authorizing and publishing potentially embarrassing factual records in the first place appear to be leading them to avoid reviewing their response to their own factual records. They face similar disincentives to following up factual records collectively.

In lieu of action by the Council, the logical CEC organ to follow up factual records is the JPAC itself. The JPAC is experienced in facilitating public engagement; it is objective, with no stake in whether a particular factual record is embarrassing to a government or whether it reveals flaws in the Secretariat's or the

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186. *E.g.*, GRAUBART, *supra* note 9; Dorn, *supra* note 132; Yang, *supra* note 153.

187. JPAC, LESSONS LEARNED, *supra* note 9, at 17.

188. *See* Knox, *A New Approach*, *supra* note 12, at 118–20. The Council has the authority—and, indeed, the obligation—to promote effective enforcement in all three countries on a cooperative basis. NAAEC, *supra* note 1, art. 10(4)(a) ("The Council shall encourage . . . effective enforcement by each Party of its environmental laws and regulations . . . .").

189. Advisory Letter from John Knox, Chair, Nat'l Advisory Comm., to the Hon. Marianne Lamont Horinko, Acting Adm'r, EPA (Oct. 29, 2003), www.epa.gov/ofacmo/nac/advice/nac_2003_10_advisory letter.htm ("[W]e were pleased to learn that U.S. government officials had made efforts to convince their counterparts on the CEC Enforcement Working Group to explore a mechanism to follow up factual records.").

190. CEC, LOOKING TO THE FUTURE: STRATEGIC PLAN OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2005–2010, at 14 (2005).

191. Letter from David McGovern, Alternate Rep. for Canada, Council of the CEC to Jane Gardner, Chair for 2008, JPAC (Aug. 14, 2008), http://www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01_en.pdf ("Therefore, any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC.").

Council's handling of the submission procedure. It can and already does provide recommendations to the Council and the Secretariat that are taken seriously.

Therefore, we recommend that *the JPAC should institute a procedure for following up factual records.* In 2008, the JPAC approved a plan to undertake just such a procedure. Specifically, it stated that it would:

> begin this ongoing, yearly initiative by selecting, at minimum, one factual record each year and soliciting the views of interested parties (NGOs, citizens, government, etc.) concerning:
>
> - steps taken by a Party and relevant others regarding the enforcement of environmental laws following the publication of the factual record;
> - progress made in addressing the enforcement issues identified in the factual record within a certain period of time after the publication of the factual record; and
> - improvement in the general underlying environmental conditions and concerns that led to the submission.[192]

The Council responded that "any such action would be beyond the scope of the NAAEC."[193] It stated that the factual record is the last step in the submission procedure "as described in Articles 14 and 15" and "any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC."[194] This response misunderstands the issue. The question is not whether the NAAEC *requires* the parties to follow up factual records, but whether it *authorizes* the JPAC to examine their effects. It clearly does. Article 16 of the NAAEC authorizes the JPAC to "provide advice to the Council on any matter within the scope of this Agreement . . . and on the implementation and further elaboration of this Agreement . . . ."[195] Effective enforcement of environmental laws is indisputably within the scope of the agreement. Indeed, that is what the agreement is (almost) all about. It is indisputable that factual records are relevant to the effective enforcement of environmental laws. Indeed, that is what factual records are (almost) all about.

After the Council's 2008 letter, the JPAC has not pursued its plan to follow up factual records. It should reverse course, inform the Council that it respectfully disagrees with the Council's views, and proceed to choose three factual records to review, one for each country.

Any mechanism adopted should be guided by the notion that "[f]or performance information to be useful, it must be complete, accurate, valid, timely,

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192. JPAC, *Re: Submissions on Enforcement Matters: From Lessons Learned to Following Up Factual Records*, Advice to Council 08-01, (Feb. 27, 2008), http://www.cec.org/Page.asp?PageID=122&ContentID=958&SiteNodeID=290&BL_ExpandID=91.

193. Letter from David McGovern to Jane Gardner, *supra* note 191.

194. *Id.*

195. NAAEC, *supra* note 1, art. 16(4).

and easy to use."[196] Scholarly studies indicate that some—though far from all—petitions have produced quite favorable results in terms of improved environmental protection and improved government enforcement policies and practices.[197] Compiling such performance information for the CEC process in a more systematic way would enhance government accountability tremendously. Such information would be of great interest to submitters and go a long way toward enabling submitters and others to assess the outcomes the process has produced.[198] In its December 2011 response to an EPA Office of Inspector General report about state environmental enforcement, the EPA noted the "power of public accountability" to encourage better performance.[199] While the EPA was referring to the impact on regulated parties, the same would likely be true for government actors as well.

CONCLUSION: INSIGHTS ABOUT CITIZEN PETITION PROCESS DESIGN AND IMPLEMENTATION FROM THE CEC EXPERIENCE

Having diagnosed problems with the CEC petition process and offered recommendations that we believe will help to put that process much more on track, we now suggest a series of insights from the CEC experience that are relevant to the design and implementation of citizen petition processes more generally.

Citizens' use of a submission procedure is an obvious indicator of its effectiveness. The level of citizen use is likely to depend on a series of variables, including barriers to entry and perceived value from participation. As we point out, at least some submitters believe the CEC process is reasonably accessible (that is, it has limited barriers to entry), though there have been complaints about the amount of information required and other steps expected of submitters. As we also point out, perceived value depends on a variety of factors, including timeliness, expected outcomes, and available alternatives. The record of use, and the commentary, suggest that submitters perceive the value of the process differently for different countries, in part because of differences in domestic legal tools. Ultimately, process designers would be well-advised to consider each of these issues as well as political realities in structuring such processes so that they will receive an "appropriate" level of citizen use. The CEC experience also suggests that implementation of such processes (in addition to their design) has the potential to affect use as well. As a result, actions to implement a process must be taken mindful of the potential impact on citizens' interest in using the process.

Perceptions concerning the timeliness and procedural justness of the CEC petition process have affected its use and perceptions about its value. As we and others have catalogued, the process moves very slowly and delays have gotten much worse in recent years. It is understandable that submitters are virtually unanimous in

196. *GPRA Modernization Act Provides Opportunities to Help Address Fiscal, Performance, and Management Challenges: Hearing Before the Comm. on the Budget, U.S. Senate*, 112th Cong. 2 (2011) (statement of Gene Dodaro, Comptroller General of the United States) [hereinafter Senate Hearing on GPRA Modernization Act].

197. *See supra* Part III.

198. Developing such information about performance might well help government policy makers as well. As the GAO has noted, "decision makers often do not have the quality performance information they need to improve results." Senate Hearing on GPRA Modernization Act, *supra* note 196, at 2 (statement of Gene Dodaro, Comptroller General of the United States).

199. EPA OFFICE OF INSPECTOR GEN., *supra* note 48, at 44.

their view that the process is much too slow when the Council has still not made a decision about either of the two currently pending Secretariat recommendations for factual records, which were submitted to the Council almost four and five years ago (in May 2008 and April 2007). Similarly, the Secretariat is still developing draft factual records that the Council authorized well over three years ago. We have made several recommendations to expedite the process. Concerns about timeliness may well arise in other citizen petition processes and care should be taken during the initial process design and during implementation to address them.[200]

The CEC experience suggests that procedural justice issues may arise because of process design and process implementation. For example, various commentators have expressed concerns about the countries' performing dual roles (as the "target" of submissions and also as key players during the decision-making process about how a petition should be handled). Similarly, the CEC process is structured to allow the parties greater opportunity for input than a submitter enjoys. Each of these design issues calls into serious question the fairness of the citizen petition process. Further, the Council has clearly exacerbated these fairness concerns, especially by its actions in narrowing the scope of authorized factual records, which many reviewers claim represent overreaching and also significantly reduce the value of the process. The CEC experience highlights the importance of procedural justice issues to the effectiveness of a process. We offer several recommendations in terms of process implementation that would make the process much more procedurally just and thereby likely increase its use and credibility. The procedural justice literature suggests the value of contextualized efforts to ensure the procedural justness of citizen-driven processes more generally. We hope that our analysis and recommendations provide a starting point for such efforts for other procedures.

Another insight from the CEC process that has broader applicability involves the recurring calls for follow-up on factual records. In its recent audit of Environment Canada's enforcement program, the Canadian Office of the Auditor General observed that "[w]ell-managed programs operate according to a systematic management cycle consisting of planning, doing, checking, and improving."[201] The design of the CEC petition process does not specifically include a "checking" or "improving" component, though it contemplates that such components may be incorporated. The lack of such a follow-up effort so far has resulted in lost chances for learning, strengthening of trust between government agencies and interested stakeholders, and performance improvement. The failure to incorporate such components to date, and the Council's apparent resistance to doing so, suggests the value of explicitly incorporating into process design each of these elements of a well-managed program. Even absent explicit incorporation of such follow-up, the groundswell of support for such monitoring reflects the value of integrating such work as part of process implementation.

A final observation from the CEC experience involves the importance of citizen involvement during process implementation as well as process design. Some commentators have suggested that NGOs invest considerable resources during the stage of process design but then pay less attention to program implementation. At

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200. For example, there have been complaints that the EPA Petition to Withdraw process drags out in some cases.

201. OFFICE OF THE AUDITOR GEN. OF CAN., *supra* note 57, at 8–9.

least one lesson that we draw from the CEC experience is the importance of formally integrating citizens into the ongoing work of a process, here through the JPAC. As we indicate above, the JPAC has been vigilant in monitoring the implementation of the CEC process. It has been willing to raise concerns when it thought the situation required it. And in at least some instances, the Council responded positively. While there have obviously been significant problems in the implementation of the CEC process, it is likely that these problems would have become far worse if the JPAC had not been watching and weighing in.

The effort to improve the effectiveness of the CEC citizen petition process is an ongoing one with many chapters yet to be written. Our assessment is that the citizen petition process has done some good to date. At the same time, significant shortcomings in the operation of the process have undermined its effectiveness and the credibility of the countries. We believe that there are readily available strategies to address these shortcomings and that implementing them would enable the process to be much more effective in the future than it has been thus far. Our diagnosis of the challenges and recommendations for fixes is intended to contribute to the ongoing effort to improve the process and to provide a foundation that will inform future evaluations.

The CEC experience also holds important lessons for the design and implementation of citizen petition processes more generally. A wide variety of such processes exists, with different designs and implementation experiences. We hope that this review of the CEC process contributes to the ongoing search for mechanisms that will be increasingly effective in engaging and informing citizens and government officials alike, and that will strengthen people's trust in the officials who serve them.

South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States

JURE VIDMAR*

Abstract

This Article identifies and analyzes the legal framework relevant for South Sudan's emergence as a state and its international delimitation. It demonstrates that independence stemmed from the domestic constitutional arrangement. Referring to the practice of confining new international borders, the Article also argues that, contrary to Sudan's argument, the 1956 colonial boundary does not apply automatically. Of central importance is the latest internal boundary. This arrangement foresees an exception to the 1956 line but has not been determined in accordance with applicable law.

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INTRODUCTION

South Sudan declared independence on July 9, 2011.[1] International recognition followed promptly[2] and on July 14, 2011, South Sudan became a member of the United Nations.[3] Unlike in the recent example of Kosovo, South Sudan's acquisition of statehood is a generally accepted legal fact and its legal status not subject to controversy.[4]

Controversy, however, arises in relation to the new international delimitation. The agreed border between Sudan and South Sudan, in principle, follows the former colonial boundary in existence on January 1, 1956 (the date of Sudan's independence).[5] The full reestablishment of this boundary is disputed because of the unclear legal status of the Abyei Area.[6] The 1956 boundary arrangement leaves the

1. *South Sudan: World Leaders Welcome New Nation*, BBC NEWS (July. 9, 2011), http://www.bbc.co.uk/news/world-africa-14095681 [hereinafter *South Sudan*].

2. *See id.* (noting recognition by the United States, Russia, China, the United Kingdom, and South Africa on the day South Sudan declared independence).

3. G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (July 14, 2011).

4. As of March 5, 2012, Kosovo has been recognized by eighty-nine states. *See Who Recognized Kosova as an Independent State?*, http://www.kosovothanksyou.com (last visited Mar. 20, 2012) (listing the states that have formally recognized Kosovo's independence). Kosovo is thus not universally recognized and some states, including Serbia, expressly oppose its independence. *See, e.g.*, U.N. SCOR, 63d Sess., 5839th mtg. at 5–8, 11–12, 14 U.N. Doc. S/PV.5839 (Feb. 18, 2008) (providing the responses of various states, including Serbia, Russia, China, Indonesia, and Vietnam, to the unilateral declaration of independence of Kosovo). *Cf. infra* text accompanying note 48.

5. The Resolution of the Abyei Conflict arts. 1.4, 8.3, May 16, 2004, *in* Comprehensive Peace Agreement Between the Gov't of the Republic of Sudan and the Sudan People's Liberation Army, Jan. 9, 2005, http://www.sd.undp.org/doc/CPA.pdf [hereinafter Comprehensive Peace Agreement].

6. *See* Ngor Arol Garang, *SPLM's Amum Says Abyei Referendum Must Happen or President Should Transfer Region to South*, SUDAN TRIB. (Jan. 13, 2011), http://www.sudantribune.com/SPLM-s-Amum-says-Abyei-referendum,37596 (describing the unresolved status of the "contested region of Abyei"). *See also infra* notes 86–88 and accompanying text.

Abyei Area in Sudan. This is a consequence of the colonial territorial rearrangements in 1905,[7] which South Sudan refuses to accept.[8]

This Article identifies and analyzes the legal framework relevant for South Sudan's emergence as a state and its international delimitation. Although the situation has a colonial pedigree, independence of South Sudan is not a matter of decolonization in the classical sense of "salt-water" colonialism. This Article thus contextualizes South Sudan within the practice of non-colonial state creations. It demonstrates that independence is not an entitlement under international law; but in this case independence stemmed from the domestic constitutional arrangement. With regard to the reestablishment of the 1956 colonial boundary, the Article demonstrates that in generally established practice, new international borders are confined along the lines of the latest internal boundary. It is thus not the 1956 boundary that is relevant per se; this boundary is only relevant to the extent to which it was adopted by the internal boundary arrangement dating to 2005. The legal status of the Abyei Area in this arrangement is yet to be determined in accordance with applicable law.[9]

I. THE EMERGENCE OF A NEW STATE: THE LEGAL FRAMEWORK

A. *The Emergence of States in International Law: Between Territorial Integrity and the Will of the People*

1. No Entitlement to Independence

Article 1 of the Montevideo Convention on Rights and Duties of States provides: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) [a] government; and (d) [the] capacity to enter into relations with the other States."[10] These qualifications have acquired the status of statehood criteria under customary international law.[11]

Practice shows that meeting these criteria is neither necessary nor sufficient for an entity to become a state.[12] Indeed, a state does not emerge automatically and self-

7. *See infra* note 85 and accompanying text.

8. *See infra* note 84 and accompanying text.

9. *See* The Resolution of the Abyei Conflict art. 1.3, May 16, 2004, *in* Comprehensive Peace Agreement, *supra* note 5 (stating that the people of the Abyei region must have their own referendum to determine whether they will remain with the North or join the South).

10. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 18 [hereinafter Montevideo Convention].

11. MARTIN DIXON & ROBERT MCCORQUODALE, CASES AND MATERIALS IN INTERNATIONAL LAW 137 (2003).

12. *See id.* (questioning the sufficiency of the Montevideo criteria for statehood and citing examples of the imposition of additional requirements for states seeking recognition).

evidently when the Montevideo criteria are met.[13] If states could emerge automatically, independence would need to be an entitlement under international law. Outside of colonialism, this is not the case.

In the U.N. Charter era, self-determination has become codified as a human right under international law[14] and an entitlement of *all* peoples, not only those subjected to colonialism.[15] However, as Gregory Fox argues, in the process of decolonization "the only territorial relationship to be altered was that with the metropolitan power. Achieving independence . . . did not come at the expense of another sovereign state's territory or that of an adjacent colony."[16] Outside of colonialism, the right of self-determination needs to be squared with the principle of territorial integrity.

The Declaration on Principles of International Law, which forms a part of customary international law,[17] provides for the following limitation on the right of self-determination:

> Nothing in the foregoing paragraphs [referring to the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[18]

In this vein, the Supreme Court of Canada in the Quebec Case held that "[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[19]

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13. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 66 (1948) (arguing that if one accepts that a state can emerge automatically and self-evidently when the statehood criteria are met, one needs to accept the rather awkward proposition that a state exists "as soon as it 'exists'").

14. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, S.Treaty Doc. 95-19, 933 U.N.T.S. 3 [hereinafter ICESCR].

15. *See* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 60 (2011) (arguing that the right of self-determination has a universal (i.e., non-colonial) scope, yet relevant sources of international law make it clear that this right is not a synonym for a right to secession).

16. Gregory Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 736 (1994) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)).

17. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, para. 80 (July 22) [hereinafter Kosovo Advisory Opinion].

18. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 124 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

19. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.) [hereinafter Quebec Case].

Independence is thus not an entitlement under international law. At the same time, it would be erroneous to interpret the absence of an entitlement to independence as a prohibition of secession.

B. Neutrality of International Law and Relevance of a Domestic Consensus

The elaboration of the principle of territorial integrity in the Declaration on Principles of International Law says that secession is not "authoriz[ed]" or "encourag[ed]," but it does not say it is prohibited.[20] The territorial-integrity limitation on the right of self-determination thus reflects the neutrality of international law pertaining to secession. As James Crawford argues, secession is "a legally neutral act the consequences of which are regulated internationally."[21] This position was reinforced by the International Court of Justice (ICJ) in the Kosovo Advisory Opinion, where the Court recalled extensive practice of state creations upon an issuing of a unilateral declaration of independence.[22] The absence of a prohibition of secession under international law was also affirmed in the Quebec Case:

> Although there is no right, under the [Canadian] Constitution or at international law, to unilateral secession, that is secession without negotiation . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community. . . .[23]

It thus follows that in contemporary international legal doctrine, states do not emerge simply upon meeting the Montevideo statehood criteria. The parent state of the independence-seeking entity is protected by the principle of territorial integrity. It is erroneous to interpret this principle as creating an absolute prohibition of secession. The principle does, however, stand as a barrier between the claim for independence and its acquisition.

Outside of the colonial context, an entity can unequivocally emerge as a state only upon removal of its parent state's claim to territorial integrity. The least controversial mode of state creation is where consent of the parent state is given. Consent may be given politically, prior to declaration of independence, or subsequently, after the declaration of independence has been issued. Pakistan consented to the independence of Bangladesh;[24] the Soviet Union consented to the

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20. Declaration on Principles of International Law, *supra* note 18, at 124.

21. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 390 (2006).

22. Kosovo Advisory Opinion, *supra* note 17, para. 79; *see also* Shelton, *supra* note 15, at 61 ("[S]tate practice did not point to the emergence in international law of a new rule that prohibits making a [unilateral] declaration of independence . . . .").

23. Quebec Case, *supra* note 19, para. 155.

24. Bangladesh (East Pakistan) declared independence in 1971, following a period of martial rule that "involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India." CRAWFORD, *supra* note 21, at 141. Twenty-eight states, including India, granted recognition promptly and, at the end of 1971, Pakistan withdrew from the eastern part. However, it was not until recognition of Bangladesh was granted by Pakistan, on February 22, 1974, that universal recognition followed. Bangladesh was only admitted to the Unitd Nations on September 17, 1974. *Id.*; *see*

independence of the Baltic States;[25] Ethiopia consented to the independence of Eritrea;[26] and Indonesia consented to the independence of East Timor.[27] These examples demonstrate that approval tends to be given in difficult political circumstances, often marked by atrocities and armed conflict.

Moreover, new states have emerged in recent practice as a result of dissolution of their parent states. Such examples were the Soviet Union,[28] the Socialist Federal Republic of Yugoslavia (SFRY),[29] and Czechoslovakia.[30] Where dissolution is

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also G.A. Res. 3203 (XXIX), U.N. Doc. A/RES/3203 (Sept. 17, 1974) (citing the General Assembly's admission of the People's Republic of Bangladesh). Therefore, even in this potential situation of remedial secession the new state unequivocally emerged only after its parent state granted recognition.

25. The three Baltic States were explicitly recognized by the Soviet Union on September 6, 1991, and only then, on September 12, 1991, did the Security Council consider their applications for the membership of the United Nations. CRAWFORD, *supra* note 21, at 394. As Crawford notes, this suggests that "the position in the Soviet authorities was treated as highly significant even in a case of suppressed independence." *Id.*

26. After a lengthy civil war, Eritrean independence was accepted by the Transitional Government of Ethiopia, which came to power with the help of the Eritrean pro-independence movement. *Id.* at 402–03. Eritrea was admitted to the United Nations on May 28, 1993. G.A. Res. 47/230, U.N. Doc. A/RES/47/230 (May 28, 1993). Although the internal political situation in Ethiopia at that time was very complicated, it is nevertheless notable that from the perspective of international law Eritrea became independent upon the previous consent of its parent state.

27. East Timor may be formally considered a matter of decolonization, yet the real issue was not independence from Portugal (its former colonial power) but independence from Indonesia (its occupying power). Indonesia ultimately consented to holding a binding referendum on the future legal status of East Timor and, after a period of violence, accepted the referendum results in favor of independence. *See* The Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor arts. 1–6, *in* U.N. Secretary-General, *Question of East Timor: Rep. of the Secretary General*, U.N. Doc. A/53/951 (May 5, 1999) (detailing the agreement of Indonesia and Portugal to a referendum vote for the people of East Timor coordinated by the United Nations); *see also* S.C. Res. 1338, U.N. Doc. S/RES/1338 (Jan. 31, 2001) (supporting East Timor's continuing transition towards independence).

28. *See* The Agreement on the Establishment of the Commonwealth of Independent States art. 1, Dec. 8, 1991, 31 I.L.M. 138 [hereinafter Minsk Agreement] ("We, the Republic of Belarus, the Russian Federation . . . and Ukraine, as founder states of the Union of Soviet Socialist Republics and signatories of the Union Agreement of 1922 . . . hereby declare that the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists."). On December 21, 1991, a protocol to the Minsk Agreement was adopted by the remaining Soviet republics, with the exception of Georgia, by way of which the Commonwealth of Independent States was extended to these former republics from the moment of ratification of the Minsk Agreement. The Protocol to the Agreement Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 147.

29. The dissolution of Yugoslavia was not consensual but rather accepted through practice of states and U.N. organs. Of central importance for development of such practice were the opinions of the Badinter Commission. *See* The Badinter Commission, Opinion No. 1 (Nov. 29, 1991), para. 3, *reprinted in* SNEŽANA TRIFUNOVSKA, YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 415 (1994) (holding that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution"). The perception of dissolution being at work in Yugoslavia was clearly adopted even by the Security Council. *See* S.C. Res. 757, pmbl., U.N. Doc. S/RES/757 (May 30, 1992) ("[T]he claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted.").

30. The dissolution of Czechoslovakia was not initiated by secessionist attempts in either republic but was rather a result of different views on the internal organization of the common state and an inability to reconcile these views. *See, e.g.*, ERIC STEIN, CZECHOSLOVAKIA: ETHNIC CONFLICT, CONSTITUTIONAL FISSURE, NEGOTIATED BREAKUP 45 (1997) (noting that "the complex general questions regarding the normative and moral bases for a secession that dominate the academic discourse were ultimately bypassed by the consensual separation"). In this negotiated settlement, the international personality of the federation was extinguished and Czechoslovakia ceased to exist on December 31, 1992. On January 1,

concerned, the international personality of the parent state is extinguished and, in the absence of a parent state, there can be no competing claim to territorial integrity.

In rare circumstances, the constitution of the parent state may provide for a right to independence. Practice shows that such a right is of little relevance if it only exists formally and is not operationalized by a clear mechanism for secession. A right to independence, in principle, existed in the constitutions of the Soviet Union[31] and the SFRY;[32] however, in the absence of an actual mechanism for secession, no constitutive republic of these two respective federations sought independence pursuant to the constitutional right.

A good example of an operationalized right to secession is Article 60 of the Constitution of the State Union of Serbia and Montenegro (SUSM). This Article provided for a clear constitutional mechanism for secession,[33] which was triggered by a Montenegrin referendum on independence.[34] However, the constitution of the SUSM was drafted as a political compromise between unionists and secessionists. The outcome of this compromise was a transitional loose federation, which was a step toward Montenegro's secession.[35] In most circumstances, constitutions do not foresee a mechanism for a state's dissolution or loss of a part of its territory. Domestic endorsement of a claim to independence then needs to be political.

C. *The Relevance of Independence Referenda*

In the case of Montenegro, the constitutional mechanism for secession was supplemented by a Referendum Act that specified the rules of the referendum and determined the vote required for the referendum to be valid.[36] The binding nature of the referendum was a reflection of the constitutional right to independence. Where such a right is not foreseen in the constitution, and given the general absence of a right to independence under international law, the support of the will of the people for independence does not have direct legal effects, that is, it does not necessarily create a new state.[37] An expression of the will of the people in support of

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1993, the Czech Republic and Slovakia were proclaimed independent states. CRAWFORD, *supra* note 21, at 402. Both were admitted to membership in the United Nations on January 19, 1993. G.A. Res. 47/221, U.N. Doc. A/RES/47/221 (Jan. 19, 1993) (Czech Republic); G.A. Res. 47/222, U.N. Doc. A/RES/47/222 (Jan. 19, 1993) (Slovakia).

31. KONSTITUTSIIA SSSR (1977) [KONST. SSSR] art. 72 [USSR CONSTITUTION].

32. CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA Apr. 7, 1963, pmbl. princ. I.

33. CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO [CONST. SERB. & MONTENEGRO] Feb. 4, 2003, art. 60.

34. Zakon o referendumu o državno-pravnom statusu Republike Crne Gore [Law on the Referendum on State-Legal Status of the Republic of Montenegro], 2006, *translation available at* http://www.legislationline.org/documents/action/popup/id/3935.

35. *See* Central Intelligence Agency, *Serbia*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ri.html (describing the "loose federation" of Serbia and Montenegro and subsequent Montenegrin secession).

36. Law on the Referendum on State-Legal Status of the Republic of Montenegro, *supra* note 34, art. 6.

37. *See* Quebec Case, *supra* note 19, para. 151 ("The democratic vote [in favor of independence], by however strong a majority, would have no legal effect on its own.").

independence is thus not a sufficient requirement for a new state creation; it may be said that it is, in principle, a necessary requirement.

Indeed, in the Western Sahara Advisory Opinion, the ICJ held that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."[38] The understanding of what is "a free and genuine expression of the will of the peoples" follows from the Quebec Case, where the Supreme Court of Canada stated that "[t]he referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."[39]

There is no universally prescribed winning majority or formulation of referenda questions. The determination of "free of ambiguity" is situation-specific. Practice shows that most independence referenda prescribe the simple winning majority of fifty percent plus one vote of those who cast their votes, at a turnout of at least fifty percent plus one vote.[40]

If overwhelmingly supported by the will of the people, the claim for independence may be stronger but does not necessarily lead to a new state creation. As indicated by the Supreme Court of Canada in the Quebec Case, a popular preference for independence may put an obligation on the parent state to negotiate the future legal status of the territory, although this does not mean that the parent state is obliged to accept independence of that territory.[41]

D. *The Relevance and Irrelevance of Recognition*

Though recognition in international law is seen by some as a constitutive act, others argue that "[t]he better view is that the granting of recognition to a new state is not a 'constitutive' but a 'declaratory' act."[42] Practice indeed shows that under certain circumstances non-recognized entities can exist as states. Such were the

38. Western Sahara Advisory Opinion, 1975 I.C.J. 12, para. 55 (Oct. 16).

39. Quebec Case, *supra* note 19, para. 87.

40. *See* Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper 17 (Feb. 2010), http://www.scotland.gov.uk/Resource/Doc/303348/0095138.pdf (citing several referendums and concluding that in the United Kingdom and Western Europe, it is "well established [that] referendums should be decided by those who choose to vote on a simple majority basis"); *see also* COMMISSION ON SECURITY AND COOPERATION IN EUROPE, THE REFERENDUM ON INDEPENDENCE IN BOSNIA-HERZEGOVINA: FEBRUARY 29–MARCH 1, 1992, at 11 (1992), *available at* http://csce.gov/index.cfm?FuseAction=UserGroups.Home&ContentRecord_id=250&ContentType=G&ContentRecordType=G&UserGroup_id=5&Subaction=ByDate (stating that for the independence of Bosnia-Herzegovina to be approved, "first, a majority of eligible voters had to participate in the referendum and, second, a majority of those participating had to vote 'for' the question"). A more demanding majority is very rarely prescribed in post-1990 practice of independence referenda outside of colonialism. One example is Montenegro's referendum on independence, which required fifty-five percent of votes cast to be in favor of secession. Law on Referendum on State-Legal Status of the Republic of Montenegro, *supra* note 34, art. 6. Another example is Slovenia's plebiscite for independence, which required approval by fifty-one percent of voters. Brenda Fowler, *Slovenes Vote Decisively for Independence from Yugoslavia*, N.Y. TIMES, Dec. 24, 1990, http://www.nytimes.com/1990/12/24/world/slovenes-vote-decisively-for-independence-from-yugoslavia.html. For South Sudan, the prescribed majority was the standard relative majority of all votes cast, yet the required quorum was higher than the standard fifty percent of those eligible to vote. *See infra* note 72.

41. Quebec Case, *supra* note 19, para. 92.

42. DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 144–45 (2004) (quoting J. L. BRIERLY, THE LAW OF NATIONS 138–39 (6th ed. 1963)).

examples of the Federal Republic of Yugoslavia (FRY)[43] and Macedonia.[44] What marked these situations is that the predecessor state, the SFRY, no longer existed so there was no competing claim to territorial integrity. In the absence of a parent state, there could be no doubt that these two entities were states; they could not be regarded as *terra nullius*.

The situation is different where foreign states decide to grant recognition to a unilateral secession. As indicated in the Quebec Case, the success of a unilateral secession may depend on international recognition.[45] In practice, foreign states are reluctant to grant recognition to attempts at unilateral secession.[46] Moreover, recognition that is widespread but not universal may create ambiguity with regard to the entity's legal status rather than clarify it. For example, as of March 21, 2012, Kosovo has attracted eighty-nine recognitions.[47] A very significant number of states thus see Kosovo as a state. But an even more significant number of states do not see Kosovo as a state.[48] Its objective legal status is therefore ambiguous and may be clarified over time.[49] However, if recognition of a unilateral declaration of independence were universal, it would be difficult to draw a doctrinal difference between universal recognition and collective state creation.[50] In other words, universal recognition of unilaterally declared independence can have constitutive effects.

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43. The FRY was an unusual example because it denied that it was a newly created state but rather claimed continuity with the legal personality of the SFRY. Despite being non-recognized, the FRY appeared before the ICJ in the Bosnia Genocide case. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 1996 I.C.J. 596, 622, para. 45 (July 22) (Preliminary Objections) (deciding that the case was inadmissable. Since parties to the proceedings before the ICJ can only be states, this implicitly confirms that the FRY was a state). This proves that the FRY was considered a state, although not recognized. Moreover, the Badinter Commission stated that the FRY became a state on April 27, 1992, the day of the adoption of its new constitution. The Badinter Commission, Opinion No. 10 (Jul. 4, 1993), para. 2, *reprinted in* TRIFUNOVSKA, *supra* note 29, at 639.

44. Macedonia was virtually universally non-recognized between 1991 and 1993. Matthew Craven, *What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood*, 16 AUST. Y. B. INT'L L. 199, 203–06 (1995). The non-recognition of Macedonia was political. Since its former parent state no longer existed, there was no applicable competing claim to territorial integrity. Consequently, there was no doubt that Macedonia was a state, despite being universally non-recognized. *See* Declaration on the Former Yugoslav Republic of Macedonia, Informal Meeting of Ministers of Foreign Affairs, Guimaraes, May 1–2, 1992, *reprinted in* CHRISTOPHER HILL & KAREN SMITH, EUROPEAN FOREIGN POLICY: KEY DOCUMENTS 376 (2000) (expressly referring to Macedonia as a "state" and affirming that non-recognition of Macedonia originated in the policy of the European Community and Greece's objection to the name of the new state).

45. Quebec Case, *supra* note 19, para. 155.

46. *See* CRAWFORD, *supra* note 21, at 403–15 (providing for an overview of unsuccessful attempts at secession).

47. *See supra* note 4 and accompanying text.

48. *See supra* note 4.

49. *Cf. supra* note 24 (discussing Bangladesh's declaration of independence).

50. *See* CRAWFORD, *supra* note 21, at 501 ("In many cases, and this is true of the nineteenth century as of the twentieth, international action has been determinative [for new state creations]: international organizations or groups of States—especially the so-called 'Great Powers'—have exercised a collective authority to supervise, regulate and condition . . . new [state] creations. In some cases the action takes the form of the direct establishment of the new State: a constitution is provided, the State territory is delimited, a head of State is nominated. In others it is rather a form of collective recognition—although the distinction is not a rigid one.").

The propositions that non-recognized states can exist as states and that universal recognition can create a state are not mutually exclusive. These are indeed two different things. In the former situation, the parent state either no longer exists or waives its claim to territorial integrity with respect to a part of its territory. Consequently, the legal status of the territory in question can only be that of an independent state. In the latter situation, the international community disregards the competing claim to territorial integrity and international recognition is granted even if the parent state does not consent to independence of a part of its territory. But, as the example of Kosovo demonstrates, the objective legal status of the entity remains ambiguous if recognition of unilateral secession is not virtually universal.

E. *International Legal Doctrine on Claims for Independence Summarized*

Independence is not an entitlement under international law, not even where clearly supported by the will of the people at an independence referendum.[51] Nevertheless, unilateral secession is not prohibited and foreign states may decide to grant recognition to an entity that is seeking independence unilaterally.[52] In such circumstances, recognition may have constitutive effects. In practice, however, foreign states tend to be very reluctant to grant recognition to unilaterally declared independence.

The situation is different where the emergence of a new state is consensual, that is, where the parent state agrees to a part of its territory becoming a separate state. The parent state thereby waives its claim to territorial integrity and the emergence of a new state is then merely acknowledged by the international community.[53] The parent state may waive its claim to territorial integrity politically, by an explicit endorsement of the declaration of independence by the seceding state,[54] or by adopting underlying domestic legislation that provides for a clear mechanism for secession.[55]

Next, this Article considers how South Sudan fits within the international legal framework governing the emergence of new states.

51. *See supra* notes 18–22.

52. *See, e.g.*, Quebec Case, *supra* note 19, para. 155 ("Although there is no right, under the Constitution or at international law . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secesssion would be debendent on recognition oby the international community . . . .").

53. *See supra* notes 24–27 and accompanying text.

54. *See supra* notes 24–27 and accompanying text.

55. *See supra* note 33 and accompanying text.

II. THE COMPREHENSIVE PEACE AGREEMENT AND APPLICABLE DOMESTIC LAW

A. *The Legal Regime of the Comprehensive Peace Agreement Regarding Secession*

Sudan became an independent state in 1956.[56] A detailed account of the history of Sudan and the north-south divide, lengthy civil wars, and atrocities has been given elsewhere.[57] For the purpose of this Article, it needs to be recalled that South Sudan's path to independence followed from the legal regime established under the Comprehensive Peace Agreement, signed on January 9, 2005, between the central government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army.[58] The Comprehensive Peace Agreement resulted from the efforts of the regional peace initiative to end the civil war.[59]

The Comprehensive Peace Agreement is comprised of texts of previously signed agreements and protocols.[60] These were: the Machakos Protocol (July 20, 2002), the Protocol on Power Sharing (May 26, 2004), the Agreement on Wealth Sharing (January 7, 2004), the Protocol on the Resolution of the Conflict in Abyei Area (May 26, 2004), the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (May 26, 2004), the Agreement on Security Arrangements (September 25, 2003), the Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (December 31, 2004), and the Implementation Modalities and Global Implementation Matrix and Appendices (December 31, 2004).[61]

The Machakos Protocol specified "[t]hat the people of South Sudan have the right to self-determination . . . through a referendum to determine their future status."[62] The Machakos Protocol further established a six-year interim period at the conclusion of which the internationally monitored referendum would take place.[63] The parties later also agreed on the implementation modalities of the permanent ceasefire and security arrangement.[64] This agreement not only made references to self-determination and the independence referendum but also regulated technical

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56. *Background to Sudan's Comprehensive Peace Agreement*, UNITED NATIONS MISSION IN SUDAN, http://unmis.unmissions.org/Default.aspx?tabid=515 (last visited Oct. 23, 2011) [hereinafter UNITED NATIONS MISSION IN SUDAN].

57. *See generally* DOUGLAS H. JOHNSON, THE ROOT CAUSES OF SUDAN'S CIVIL WAR (5th ed. 2011); AFTER THE COMPREHENSIVE PEACE AGREEMENT IN SUDAN (Elke Grawert ed., 2010).

58. Comprehensive Peace Agreement, *supra* note 5.

59. *See* UNITED NATIONS MISSION IN SUDAN, *supra* note 56 (describing the history of the Comprehensive Peace Agreement).

60. Chapeau of the Comprehensive Peace Agreement, *in* Comprehensive Peace Agreement, *supra* note 5, at xi, para. 6; *see also Background to Sudan's Comprehensive Peace Agreement*, *supra* note 56 (describing the texts comprising the Comprehensive Peace Agreement).

61. Comprehensive Peace Agreement, *supra* note 5.

62. The Machakos Protocol art. 1.3, July 20, 2002, *in* Comprehensive Peace Agreement, *supra* note 5.

63. *Id.* art. 2.5. The six-year period started at the time of conclusion of the Comprehensive Peace Agreement.

64. *See* Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities, G.O.S.-S.P.L.M/S.P.L.A., Dec. 31, 2004, *in* Comprehensive Peace Agreement, *supra* note 5.

details pertaining to South Sudan's departure from the common state in case of a decision for independence.[65]

After the adoption of the Comprehensive Peace Agreement, Sudan promulgated a new interim constitution that granted substantive autonomy to Southern Sudan.[66] The Constitution further specified that a referendum on the future status of Southern Sudan would be held six months before the end of the six-year interim period.[67]

B. *The Independence Referendum*

The referendum question was initially indicated in the Interim Constitution by providing that the people of Southern Sudan would either "(a) confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or (b) vote for secession."[68] The referendum rules were subsequently specified by the Southern Sudan Referendum Act on December 31, 2009.[69]

The Act repeats the general references to self-determination and the independence referendum, which were previously invoked in the Comprehensive Peace Agreement and the Constitution.[70] It further repeats the referendum choice provided for by the Constitution, that is, either "[c]onfirmation of the unity of the Sudan by sustaining the form of government established by the Comprehensive Peace Agreement and the Constitution, or . . . secession."[71]

Article 41 of the Act specified the referendum rules and made specific provisions for the required quorum as well as the winning majority:

> (2) The Southern Sudan Referendum shall be considered legal if at least (60%) of the registered voters cast their votes. . . .
>
> (3) . . . the referendum results shall be in favour of the option that secures a simple majority (50% +1) of the total number of votes cast for one of the two options, either to confirm the unity of the Sudan by maintaining the system of government established by the Comprehensive Peace Agreement or to secede.[72]

The referendum ballot was clear and simple; in accordance with the Constitution and the Southern Sudan Referendum Act, it provided for two options: "unity" or "secession."[73]

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65. *See id.* arts. 17.8, 20.1, 20.2, 21.2.

66. THE INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN, July 6, 2005, art. 2.

67. *Id.* art. 222(1).

68. *Id.* art. 222(2).

69. The Southern Sudan Referendum Act (2009, trans. 2010), http://saycsd.org/doc/SouthernSudanReferendumActFeb10EnglishVersion.pdf.

70. *Id.* arts. 4–5.

71. *Id.* art. 6.

72. *Id.* art. 41.

73. For an image and description of the referendum ballot, see Chris Dye, *Southern Sudan 2011: Ballot Paper*, INDEPENDENCE REFERENDUMS (Jan. 31, 2011), http://independencereferendum.blogspot

The referendum rules were thus clear in terms of both the question and the winning majority. Moreover, Article 66 of the Southern Sudan Referendum Act specified that the referendum decision would be binding:

> [T]he option approved by the people of Southern Sudan by a majority of 50% + 1 of valid votes cast in the referendum in accordance with the present Act, shall supersede any other legislation and shall be binding to all the State bodies as well all citizens of Southern and Northern Sudan.[74]

At a referendum held between January 9 and 15, 2011, the option for secession was given the overwhelming support of 98.83%, at a turnout of 97.58%.[75] South Sudan declared independence on July 9, 2011.[76] International recognition followed promptly,[77] and on July 14, 2011, South Sudan became a member of the United Nations.[78]

South Sudan's path to independence was marked by a lengthy civil war, atrocities, and a grave humanitarian situation.[79] However, these circumstances did not create a right to independence under international law.[80] In terms of international law, South Sudan did not become an independent state until the central government formally agreed to hold a binding referendum on independence at which secession was supported by an overwhelming majority. Unlike the example of Kosovo, South Sudan is a state created with the approval of the parent state. The mechanism for secession was rooted in the 2005 Comprehensive Peace Agreement and the constitutional arrangement that resulted from this agreement. South Sudan is thus a rare example of a right to independence being exercised under domestic constitutional provisions. Its example further affirms that such constitutional provisions tend to be implemented exceptionally, as a political compromise and an interim solution aimed at peaceful settlement of the contested entity's legal status.[81]

.com/2011/01/southern-sudan-2011-ballot-paper.html.

74. The Southern Sudan Referendum Act, *supra* note 69, art. 66.

75. Results for the Referendum of Southern Sudan, SOUTHERN SUDAN REFERENDUM 2011, http://southernsudan2011.com.

76. *South Sudan*, *supra* note 1.

77. *Id.*

78. G.A. Res 65/308, *supra* note 3.

79. *See generally* JOHNSON, *supra* note 57.

80. An argument could be made that South Sudan is a matter of independence under the doctrine of remedial secession, which has some support in academic writings and, possibly, also in the framework of the African regional human rights system. *Cf.* Shelton, *supra* note 15, at 63–71. Nevertheless, it can only be said that decades of violence and oppression created political circumstances in which Sudan accepted South Sudanese independence. Secession still was not an entitlement under international law; it clearly followed from domestic constitutional provisions.

81. *Cf.* CONST. SERB. & MONTENEGRO, *supra* note 33.

III. INTERNATIONAL DELIMITATION BETWEEN SUDAN AND SOUTH SUDAN AND THE QUESTION OF THE ABYEI AREA

A. *The 1956 Boundary and the Abyei Area*

1. Reestablishment of the 1956 Boundary

Sudan became an independent state in 1956, comprising northern and southern parts that were settled by peoples diverse in terms of ethnicity, religion, and language.[82] The basis for the new international delimitation in 2011 was the pre-independence north/south line, as it existed on January 1, 1956 (the day Sudan became an independent state).[83] This is also the line to which Sudan referred in its statement recognizing South Sudan: "The Republic of Sudan announces that it recognises the Republic of South Sudan as an independent state, according to the borders existing on 1 January [] 1956."[84]

South Sudan, however, invokes an exception to the 1956 boundary. Article 1(2) of Part I of the Provisional Constitution of South Sudan provides:

> The territory of the Republic of South Sudan comprises all lands and air space that constituted the three former Southern Provinces of Bahr el Ghazal, Equatoria and Upper Nile in their boundaries as they stood on January 1, 1956, and the Abyei Area, the territory of the nine Ngok Dinka chiefdoms transferred from Bahr el Ghazal Province to Kordofan Province in 1905 as defined by the Abyei Arbitration Tribunal Award of July 2009.[85]

As indicated in the South Sudanese constitutional provision, in 1905 the Abyei Area was transferred from a southern to a northern province. The Abyei Protocol, which is included in the Comprehensive Peace Agreement, also defined the disputed territory "as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."[86] Since the boundaries of the disputed area were unclear, the Abyei Protocol established the Abyei Boundary Commission (ABC) in order "to define and demarcate" the area geographically.[87]

The Abyei Protocol further foresaw a separate referendum to determine the area's future status, either within the northern or southern part,[88] and further specified: "The January 1, 1956 line between north and south will be inviolate, *except as agreed above* [i.e., in the provisions on referendum]."[89] The 1956 boundary thus was not adopted in its full extent. The Abyei Protocol acknowledged the Abyei Area

82. M.W. Daly, *Broken Bridge and Empty Basket: The Political and Economic Background of the Sudanese Civil War*, *in* CIVIL WAR IN THE SUDAN 1–3 (M.W. Daly & Ahmad Alawad Sikainga eds., 1993).

83. The Resolution of the Abyei Conflict arts. 1.4, 8.3 (May 26, 2004), *in* Comprehensive Peace Agreement, *supra* note 5.

84. *South Sudan Counts Down to Independence*, BBC NEWS (July 8, 2011), http://www.bbc.co.uk/news/world-africa-14077511.

85. THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN, July 9, 2011, art. 1(2).

86. The Resolution of the Abyei Conflict art. 1.1.2, May 26, 2004, *in* Comprehensive Peace Agreement, *supra* note 5.

87. *Id.* art. 5.1.

88. *Id.* art. 1.3.

89. *Id.* art. 1.4 (emphasis added).

exception to the 1956 line and the final delimitation was to be determined by popular consultation. A separate referendum on the legal status of the Abyei Area never took place. This was due to disagreements between north and south on determining the population eligible to take part in the vote.[90]

Thus, according to the applicable legal regulation, the boundaries of the Abyei Area (but not its legal status) were to be determined by an independent commission, while the legal status of the disputed area was to be determined by the expression of the will of the people at a referendum.

2. International Arbitration on the Abyei Area

The ABC defined the Abyei Area and delivered its report on July 14, 2005.[91] The central government of Sudan strongly disagreed with the ABC and refused to accept its findings. Subsequently, on July 7, 2008, the Government of Sudan and the Sudan's People Liberation Movement/Army signed an Arbitration Agreement whereby they agreed to refer the question of the Abyei Area to the Permanent Court of Arbitration (PCA), under the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State.[92] The question referred to the arbitration was whether the ABC exceeded its mandate given in the Abyei Protocol.[93] If the mandate were not exceeded, the arbitral tribunal was authorized to proclaim the finding of the ABC as being final.[94] If the ABC exceeded its mandate, the arbitral tribunal was authorized to "make a declaration to that effect, and shall proceed to define (i.e., delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."[95]

The arbitral tribunal, inter alia, held that "the ABC Experts did not provide sufficient reasoning with respect to essential elements of the decision, namely the determination of the eastern and western boundary lines of the Abyei Area."[96] The arbitral tribunal thus partly overruled the ABC's findings, declaring the boundaries as not drawn in compliance with the ABC's mandate, and proceeded to determine the western and eastern boundaries of the Abyei Area, pursuant to Article 2(c) of the Arbitration Agreement.[97]

The arbitral tribunal noted that there were no useful maps from 1905 to indicate the delimitation of the Abyei Area[98] and proceeded with considering oral statements and anthropological writings that located the area historically populated by the Ngok

90. *See* Garang, *supra* note 6.

91. Gov't of Sudan v. Sudan People's Liberation Movement/Army, Final Award, paras. 122, 130–32 (Perm. Ct. Arb. 2009), http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf [hereinafter Abyei Arbitration].

92. *Id.* paras. 1–3.

93. *Id.* para. 6(a).

94. *Id.* para. 6(b).

95. *Id.* para. 6(c).

96. *Id.* para. 708.

97. Abyei Arbitration, *supra* note 91, para. 712.

98. *Id.* para. 713.

Dinka people.[99] The arbitral tribunal ultimately defined the Abyei Area as a significantly smaller geographical area compared to the ABC's previous finding.[100]

The central government of Sudan refuses to accept the incorporation of the Abyei Area in the newly created Southern Sudanese state, not even in the narrower borders, and insists on the full reestablishment of the 1956 boundary.[101] It thus needs to be considered whether international law supports Sudan's claim for reestablishing the former colonial boundary.

B. *The International Legal Significance of the 1956 Boundary Arrangement*

1. Practice and Doctrine of Determining New International Borders

Discussing the concept of self-determination, Ivor Jennings pointed out the following difficulty: "On the surface [the idea of self-determination] seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people."[102] In the process of decolonization, the application of the right of self-determination was territorial and the principle of *uti possidetis* effectively decided who the people were for the purpose of the right of self-determination.[103] In so doing, the *uti possidetis* principle imposed "identities on the various inhabitants of former colonies."[104]

In the context of dissolution of the SFRY, the Badinter Commission applied the *uti possidetis* principle outside of colonialism.[105] This application remains doctrinally controversial and it is not generally accepted that *uti possidetis* applies outside the process of decolonization.[106] Nevertheless, the practice of non-colonial state creations indicates a clear trend of confinement of new international borders along the lines of the latest internal boundary arrangement, even where this arrangement was subject to arbitrary changes. Without any reference to *uti possidetis* in the

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99. *Id.* paras. 717–44.

100. *Id.* para. 770.

101. *See supra* note 84 and accompanying text.

102. IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 56 (1956).

103. *See* Frontier Dispute (Burk. Faso/Rep. of Mali), 1986 I.C.J. 554, 566, para. 23 (Dec. 22) ("The essence of the principle [of *uti possedetis*] lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions of colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.").

104. Andrew A. Rosen, *Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship Between* Uti Possidetis *and Democracy*, 25 PENN ST. INT'L L. REV. 207, 212 (2006).

105. *See* The Badinter Commission, Opinion No. 2, *reprinted in* TRIFUNOVSKA, *supra* note 29, at 474 ("[I]t is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.").

106. *See generally* Steven Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM J. INT'L L. 590 (1996); Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31 (1998–1999); Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50 (2000); Robert McCorquodale & Raul Pangalangan, *Pushing Back the Limitation of Territorial Boundaries*, 12 EUR. J. INT'L L. 867 (2001).

underlying legal instruments, such practice was developed in the territories of the Soviet Union,[107] Czechoslovakia,[108] Ethiopia/Eritrea,[109] Indonesia/East Timor,[110] Serbia/Montenegro,[111] and Serbia/Kosovo.[112] Practice thus affirms that the latest boundary arrangement of the independence-seeking entity will form a strong base for the new international delimitation. But this conclusion needs to be accompanied by a caveat.

International law does not preclude rearrangement of boundaries when new states are created. It is possible that the border arrangement would become a part of the political process, possibly (but not necessarily) leading to consensual secession.[113] If an independence-seeking entity is presented with the choice of becoming independent within narrower borders or not becoming independent at all, accepting independence within narrower borders may be an appealing choice. But such practice has not yet developed.

The question of future international delimitation was also invoked in the Quebec Case.[114] The Supreme Court of Canada made reference to possible negotiations on Quebec's legal status, whereby the question of new international borders could also be discussed.[115] In this regard, Alain Pellet noted that "negotiations on Quebec's borders [were] possible but . . . not obligatory."[116] Pellet further argues that the Supreme Court of Canada in the Quebec Case "has not ruled out the possibility that the issue of Quebec's boundaries might be the subject of future negotiations . . . . [as] nothing in the Court's ruling precludes negotiations between the Parties dealing with the issue of Quebec's borders."[117] The possibility of

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107. *See* Minsk Agreement, *supra* note 28, art. 5 ("The High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth.").

108. Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478, 500 (1997).

109. *Id.*

110. NEIL DEELEY, THE INTERNATIONAL BOUNDARIES OF EAST TIMOR 25 (2001).

111. Jure Vidmar, *Confining New International Borders in the Practice of Post-1990 State Creations*, 70 HEID. J. INT'L L. 319, 351 (2010).

112. *Id.* at 352–55.

113. *See* Quebec Case, *supra* note 19, para. 92 ("The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.").

114. *Id.* para. 96 ("Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.").

115. *Id.* para. 97.

116. Suzanne Lalonde, *Quebec's Boundaries in the Event of Secession*, 3 MACQUARIE L. J. 129, 149 (2003) (translating Alain Pellet, *Avis juridique sommaire sur le projet de loi donnant effet à l'exigence de clarté formulae par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec*).

117. *Id.*

negotiations on future international delimitation was also left open by the Badinter Commission in its Opinion No. 3 in the context of the dissolution of the SFRY.[118]

Even in non-colonial situations, there is thus a strong presumption in the practice of state creations that the new international borders would be confined along the lines of the most recent internal boundary arrangement. At the same time, international law does not preclude agreements on territorial rearrangements as an outcome of negotiations on consensual secession. However, practice of this kind has yet to develop.

2. The 1956 Boundary and Legal Grounds for the Abyei Area Exception

The reestablished 1956 boundary has a colonial pedigree. However, the colonial *uti possidetis* line could apply automatically only if North and South Sudan became two separate states on January 1, 1956. This was not the case and the emergence of South Sudan as an independent state is not a matter of decolonization; as demonstrated above, this is rather a situation of a consensual emergence of a new state outside the colonial context.

Practice of state creations shows that new international borders are drawn along the lines of the most recent internal boundary arrangement.[119] The relevance of the 1956 boundary is therefore not in its colonial pedigree; it is rather relevant because it was adopted by the internal legal regime of 2005.[120] Since the 2005 boundary is the latest internal boundary regime, the 1956 boundary is legally relevant *only* to the extent to which it was adopted in 2005.

The latest internal boundary arrangement in 2005 did not fully adopt the 1956 line. It acknowledged the Abyei Area exception,[121] albeit not by determining its legal status but rather by creating a mechanism for its determination—a popular consultation.[122] The consultation never took place.[123] Moreover, the ABC and the arbitral tribunal were asked to determine the Abyei Area geographically; they were not asked to determine its legal status.[124] As a consequence the area is now determined geographically, but with the referendum still outstanding, its legal status remains undetermined. With South Sudan becoming an independent state, the internal boundary dispute became a dispute over international delimitation.

There can be no automatic presumption of reestablishment of the 1956 boundary, since this was not the latest internal boundary arrangement within Sudan. At the same time, this does not mean that the Abyei Area necessarily belongs to South Sudan. The final international delimitation can only be determined by a referendum in the Abyei Area, held in accordance with the Abyei Protocol.[125]

118. *See* The Badinter Commission, Opinion No. 3 (Jan. 11, 1992), *reprinted in* TRIFUNOVSKA, *supra* note 29, at 480 (stating that the boundaries between any new independent states "may not be altered except by agreement freely arrived at").

119. *See supra* notes 107–112 and accompanying text.

120. *See supra* notes 82–90 and accompanying text.

121. *See supra* notes 86–89 and accompanying text.

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

123. *See* Garang, *supra* note 6.

124. *See supra* note 87 and accompanying text.

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

CONCLUSION

South Sudan's path to independence was rooted in the legal arrangement provided for by the 2005 Comprehensive Peace Agreement[126] and the subsequently adopted Interim Constitution of Sudan.[127] In accordance with these legal instruments, South Sudan became a self-determination unit with a constitutionally guaranteed right to secession. This right was operationalized by the 2009 Referendum Act.[128]

While no right to independence exists under international law, practice shows that where the parent state waives its claim to territorial integrity, the international community promptly accepts the emergence of a new state. Sudan waived its claim to territorial integrity by enacting a clear mechanism for secession and by a prompt recognition of the new South Sudanese state.[129] The consent of the parent state is the reason why, unlike in the situation of Kosovo, the new legal status of South Sudan is undisputed.

The controversy pertains to the new international delimitation. In principle, the border between Sudan and South Sudan follows the colonial boundary in existence on January 1, 1956 (the day of Sudan's independence). Practice of new state creations shows that new international borders are confined along the lines of the most recent internal boundary arrangement, although territorial rearrangements by agreement are possible.[130]

What is at issue here is not belated decolonization, but the emergence of a new state outside the process of decolonization. The 1956 boundary is therefore not relevant because it was applicable in 1956, but because it was, in principle, adopted in the latest internal arrangement of 2005 as a boundary delimiting the self-determination unit of Southern Sudan.[131] But in 2005, the 1956 line was not adopted in its full extent. The dispute over the Abyei Area remained unresolved and the referendum on its future status is still outstanding under the applicable legal regime of 2005.[132] Therefore, the colonial boundary from 1956 is not directly applicable. What matters is the latest internal boundary arrangement. In the Abyei Area this arrangement can only be determined by the foreseen, yet never conducted, popular consultation.

South Sudan emerged as a state with the approval of its parent state and therefore its legal status under international law was not subject to controversy, though its new international delimitation remains controversial. This Article demonstrates that the applicable law requires a referendum on the future legal status of the Abyei Area and thus the final determination of the new international border.

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126. *See supra* notes 62–65 and accompanying text.
127. *See supra* notes 66–68 and accompanying text.
128. *See supra* note 69 and accompanying text.
129. *See supra* note 2 and accompanying text.
130. *See supra* note 107–113 and accompanying text.
131. *See supra* notes 86–89 and accompanying text.
132. *See* Garang, *supra* note 6.

Insuring Maritime Trade with the Enemy in the Napoleonic Era

SU JIN KIM* & JAMES OLDHAM**

Abstract

During the late eighteenth and early nineteenth centuries, England and France were continuously at war. Although there were free-traders in the eighteenth century who thought trade with enemies made commercial sense, the law by the end of the century clearly held that trading with the enemy was illegal. Yet since trade with European nations had become crucial to the British economy, special licenses were issued by the Crown that overrode the legal prohibition. These licenses proliferated in the early 1800s and were supplemented by simulated papers to permit ships to evade capture and condemnation by the enemy. The use of simulated papers was acknowledged in courts of law, and marine insurance policies expressly authorized journeys that used simulated papers. Courts protected merchants by allowing them to recover under these insurance policies. The rationale was that this was necessary to protect British commerce. At first, the benefits of such policies applied only to British merchants, but in the early 1810s, the courts construed the insurance policies to benefit alien neutrals, and eventually alien enemies. The irony of these developments was that the end result in practical effect came close to the free trade views that had been crowded out by eighteenth century case law.

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INTRODUCTION

Historians often mention the familiar saying, *plus ça change, plus c'est la même chose*,[1] and with good reason. History does indeed repeat itself. On December 23, 2010, the *New York Times* ran a story headlined, "With U.S. Leave, Companies Skirt Iran Sanctions." The article opened with the following:

> Despite sanctions and trade embargoes, over the past decade the United States government has allowed American companies to do billions of dollars in business with Iran and other countries blacklisted as state sponsors of terrorism, an examination by The New York Times has found. At the behest of a host of companies . . . a little-known office of the Treasury Department has granted nearly 10,000 licenses for deals involving [foreign] countries that have been cast into economic purgatory, beyond the reach of American business.[2]

More than two centuries earlier in England, it had been clearly established that trading with the enemy was unlawful, and although prior to 1800 occasional dispensations were given in the form of special licenses, these were rare. Yet by 1810 the number of special licenses authorizing trade with foreigners in enemy nations reportedly exceeded 18,000. This Article examines that phenomenal pattern of change, together with the legal rationalizations and somersaults that accompanied it.

During the late eighteenth and early nineteenth centuries, England and France seemed to be continuously at war. The upheaval naturally affected the maritime trade between England and the continent. Even though English law clearly held that during times of war trading with the enemy was prohibited, there were isolated free-

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1. "The more things change, the more they stay the same."

2. Jo Becker, *With U.S. Leave, Companies Skirt Iran Sanctions*, N.Y. TIMES, Dec. 24, 2010, at A1. According to the NEW YORK TIMES, most of the special licenses were issued under broadly interpreted exemptions for agricultural and humanitarian aid, or because they were deemed to serve American policy goals. Stuart Eizenstat, who handled sanctions policy for the Clinton administration, was quoted as saying that, "when you create loopholes like this that you can drive a Mack truck through, you are giving countries something for nothing, and they just laugh in their teeth." *Id.* In its online version, the NEW YORK TIMES also itemized more than 100 examples of special licenses that had been issued after exemptions were granted. Jo Becker, *Licenses Granted to U.S. Companies Run the Gamut*, N.Y. TIMES, Dec. 24, 2010, http://www.nytimes.com/interactive/2010/12/24/world/24-sanctions.html. In the United States, the Trading with the Enemy Act by its terms is operative "[d]uring the time of war." 12 U.S.C. § 95a (2000). Although the United States is not formally at war with Iran, it has instituted economic sanctions against Iran that prohibit domestic businesses from trading with Iran. Iran Sanctions Act of 1996, 22 U.S.C. § 8512 (2010). *See also* the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (2000) (granting certain economic powers to the Secretary of State during national emergencies); Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189 (2011) (granting the Secretary of State the authority to classify certain groups as terrorist organizations); 18 U.S.C. § 2339 (2011) (making it a crime to harbor or conceal terrorists); and International Security and Development Cooperation Act, 22 U.S.C. § 2349aa-9 (2011) (restricting trade with countries that associate with organizations that have been classified as terrorist organizations).

trade voices in the eighteenth century claiming that trade with enemies made commercial sense. As early as 1747, for example, Attorney General Dudley Ryder and Solicitor General William Murray (later Lord Mansfield) spoke in opposition to a bill introduced in the House of Commons to prohibit English insurance on French ships at a time when England and France were at war. Murray asserted that, "To carry on trade for the mutual benefit of both nations is not aiding and assisting the enemy, nor is it such a correspondence as was intended to be prohibited by his majesty's declaration of war, especially when it is such a trade as must always leave a large balance in ready money here in England."[3] Ryder agreed, arguing that, "The trade of insuring we possess without a rival; but it will soon be established in other countries, and our own merchants may deal with foreign insurance-companies."[4] Yet the bill passed overwhelmingly. Lord Campbell, in his mid-nineteenth-century biography, sardonically observed that Mansfield's views "would furnish a defence of the Dutch doctrine, that a besieged city should sell gunpowder and balls to the besieging army."[5]

By the end of the eighteenth century, there was no disagreement about where the law stood. In *Potts v. Bell*,[6] Chief Justice Lloyd Kenyon of the Court of King's Bench[7] declared that the reasons that had been argued and the authorities that had been cited "were so many, so uniform, and so conclusive, to shew that a *British* subject's trading with an enemy was illegal, that the question might be considered as finally at rest . . . ."[8] Referring to "a long string of authorities" from the Admiralty Court, Kenyon acknowledged that there was but one authority in the common law books to the same effect,[9] but that authority was strong, and it could be taken for granted that the illegality of "[t]rading with an enemy without the King's license" had become "a principle of the common law."[10]

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3. 14 THE PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST TO THE YEAR 1803, at 116 (W. Cobbett & J. Wright eds., 1806–20).

4. 2 JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 247 (1849).

5. *Id.* at 365.

6. Potts v. Bell, (1800) 101 Eng. Rep. 1540 (K.B.); 8 T.R. 547. *See also In re* Hoop, (1799) 165 Eng. Rep. 146 (Adm.); 1 C. Rob. 196 ("By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of . . . permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war.").

7. The Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer were the three common law courts in England in the eighteenth century. Although the three courts originally had separate jurisdictions, by the mid-eighteenth century, their jurisdictions largely overlapped. Their relative popularity with parties depended on differences in costs, ease of procedural rules, and the pull of certain judges. By the latter part of the eighteenth century, the Court of King's Bench had become dominant. "Appeals" were heard by the Court of Exchequer Chamber (distinct from the Court of Exchequer), and the court of last resort was the House of Lords. There were also specialty courts, such as the Admiralty Court, which heard all cases dealing with prize or those arising on the high seas. "Appeals" from this court were heard by the Privy Council. *Nisi prius* cases were civil jury cases in London and at the local assizes. *See generally* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2002).

8. *Potts*, 101 Eng. Rep. at 1547; 8 T.R. at 561 (emphasis added).

9. Kenyon did not identify the one authority. In the report of *Bell v. Potts* in THE TIMES, May 10, 1800, at 3, the source was said to be ROLLE'S ABRIDGEMENT. (Note, THE TIMES in this Article refers to the LONDON TIMES.)

10. *Potts*, 101 Eng. Rep. at 1547; 8 T.R. at 561. Thus the plaintiff could not recover on insurance covering goods purchased in an enemy country (Holland) after the ship carrying the goods had been captured by the French. For British insurance law generally, see JAMES A. PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES; WITH THREE CHAPTERS ON BOTTOMRY; ON INSURANCES ON LIVES; AND ON

Yet strict adherence to the legal prohibition against trading with the enemy would have severely damaged British commerce. It was for this reason that the British license system mushroomed. It had existed before the Napoleonic Wars, but on a much smaller scale. A license was a grant from the Crown that allowed its holder to trade with the enemy, a royal prerogative that exempted the holder from prosecution. To supplement the license system, simulated papers were used to evade capture and condemnation by the enemy. These complementary devices facilitated trade with the enemy notwithstanding the legal prohibition. If stopped by a British cruiser, a merchant ship's captain would produce the license showing that it was authorized to trade with the enemy. If captured by an enemy ship, the same captain would produce the simulated papers indicating that his was a neutral or friendly ship, not British. The use of simulated papers was acknowledged in courts of law, and marine insurance policies expressly authorized journeys that used simulated papers. Indeed, the underwriters sometimes refused to insure *unless* false papers were used. As the Chief Justice of the Court of Common Pleas observed in 1811:

> [A]t present it was quite necessary [for a ship to carry simulated papers]: several brokers and other witnesses proved, that since . . . 1806, a ship could not safely proceed to the Baltic without simulated papers: that no policy would now be underwritten without liberty to carry simulated papers; that some underwriters had refused to subscribe policies, because the simulated papers were not well arranged; that no ship could sail to Russia without simulated papers, but that some policies on that voyage did, and others did not contain an expression of the liberty to use them.[11]

I. BACKGROUND TO THE LICENSE SYSTEM

After several years of protracted warfare against Britain and a major naval defeat at Trafalgar in October 1805, Napoleon decided that purely military affronts were insufficient to defeat his enemy.[12] In the first decade of the nineteenth century, he issued a number of edicts that were meant to ruin Britain economically.[13] The first was the Berlin Decree, issued in November 1806, which declared a blockade on the British Isles and forbade any of his Continental allies or dependent countries to import goods from Britain.[14] This "Continental System," as it was called, implemented Napoleon's plan to starve out Britain by cutting off all her trade.[15] In

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INSURANCES AGAINST FIRE (3d ed. 1796).

11. Steel v. Lacy, (1810) 128 Eng. Rep. 113 (C.P.) 115; 3 Taunt. 285, 290.

12. *See* ELI F. HECKSCHER, THE CONTINENTAL SYSTEM: AN ECONOMIC INTERPRETATION 88–89 (Herald Westergaard ed., 1922) (describing Napoleon's new tactics following Trafalgar).

13. *See generally id.* at 83–87 (discussing French customs policy at the beginning of the nineteenth century).

14. *Id.* at 88–90.

15. *See generally id.* at 92–93, 98. One historical viewpoint of the Continental System was that Napoleon knew his French navy was no match for that of Britain, and the language of the Berlin Decree (and of other decrees that followed) was merely for show. Heckscher claims, however, that the real aim was to close the continental markets to British goods using this "self-denying ordinance." Conversely, the British response, though purportedly a blockade of France in retaliation for the decrees, was really to ensure that the French market was well-stocked with British goods. *Id.* at 93, 98. Another viewpoint is provided in 2 CAPTAIN A.T. MAHAN, THE INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE: 1793–1812, at 272–357 (4th ed. 1892). Though historical interpretations of the motivations for Napoleon's decrees and the Continental System vary, this Article is not meant to enter that debate;

response, Britain's Privy Council passed a number of its own economic measures, termed Orders in Council.[16] The most important ones were issued in January and November 1807 and April 1809. The January 1807 Order declared all ports of France and her colonies in a state of blockade, and also forbade any neutral states from trading with France and her colonies.[17] The November 1807 Order extended the blockade to include any ports that excluded the British flag, and it also declared that any American ships bound for France or her allies were to stop first at a British port to pay taxes if they wished to circumvent the blockade.[18] Failure to do so would risk condemnation of the ship in the British Admiralty's prize court. The Berlin Decree was followed by the second Milan Decree in December 1807, a direct response to the November 1807 Order in Council. The second Milan Decree expressly expanded the Continental System from imports on land to shipping at sea by providing that any ship that submitted to British inspection, called at a port in Britain, or paid duties to Britain, became English property, and thus lawful prize upon capture by the French.[19]

Understandably, the November 1807 Order was highly unpopular among Americans and was partially revoked by the April 1809 Order, which opened trade with the north of Europe.[20] This meant that the only blockaded ports were those of Holland, France and her colonies, and southern Italy.[21] For both British and American merchants to avoid the Orders in Council, a special license permitting trade with France and allied enemies was necessary.

Before 1800, licenses were rarely granted.[22] By 1807, however, 1,600 licenses were granted each year, and in 1810, more than 18,000 licenses were granted.[23]

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rather, we describe the historical events only to provide the context in which the license system and simulated papers existed.

16. Several were passed, but only a few merit mention. The Orders were often criticized as being contradictory, "obscur[e] and rambling," even incomprehensible, but the economic objective remained consistent. HECKSCHER, *supra* note 12, at 114–15.

17. William Sloane, *The Continental System of Napoleon*, 13 POL. SCI. Q. 213, 224 (1898). For a selection of Orders in Council, see 6 WILLIAM FREEMAN GALPIN, THE GRAIN SUPPLY OF ENGLAND DURING THE NAPOLEONIC PERIOD, app. 6, at 223–36 (1925).

18. Sloane, *supra* note 17, at 224; HECKSCHER, *supra* note 12, at 116–17. "The intention of this regulation was presumably, above all, to raise the prices on the products of the enemy colonies and the enemy parts of the European mainland in all ports where they might compete with goods of Great Britain or her colonies." This Order, coupled with its French counterpart, put neutrals in a very difficult position, for the Order also said that the mere possession of a French certificate of origin declaring the goods to be non-British was enough to warrant confiscation of the goods by the British, whereas the French ordinance stated that the lack of a certificate of origin was grounds for confiscation. "The only effect of all this was the establishment of a system of double ship's papers, which gradually attained an immense scope; and thus in reality the consequence was that the laws of both sides were broken." *Id.*

19. HECKSCHER, *supra* note 12, at 124; Sloane, *supra* note 17, at 225.

20. Sloane, *supra* note 17, at 225; *see also* 21 PARL. DEB., H.C. (1st ser.) (1812) 1042–44 (discussing British concerns that the November 1807 Order would endanger trade between Britain and America).

21. Sloane, *supra* note 17, at 225.

22. JOSEPH PHILLIMORE, REFLECTIONS ON THE NATURE AND EXTENT OF THE LICENSE TRADE 7–9 (3d ed. 1812).

23. Mr. Brougham's Motion Relating to the Orders in Council and the License Trade, 21 PARL. DEB., H.C. (1st ser.) (1812) 1105 [hereinafter Brougham's Motion]. Lord Brougham (born Henry Peter Brougham, 1778–1868), was a precocious student, author of voluminous Whig pieces in his youth, and a reformer during his entire political life. It was largely through his efforts, and his well-known oratory skills, that the Orders in Council were repealed. He was appointed Lord Chancellor in 1830 and initiated

According to one historian, "the number of licenses issued rose from [4,910] in 1808, to no fewer than [15,356] in 1809, and [18,356] in the year 1810."[24] Some contended the government was too enmeshed in the details of private commerce.[25] The case-by-case nature of license approval resulted in little consistency in who received or was denied a license. In one instance, an application was made for a license unsuccessfully three times, but on the fourth try, it was granted.[26] Furthermore, this system engendered a vicious cycle in which licenses were issued, ships were captured, and courts had to decide whether the ships had been fairly captured as prize or had been authorized to carry on trade with the enemy, thereby hampering the insurance recovery process and impeding trade. As one pamphleteer declared, "[I]t may fairly be computed, that of the last two hundred vessels detained for the adjudication of the High Court of Admiralty . . . , at least three-fourths have been proceeded against, on the sole ground of their carrying on the commerce of the enemy, under the protection of British licenses."[27]

At the very least, the indispensability of licenses created a black market for them both in England and abroad. According to a petition from Hull traders to Parliament, "numbers of British licences have been publicly sold on the continent," and "by means of those licences, and even under the protection of British convoys, our enemies have been supplied, to a great extent, with naval stores, conveyed directly into their own harbours."[28] Allegations flew that the license system propagated fraud. Brougham cited Sir William Scott, the Admiralty judge, who described the trade as "a system of simulation and dissimulation from beginning to end."[29] Brougham also claimed that in 1810, Scott "revealed the extent of this legalized trading with the enemy when he said: 'It is a matter perfectly notorious that we are carrying on the whole trade of the world under simulated and disguised papers.'"[30] But to Brougham, "it would be still more accurate to say that it is a system which begins with forgery, is continued by perjury, and ends in enormous frauds."[31] In fact, according to one Member of Parliament, Samuel Marryat,

> The License trade abounded with frauds. There was not a consul in the world whose signature was not forged; and there were men in London,

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various reforms, most notably the creation of the Judicial Committee of the Privy Council. A.W.B. SIMPSON, BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 79–82 (1984); *see also* 10 LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS OF ENGLAND: FROM THE EARLIEST TIMES TILL THE REIGN OF QUEEN VICTORIA 202–565 (John Allan Mallory ed., 1875) (biographical chapter of Lord Brougham).

24. 2 WILLIAM SCHAW LINDSAY, HISTORY OF MERCHANT SHIPPING AND ANCIENT COMMERCE 313 (1965).

25. Mr. Brougham: "It certainly wears rather a strange appearance to see the President and Vice-President of the Board of Trade . . . spending whole mornings in laying their heads together, and determining with the utmost attention and gravity whether one cargo should consist of cotton, or of wool—whether scissars should be added—whether nails should be added to the scissars—whether the scissars or the nails should be left out—or whether the commerce of the country might or might not be ruined by throwing in a little hemp along with the nails and the scissars!" Brougham's Motion, *supra* note 23, at 1107–08.

26. *Id.* at 1147–48.

27. PHILLIMORE, *supra* note 22, at 44–45.

28. Petition from Hull Respecting Commercial Licenses, 21 PARL. DEB., H.C. (1st ser.) (1812) 980.

29. Brougham's Motion, *supra* note 23, at 1110.

30. Roland Ruppenthal, *Denmark and the Continental System*, 15 J. MOD. HIST. 7, 16 (1943).

31. Brougham's Motion, *supra* note 23, at 1110.

> who, if they received a letter to-day, would be able in a few days to produce two or three letters so completely similar in hand-writing, water-mark, &c. that he who had wrote the original, could not distinguish it from the copies.[32]

There were, however, differing opinions on whether the licensing system had indeed hurt trade.[33] One view was that the Orders in Council authorizing the licenses had nothing to do with the increase in the number of licenses that were issued, because licenses had existed prior to the establishment of the Orders.[34] Then-foreign secretary Lord Castlereagh asserted that "[t]he licenses connected with the system of blockade [created by the Orders in Council] did not form a fifth of the whole licence system of the country."[35] According to government officials, the remainder would have been issued regardless of the Orders in Council's existence "to serve as a form of dispensation from the prohibition of trading with the enemy."[36] One historian said that, "as it was generally considered to be equally self-evident that this trade with the enemy should be forbidden by law and encouraged in reality, the government . . . had the better of the argument."[37] And Alexander Baring, while admitting that some fraud existed, claimed that the majority of trade carried on by Americans was "*bona fide* neutral."[38]

One of the chief complaints of British traders had been that the allegedly neutral Americans were actively engaging in fraud to circumvent Britain's Orders in Council that required that American ships bound for the continent first stop in London. Yet according to Baring, a number of factors made it very difficult for the Americans to trade directly with the enemy.[39] For one, the distance between America and the continent made it hard to secure current news about who was at war with whom, so it was difficult to be confident that forged licenses were up-to-date.[40] Furthermore, the cost to a French exporter would far outweigh any benefits of shipping under an American flag (duties, risk of capture, risk of trusting someone for the time for a ship to cross the ocean, commissions, etc.).[41] Thus, the French had "at the breaking out of the present war, very little shipping to transfer" to America.[42]

32. *Id.* at 1149.

33. *Id.* at 1119.

34. *Id.* at 1144–45.

35. Mr. Brougham's Motion on the Present State of Commerce and Manufacturers—and for the Repeal of the Orders in Council, 12 PARL. DEB., H.C. (1st ser.) (1812) 540 [hereinafter Repeal of Orders].

36. HECKSCHER, *supra* note 12, at 206–07.

37. *Id.* at 207.

38. ALEXANDER BARING, AN INQUIRY INTO THE CAUSES AND CONSEQUENCES OF THE ORDERS IN COUNCIL; AND AN EXAMINATION OF THE CONDUCT OF GREAT BRITAIN TOWARDS THE NEUTRAL COMMERCE OF AMERICA 41 (1808). Alexander Baring (1773–1848) came from the prestigious Baring financing empire, but gave up the family business to enter politics and served as a Member of Parliament for various locales. In his early years, he was an advocate of free trade, and his experience in living and working in America informed his views of the American trade during the debates over the Orders in Council. JOHN ORBELL, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 815–18.

39. BARING, *supra* note 38, at 30.

40. *Id.* at 34.

41. *Id.* at 32–33.

42. *Id.* at 33.

Still, based on the printed reports of cases, pamphlets, and the voluminous Parliamentary Debates, it is safe to conclude that the use of licenses and simulated papers increased sufficiently during the early 1800s to warrant concern among policymakers. Certainly trade was impacted enough to cause petitions to Parliament seeking relief to proliferate.

II. SIMULATED PAPERS

A brief note in *The Times* on March 5, 1814, described the following special verdict in the case of *Meyer v. Pigou*:

> [T]hat in August, 1810, all British commerce was prohibited by the Powers of the Baltic and Gulf of Finland, and it was only carried on by simulated papers and clearances, importing that it proceeded from neutral countries, under British licenses, and that this course was as well understood by the defendant as by the plaintiff.[43]

A. *Widespread Availability of Simulated Papers*

Accessible printed sources reveal clearly that simulated papers were widely available.[44] The sheer volume of cases in which insurance policies permitted the use of simulated papers shows just how prevalent the use of simulated papers was in England during the Napoleonic wars.[45] There were even circulars advertising the services of those who specialized in creating simulated papers, as, for example, the following:

> Liverpool, _____.
>
> Gentlemen—We take the liberty herewith to inform you, that we have established ourselves in this town, for the sole purpose of making

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43. *Law Report: Court of King's Bench, Friday, March 4*, TIMES, Mar. 5, 1814, at 2. The *Meyer* case was unreported. According to THE TIMES, an appeal was to be made in the House of Lords, and it was for this purpose that the special verdict was found. No further record of the case has been located.

44. Records in the National Archives would undoubtedly illuminate and expand the matters addressed in this Article. Although it has not been possible for the authors to explore relevant National Archives holdings, we hope that it will be undertaken by future researchers. Also, according to Brougham, the House of Commons collected a "load of papers—these eight or nine hundred folios of evidence—together with the bulk of papers and petitions" before the Members of Parliament. Repeal of Orders, *supra* note 35, at 487.

45. A representative sampling of cases in which the use of simulated papers was permitted in insurance policies is as follows: Spitta v. Woodman, (1810) 127 Eng. Rep. 1139 (C.P.); 2 Taunt. 416; Jarman v. Coape, (1811) 170 Eng. Rep. 1269 (K.B.); 2 Camp. 613, *aff'd*, 104 Eng. Rep. 422 (K.B.); 13 East 394; Brown v. Carstairs, (1811) 170 Eng. Rep. 1341 (K.B.); 3 Camp. 161; Muller v. Thompson, (1811) 170 Eng. Rep. 1268 (K.B.); 2 Camp. 610; Reyner v. Pearson, (1812) 128 Eng. Rep. 491 (C.P.); 4 Taunt. 662; Feise v. Newnham, (1812) 104 Eng. Rep. 1063 (K.B.); 16 East 197; Flindt v. Crokatt, (1812) 104 Eng. Rep. 941 (K.B.); 15 East 522; Flindt v. Scott, (1812) 104 Eng. Rep. 942 (K.B.); 15 East 525; Keyser v. Scott, (1812) 128 Eng. Rep. 490 (C.P.); 4 Taunt. 660; Langhorn v. Allnutt, (1812) 128 Eng. Rep. 429 (C.P.); 4 Taunt. 511; Le Cheminant v. Pearson, (1812) 128 Eng. Rep. 372 (C.P.); 4 Taunt. 367; Levy v. Vaughan, (1812) 128 Eng. Rep. 380 (C.P.); 4 Taunt. 387; Fomin v. Oswell, (1813) 105 Eng. Rep. 147 (K.B.); 1 M. & S. 393; Mellish v. Andrews, (1812) 104 Eng. Rep. 1108 (K.B.); 16 East 312; Mellish v. Allnutt, (1813) 105 Eng. Rep. 322 (K.B.); 2 M. & S. 106; Andrews v. Mellish, (1814) 128 Eng. Rep. 782 (Ex. Chbr.); 5 Taunt. 496; Anthony v. Moline, (1814) 128 Eng. Rep. 870 (C.P.); 5 Taunt. 711.

> simulated papers [Hear, hear!] [sic] which we are enabled to do in a way which will give ample satisfaction to our employers, not only being in possession of the original documents of the ships' papers, and clearances to various ports, a list of which we annex, but our Mr. G_____ B_____ having worked with his brother, Mr. J_____ B_____, in the same line for the last two years, and understanding all the necessary languages.
>
> Of any changes that may occur in the different places on the continent, in the various custom house, and other offices, which may render a change of signatures necessary, we are careful to have the earliest information, not only from our own connections, but from Mr. J _____ B_____, who has proffered his assistance in every way, and who has for some time past made simulated papers for Messrs. B_____ and P_____, of this town, to whom we beg leave to refer you for further information. We remain, &c.[46]

Though precise numbers are unavailable and there are conflicting accounts of how extensive the abuse of the licensing system was, one could safely conclude that simulated papers were widely used. One Member of Parliament, Mr. Whitbread, noted that he possessed "papers which had been left in the hand of a bankrupt, who had dealt in these simulated papers; and the clerks of that very bankrupt had since advertised, that all persons who were desirous of obtaining simulated papers might be immediately supplied by them."[47] Further, barrister Thomas Carr, in the case of *Flindt v. Scott* (1814), asserted: "The whole trade of the country is carried on by perjury, swearing these instruments are genuine, though all manufactured by one man in London."[48]

One example of the lengths to which ship owners or captains would go to maintain the pretense was the case of *The Mercury, Roberts*.[49] There, the ship originally sailed from Havana and was bound for Charlestown. Upon interrogation by a British cruiser, the papers and the Master's testimony all confirmed the story of an American ship being homebound with no further destination.[50] Thus, the British

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46. Brougham's Motion, *supra* note 23, at 1113. Following the solicitation, there was a list of "about twenty places from and to which they can forge papers (having all the clearances ready [for] them, from the different public agents) the moment they receive intelligence that any merchant may need their assistance." *Id.*

47. Repeal of Orders, *supra* note 35, at 543.

48. Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 862; 5 Taunt. 675, 689. We can infer that he was referring to simulated papers, but precisely to whom he was referring is unclear.

49. The case was apparently unreported. Its source is JAMES STEPHEN, WAR IN DISGUISE; OR, THE FRAUDS OF THE NEUTRAL FLAGS 52–53 (4th ed. 1806). Of James Stephen, Baring said, "he appears ignorant of every thing relating to American trade to a degree incredible in a person, who undertakes to inform the public upon it." BARING, *supra* note 38, at 55. James Stephen (1758–1832), though most well-known for his work as an abolitionist, supported himself as a lawyer. "Much of his [earlier legal experience] came from defending American traders [in the West Indies] whose cargoes and ships had been seized for violations of the Navigation Acts." He was successful enough that his practice took him to "the prize appeal court of the privy council, where he remained until his appointment . . . as master in chancery on 20 February 1811." Although the recognized author of WAR IN DISGUISE, he later admitted that he was mistaken in his policy of pursuing war against America. P. LIPSCOMB, III, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 433–35 (2004). Interestingly, Sir William Scott (Lord Stowell) had reviewed the manuscript and encouraged Stephen to publish the pamphlet. HENRY J. BOURGUIGNON, SIR WILLIAM SCOTT LORD STOWELL: JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798–1828, at 118 n.5 (1987).

50. STEPHEN, *supra* note 49, at 51–52.

cruiser released the ship. Instead of heading home, however, the ship anchored at Charlestown and, without unloading any cargo, took on a new set of papers and set sail for either Hamburg or Spain. The ship was again intercepted by the British. All the papers were in order, and the Master's testimony was in agreement. The ship surely would have been released again, except that the cruiser that stopped it happened to be the same one that had stopped it the first time. The commander of the cruiser recognized the ship and captured it as prize.[51] The author of the pamphlet, James Stephen, assumed that because of the slim odds of uncovering such fraud, this case could be only the tip of the iceberg.[52] According to Stephen, even underwriters were complicit in indirectly trading with the enemy.[53] They would issue a policy that was perfectly valid on its face. Then, after issuing the policy, the underwriter would execute a second (illegal and unenforceable) agreement with the ship or cargo owner, that in the event of capture and a decision from a judicial body that the ship had been bound for a hostile port, the underwriter would not take advantage of such a judgment or argue that there had been a breach of the warranty of neutrality. For such a second agreement, the cost of insurance had a built-in premium of approximately one percent on top of the originally agreed-upon insurance rate.[54]

B. *Case Law*

By the end of the eighteenth century, as Chief Justice Kenyon explained in *Potts v. Bell*,[55] the law was clear that trading with the enemy during times of war was illegal, unless licensed by the King. That black letter law did not change, but the attitudes of the judges about how to construe licenses and whether to protect aliens (both neutrals and enemies) altered in the early nineteenth century. Although according to the law of nations, the use of simulated papers was illegal,[56] many nations used them,[57] and these papers were expressly permitted in insurance policies.[58] Indeed, underwriters often demanded they be used, and would sometimes refuse to write policies when the quality of simulated papers was poor.[59] For a ship to be fully protected, it would need a license to trade with the enemy from the Board of Trade in London (in case a British cruiser stopped it), simulated papers attesting to neutral

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51. *Id.* According to Heckscher, citing Stephen, neutrals—especially the Americans—were the great beneficiaries of the Napoleonic Wars; during times of war, America's foreign exports spiked with a "quite unique excess of re-exports, *i.e.*, the exports of foreign products" and during intermittent and short-lived times of peace, foreign exports dropped. Eventually, Britain would deal with this circuitous trade, first through the judges who ruled against American ships in prize cases, and second by passing the several Orders in Council. HECKSCHER, *supra* note 12, at 103–04, 107, 110.

52. STEPHEN, *supra* note 49, at 51.

53. *Id.* at 81, 86.

54. *Id.* at 81–83.

55. *See supra* text accompanying notes 6–10.

56. Horneyer v. Lushington, (1811) 170 Eng. Rep. 1314 (N.P.) 1315; 3 Camp. 85, 89.

57. *See, e.g.*, Ruppenthal, *supra* note 30, at 16–19 (discussing the license system and the use of simulated papers).

58. *See supra* text accompanying note 11. See also the Appendix for a copy of a standard Lloyd's marine insurance policy issued on August 4, 1810, with handwritten interlineations that include "liberty to carry use and exchange any simulated papers clearances and documents whatsoever." Hagedorn v. Oliverson, (1813) 105 Eng. Rep. 461 (K.B.); 2 M. & S. 485.

59. Steel v. Lacy, (1810) 128 Eng. Rep. 113 (C.P.) 115; 3 Taunt. 285, 290.

ports of departure and destination, and an insurance policy to cover the loss in the event of capture (with permission to carry simulated papers).[60]

In *Steel v. Lacy*,[61] the Chief Justice of the Court of Common Pleas, Sir James Mansfield, elicited useful information from special jurors who said that since the Berlin Decree's issuance,[62] a ship could not safely sail the Baltic without using simulated papers.[63] The court, however, declined to decide the issue of the legality of using simulated papers and instead nonsuited the plaintiff because there was no proof that the Berlin Decree had been adopted in Denmark.[64] Yet Chief Justice Mansfield hinted that, in his opinion, using simulated papers was improper: "I give no opinion on what might be the case, if the same point was to arise on proper evidence; but there must be pretty strong evidence of the necessity of simulated papers, to induce the Court to give sanction to them."[65]

The question of whether simulated papers could be used without permission to lessen the risk of a voyage was decided in the negative at trial in *Horneyer v. Lushington*[66] and subsequently confirmed by the full Court of King's Bench.[67] That case involved a ship that had sailed from Gothenburg (Sweden) to Riga (Russia). At the time, Sweden and Russia were at war, so simulated papers were obtained stating the ship had actually sailed from Bergen (Norway).[68] The papers were obtained without consulting the underwriters, who therefore did not insert in the policy that the ship had leave to carry simulated papers.[69] Upon landing at Riga, the ship was condemned as prize for carrying simulated papers, contrary to the law of nations.[70] The Attorney General insisted that the papers were used to ensure the safety of the

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60. Horneyer v. Lushington, (1812) 104 Eng. Rep. 761 (K.B.); 15 East 46.

61. *Steel*, 128 Eng. Rep. at 113–14; 3 Taunt. at 285–86. The voyage in question was from London to Riga: the ship was captured off the coast of Elsineur (Denmark) in 1808 and carried into a Danish port and condemned as prize for, among other reasons, using simulated papers. The policy had not given leave to carry the papers, so the underwriter refused to pay.

62. Napoleon had issued this decree on November 21, 1806, which directly forbade any European country allied with or dependent on France to import British goods. HECKSCHER, *supra* note 12, at 88–89, 93.

63. In late eighteenth and early nineteenth century England, special merchant jurors at trial frequently relied on their own knowledge and expertise, often educating the court in the process. JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 22 (2006). Relying on the jury's answer, counsel for the plaintiff in *Steel v. Lacy* said: "It is clear law that the assured need not disclose that to the underwriter, which is notoriously known to all men. It is notorious that a ship cannot go this voyage without simulated papers; it was in proof that underwriters would not insure without them. The Defendants knew the voyage they were insuring; they knew that without these papers the vessel must have been condemned . . . . The taking these papers on board, (to sail without which would be absolute destruction,) certainly does not of necessity increase the risk, nor have the jury found that it did . . . . Sir W. Scott has declared that, under the present circumstances of Europe, if trade with the continent is to be carried on at all, it must be carried on by the aid of simulated papers." *Steel*, 128 Eng. Rep. at 116; 3 Taunt. at 292–93.

64. *Steel*, 128 Eng. Rep. at 118–19; 3 Taunt. at 296–98.

65. *Id.* at 118; 3 Taunt. at 298.

66. Horneyer v. Lushington, (1811) 170 Eng. Rep. 1314 (N.P.) 1314–16; 3 Camp. 85, 89.

67. Horneyer v. Lushington, (1812) 104 Eng. Rep. 761 (K.B.) 763–64; 15 East 46, 51.

68. *Horneyer*, 170 Eng. Rep. at 1314; 3 Camp. at 85.

69. *Id.* at 1315; 3 Camp. at 87.

70. Among other reasons, the ship was condemned for "having violated the laws of neutrality in bringing to a Russian port a cargo the property of an enemy concealed under false documents." *Id.* at 1314–15; 3 Camp. at 86.

ship, for without the papers the ship would certainly have been condemned. He asserted that "it must have been perfectly well understood between the parties that simulated papers were to be used; and for that reason no express liberty to use them appears upon the face of the policy."[71] Otherwise, the underwriters never would have issued the policy. Lord Ellenborough, however, held:

> [T]he underwriters are not liable in this case, as the assured must be considered the efficient cause of the loss, by an act which is in itself illegal, and for which no liberty is given in the policy .... By this [foreign court's] sentence, the ship and cargo are condemned for a breach of the law of nations, in carrying fabricated papers .... The liberty to carry simulated papers is now frequently expressed in policies of insurance; and ought to have been so in this instance.[72]

Thus, notwithstanding the illegality of using simulated papers, under the law of nations, Lord Ellenborough thought that if an insurance contract permitted their use, a plaintiff could recover for a loss of ship or cargo.[73]

Indeed, if the policy gave leave to carry simulated papers, the underwriter could not escape liability by showing that the papers contained errors. In *Bell v. Bromfield*,[74] the ship was confiscated and condemned as prize for carrying simulated papers, which the insurance policy had given leave to do, but the papers were written badly. The underwriters claimed that if the ship used them, they had to be error-free.[75] Lord Ellenborough disagreed. The foreign court's ruling was based on the existence of simulated papers, not their flawed nature. He said that "the main stress of the argument is that there was a simulation. Then if the simulation of papers be the ground ... of the condemnation, the underwriter cannot object to bear the loss which has accrued on that account; he having agreed that the assured should carry simulated papers."[76]

III. THE EXISTENCE OF WAR

Naturally, no "trading with the enemy" issue arose unless the foreign nation involved in a business transaction occupied "enemy" status. Not infrequently this presented difficult threshold questions for the courts. How was it known or determined that hostilities between England and another country had reached

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71. *Id.* at 1315; 3 Camp. at 88.

72. *Horneyer*, 170 Eng. Rep. at 1315; 3 Camp. at 88–89.

73. See Oswell v. Vigne, (1812) 104 Eng. Rep. 771 (K.B.) 771; 15 East 70, in which the policy did not contain leave to carry simulated papers and the ship was captured and condemned for having such papers onboard. Because the plaintiff-insured lost in *Oswell v. Vigne*, he sued his broker for failing to obtain permission to carry simulated papers in Fomin v. Oswell, (1813) 105 Eng. Rep. 147 (K.B.); 1 M. & S. 393. In *Fomin*, verbal instructions had contained an order to insert a clause granting leave to carry simulated papers, but the written instructions did not. The ship was captured and condemned for carrying simulated papers. The owners were unable to collect on the insurance because the policy did not grant them permission to have carried simulated papers.

74. Bell v. Bromfield, (1812) 104 Eng. Rep. 882 (K.B.); 15 East 364.

75. *Id.* at 882–83; 15 East at 364–65.

76. *Id.* at 885; 15 East at 370.

sufficient intensity so that the two countries were "at war"? Was a declaration of war necessary?[77] And even if war status existed, did that invalidate all unlicensed trade?

In the *Bristow v. Towers* report from the December 27, 1794, issue of *The Times*, counsel for the plaintiff argued that the government should decide when its trade with another country was impermissible and make it known to British subjects, for example by a legislative announcement or an order of the King in Council.[78] He claimed that "the mere commencement of a war with an enemy, did not make the trade carried on with that enemy illegal, unless it was carried on in violation of the subject's allegiance, by aiding the King's enemies."[79]

Alternatively, a court might take judicial notice of the fact that, absent a special license, trade was prohibited with another country because of overt hostile engagements. But in *Potts v. Bell*,[80] plaintiff's counsel, Edmund Wigley, argued that "[h]ostilities . . . may exist without open war"; further, that "[a] declaration of war generally contains a prohibition to trade with the enemy; but a proclamation for marque and reprisals only, does not; and it is only from the prohibition of the King, by virtue of his prerogative, that the illegality arises."[81] Opposing counsel, Vicary Gibbs, disagreed, claiming that "[t]he Court will take notice of the existence of open war between this and any other country, if it be necessary, . . . but it is sufficient to state, as here, that hostilities existed at the time, which is equivalent to open war."[82] Chief Justice Kenyon said nothing to this point in his brief opinion.

A decade later, whether a court could take judicial notice of war status remained unresolved. In *Rucker v. Ansley*,[83] a license was issued on July 6, 1810, to ship brokers "on behalf of themselves and British or neutral merchants."[84] The license authorized specified exports on a Russian ship "to any port in Sweden or the Baltic not under blockade," and to import in return grain needed in England.[85] The ship was seized in Riga, a Russian port. At trial, Serjeant Best, counsel for the underwriter-defendant, argued that the interested parties were alien enemies domiciled at Riga, who were not protected by the insurance policy on the ship and cargo.[86] For the plaintiff, the Attorney General argued "that Riga was not in a state of hostility with Great Britain."[87] Serjeant Best said the court should take judicial notice of the state of war, but Chief Justice Ellenborough said no—"I am not bound

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77. Sir William Holdsworth stated that according to Blackstone, "The King has the sole prerogative of making peace and war. . . . To make it clear that the war is not the unauthorized act of private persons, but is regularly begun, a declaration of war is necessary." Holdsworth protested that this view, though once generally held, "had become antiquated in Blackstone's time." 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 374 (1938).

78. *Law Report*: *Bristow v. Towers*, TIMES, Dec. 27, 1794, at 3, reporting the case from July 1, 1794. Lord Kenyon commented, "I suppose it must be done by the whole legislative body. I do not know whether the King has ever assumed that right." *Id.*

79. *Id.*

80. Potts v. Bell, (1800) 101 Eng. Rep. 1540 (K.B.); 8 T.R. 548.

81. *Id.* at 1542; 8 T.R. at 552–53 (citing M. HALE, PLEAS OF THE CROWN 162 (1716)) (a general marque or reprisal "doth not make the two nations in a perfect state of hostility between them").

82. *Id.* at 1542; 8 T.R. at 553.

83. Rucker v. Ansley, (1816) 105 Eng. Rep. 961 (K.B.); 5 M. & S. 25.

84. *Id.* at 961; 5 M. & S. at 26.

85. *Id.*

86. *Id.* at 962; 5 M. & S. at 28.

87. *Law Report*: *Rucker v. Ansley*, TIMES, Oct. 31, 1811, at 3.

to know the secrets of councils; or with whom the country considers itself at war or at peace, except by its manifest acts."[88] He said that Serjeant Best must prove the war status "independently of the acts of State" and that "it is incumbent on [him] to show, that Russia is in a state of hostility with us; and not upon the plaintiffs, to show, that it is neutral."[89] Addressing the jury, Serjeant Best said that the jurors must of their own knowledge know whether Russia was, at that moment, at war with England, but Lord Ellenborough interjected that "[i]t must be a legitimate knowledge; not a persuasion, or a belief: it must be that which, if detailed in evidence, would be legal proof."[90] The Attorney General said that even though Russia and England might be in a "feverish state," no letters of marque had been issued against Russia, which was "the strongest evidence that the country [Russia] was not considered hostile."[91] In the end, Lord Ellenborough said that it was for the jury to say whether "Russia's allowance of no commerce in English ships did not constitute a decided hostility towards England."[92] Ellenborough told the jury that, "[i]f a country puts itself in a decided state of hostility, there need not be reciprocity to constitute war."[93] "The jury, however, found for the plaintiff," apparently taking the view that war status had not yet been established, so that the license was unnecessary.[94]

The possibility of taking judicial notice of war status continued to be debated. Serjeant Best reportedly remarked in the Common Pleas case of *Steinburgh v. Vaux* in December 1811 that, "[a]s to the question of our being at peace or war, the right to take *judicial notice* of that from notoriety, when there was no regular declaration, was now *sub judica*, and would be shortly determined by the twelve Judges."[95] Whether this determination occurred is not known. Consensus was not always achieved on questions taken up informally by the twelve judges, and even when there was agreement, the results of twelve-judge deliberations in non-criminal cases were not ordinarily made public.[96] Perhaps the question of judicial notice was shelved when war in the Baltic died out.

88. *Id.*

89. *Id.* This provoked Serjeant Best to grumble that "he should be puzzled to prove that we were at war with France."

90. *Id.*

91. *Id.*

92. *Id.*

93. *Law Report: Rucker v. Ansley*, *supra* note 87, at 3.

94. *Id.* Afterwards, Serjeant Best was successful in a motion for new trial by offering to prove the issuance of Orders of Council in December 1807 commanding general reprisals against Russia and publishing a declaration of causes of war in that country. *See Law Report: Rucker v. Ansley*, TIMES, Nov. 9, 1811, at 3; Jan. 29, 1812, at 3. In a report in THE TIMES of an intermediate phase of *Rucker v. Ansley*, Lord Ellenborough observed that the courts were dependent on the evidence presented by the parties, "and if evidence were produced in one case that led to one conclusion, and withheld in another, whereby the Court came to another conclusion, so that the verdicts varied every day, it might be lamented, but it could not be prevented." TIMES, Nov. 8, 1811, at 3. He said he wished "proclamations were transmitted to us by some means," adding, in frustration, "I don't know how the case stands as to Hamburgh at this moment." *Id.*

95. TIMES, Dec. 7, 1811, at 3.

96. *See generally* James Oldham, *Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries*, 29 LAW & HIST. REV. 181 (2011).

IV. PROTECTION OF ALIENS: NEUTRALS AND ENEMIES

Despite the insistence in the early nineteenth century that trading with the enemy was illegal, courts began to adopt a different attitude towards *licensed* trade with the enemy. There was a major shift in interpretations of how to construe licenses. Alien enemies could be the beneficiaries of insurance policies on these voyages, so long as the license did not preclude alien enemies from benefiting from that trade.[97]

A preliminary question, however, is whether the language of special licenses became standardized so that consistent judicial interpretation was feasible. For several reasons, this did not happen. Licenses were issued not only by the Privy Council and the Board of Trade in London, but also by provincial authorities throughout the globe.[98] In such circumstances, uniform drafting of license language was unrealistic.[99] Indeed, in *Haggedon [Hagedorn] v. Vaughan*, Lord Ellenborough expressed the wish that "licences were more advisedly and distinctly framed," to which the Attorney General responded "that the object of the Council Board, was to give the merchant as large a licence as he wanted, and the merchant was permitted to draw them up."[100] We should note, however, that even though special licenses did not acquire standardized language, certain interpretative questions did recur. Many licenses, for example, were issued to named persons "and others." This open-ended

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97. Hagedorn v. Bazett, (1813) 105 Eng. Rep. 319 (K.B.); 2 M. & S. 100. A license had been issued to J.H.P. Hagedorn "on behalf of himself and other British merchants or neutral merchants," but the property was owned by Hagedorn, Hamburg merchants (then neutrals), and Russians (then enemies of Britain). Because the ownership of the goods was divisible, the insurance was recoverable in proportion to the ownership of the goods. Thus, the ship having been captured, the British and Hamburg merchants could recover on the policy while the Russians could not. *See also* Blackburne v. Thompson, (1812) 104 Eng. Rep. 775 (K.B.); 15 East 81 (finding that trade to ports declared to be not hostile did not require the use of a license); Hagedorn v. Bell, (1813) 105 Eng. Rep. 168 (K.B.); 1 M. & S. 450 (holding that the insured was entitled to recover for a loss though the destination was occupied by enemy troops). In the latter case, the only question was whether goods that had been shipped on account of Hamburg merchants were insurable and recoverable. At the time, Hamburg had been captured by French troops, but France allowed the Senate of Hamburg to exercise full sovereign civil authority, and no declaration of war against Britain had ever been issued. Lord Ellenborough held that there had been no overt act on the part of Hamburg to create a state of war, and the Orders in Council treated Hamburg, at worst, as a neutral, so the trade was insurable. *See also* Hagedorn v. Reid, (1813) 170 Eng. Rep. 1416 (N.P.); 3 Camp. 377 (holding that recovery was permitted only where claimant could prove that cargo belonged to the British or neutral merchants). In this case, the license had been granted on the same terms as in *Hagedorn v. Bell*, but there was no proof offered at trial to show the goods were owned by a British or neutral merchant. Such proof was necessary, especially because the goods were loaded in a hostile port (Gluckstadt, Denmark), raising the likelihood that they belonged to an enemy.

98. According to Sir John Nicholl, "The Governor of Jamaica has power given to him to licence trading with the Spanish West India Settlements; which he has exercised accordingly. The Governor of Gibraltar has the same power with respect to Spain." Potts v. Bell, (1800) 101 Eng. Rep. 1540 (K.B.) 1544; 8 T.R. 547, 556. Although before the nineteenth century the King had to stamp all licenses with his sign manual, it became impractical (if not impossible) once war with France broke out and the number of licenses issued ballooned. *See* Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 864; 5 Taunt. 674, 693–94 (tracing the development of who had authority to issue licenses).

99. Compare license at issue in *In re* Hendrick, (1810) 12 Eng. Rep. 125 (P.C.); 1 Acton 322, with that at issue in Jonge Johannes, (1802) 165 Eng. Rep. 606 (Adm.) 607 n.(b); 4 C. Rob. 263, 264 n.(b). For more samples of licenses, *see* GALPIN, *supra* note 17, at apps.

100. TIMES, Nov. 13, 1811, at 3 (in this report, the case is unnamed, but a brief report in THE TIMES on November 12, 1811, identifies the case by name).

expression understandably invited counsel to invoke the maxim of *ejusdem generis*, sometimes successfully and sometimes not.[101]

In the early 1800s, both the common law courts and the Court of Admiralty were conservative, resisting expansive interpretation of license language or even recognition of an alien enemy's right to recover at all.[102] The first court to break new ground was the Admiralty Court, presided over by Sir William Scott. In 1810, in *Cousine Marianne*, Scott said, "this Court has never yet restored the property of the enemy, except in those instances where the words, 'to whomsoever the property may appear to belong,' are introduced into the licence. Where those words occur they have been held to exclude all enquiry into the proprietary interest."[103] Therefore, if the license did not specify to whom the property had to belong, it could belong to an alien enemy and still be sanctioned under British law.

A year later in *Usparicha v. Noble*,[104] the Court of King's Bench held that if a Spanish merchant domiciled in England had received a license to trade with enemy Spanish merchants (who had interests in the cargo), he could recover on an insurance policy on a ship lost through capture by a French privateer and condemned by a French consular court sitting in Spain.[105] This was the beginning of the expansion in the common law courts of alien enemies' maritime rights.[106] According to Lord Ellenborough:

> The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our Courts of Law, but that the commerce itself is to be regarded as legalized .... The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its licence for such purpose ought to receive the most

101. *See, e.g.*, Feise v. Bell, (1811) 128 Eng. Rep. 227 (C.P.) 228; 4 Taunt. 4, 7 (holding that a license granted to "Feise and Co." should be given broad interpretation to include both British and enemy Russian merchants); Mennett v. Bonham, (1812) 104 Eng. Rep. 924 (K.B.); 15 East 477 (holding that a license granted to British merchants "and others" did not include the Russian merchant who owned the goods); Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 856; 5 Taunt. 674, 674 ("Licences to trade with an enemy are to be construed liberally .... therefore, although the agent, in obtaining the licence, did not represent to the privy council that he applied on behalf of an hostile trader, the concealment did not vacate the licence, or vitiate the policy.").

102. *See In re* Jonge Klassina, (1804) 165 Eng. Rep. 782 (Adm.) 784; 5 C. Rob. 297, 301 (declining to restore cargo despite the hardships associated with the loss: "If trade with the enemy is generally unlawful, it is not in the power of this Court to admit it, beyond the degree which is fairly described in the terms of the licence"); *In re* Cosmopolite, (1801) 165 Eng. Rep. 516 (Adm.) 517–18; 4 C. Rob. 8, 11 ("Licences being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority, which grants them, may be supposed to extend."); Brandon v. Nesbitt, (1794) 101 Eng. Rep. 415 (K.B.) 418; 6 T.R. 23, 28 (finding not "a single case, in which the action had been supported in favour of an alien enemy"); Bristow v. Towers, (1794) 101 Eng. Rep. 422 (K.B.) 429; 6 T.R. 35, 49 (deferring to *Brandon v. Nesbitt*).

103. Cousine Marianne, (1810) 165 Eng. Rep. 1134 (Adm.) 1134; Edw. 346, 346. However, in this case, because the phrase "to whomsoever the property may appear to belong" was not in the license, the alien enemy could not recover. Notably, Sir William Scott hinted there had been previous cases in which Admiralty had restored cargo to alien enemies when the magic words were inserted in the license.

104. Usparicha v. Noble, (1811) 104 Eng. Rep. 398 (K.B.); 13 East 332.

105. Spain and France were allied against Britain at the time. *Id.*

106. There was no indication that the ship was condemned for carrying simulated papers, per se, but the French condemned it. It is also unclear whether the Board of Trade was aware of the Spanish ownership of the cargo. *Id.*

> liberal construction . . . . For adequate purposes of State policy and public advantage, the Crown . . . has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the Crown has thought fit to permit . . . must be regarded . . . as legal.[107]

Because the plaintiff, Usparicha, had been domiciled in England for a lengthy period of time, his legal status was the equivalent of that of a British merchant, which afforded him the protection of the law in recovering on the insurance policy.

The Court of Common Pleas also expanded protection of beneficiaries of insurance policies, beginning with protection for British citizens residing in hostile countries. In *Fayle v. Bourdillon*,[108] a license to import goods from Russia had been granted to Benjamin Fayle and Co., the plaintiff-consignee of the goods. The three partners with an interest in the cargo were all British subjects, but two of them resided in hostile countries (Sweden and Germany). The voyage was on a neutral vessel and, on the return trip from St. Petersburg, the ship was lost and the underwriters refused to pay the insured.[109] The court declined to answer the question of whether alien enemies could recover under insurance policies, even though counsel for the underwriters claimed that the owners of the goods (British citizens) had become alien enemies by virtue of trading from and living in hostile countries, and that the license did not cover such trade. Rather, Chief Justice James Mansfield held that because the plaintiffs applied for the license, because they had an interest in the policy (by being consigned the bills of lading), and because the terms of the license were very broad and did not specify a particular owner, the voyage was covered by the license and thus insurable.[110] Moreover, the purpose of the voyage was to procure these goods from these enemy countries, and the Board of Trade must have understood that either British citizens or alien enemies would have had to put the goods onboard the ship when it sailed from a hostile port. Thus, the license had intentionally been written very broadly and generally to protect the voyage. As Chief Justice Mansfield explained:

> The words of the licence are as general as it is possible for them to be . . . . Under this licence goods are imported from Russia, consigned to Fayle and Co.; they . . . are the consignees, and are the very persons who applied for this licence and obtained it. The transaction exactly corresponds with this license, and probably this was the very sort of trade the licence was meant to legalize . . . . [I]t seems to have been the very intention of government to encourage the importation of these goods from Russia, Prussia, and Denmark; and probably they form the very bulk of this trade from those countries to this, therefore there may be very good reasons for making this licence so general.[111]

107. *Id.* at 402; 13 East at 342.
108. Fayle v. Bourdillon, (1811) 128 Eng. Rep. 216 (C.P.); 3 Taunt. 546.
109. The policy gave leave to carry simulated papers, but the case did not turn on their existence.
110. *Id.* at 219; 3 Taunt. at 553.
111. *Id.*

It did not take long for the Court of Common Pleas to answer the question left undecided in *Fayle*, that is, whether alien enemies could be insured by English policies. In *Feise v. Bell*, decided one month after *Fayle*, Chief Justice Mansfield held that if the license was granted to British merchants "and others," the others did not also have to be British merchants, but could be anyone.[112] In that case, a license to trade with Russia was given to Godfrey Feise and Co. (British merchants), "on behalf of themselves and others," and the goods were co-owned by Feise and Russians, even though Russia was then at war with England.[113] At trial, Mansfield overrode the objection that "and others" was *ejusdem generis* and meant British merchants, certainly not foreign merchants, or worse, alien enemies, and he ruled in favor of the plaintiff.[114] On argument before the full Court of Common Pleas, Mansfield's trial decision was affirmed *per curiam*. Despite the objection that allowing recovery for the plaintiffs would indirectly aid the enemy, the court said:

> [The] object [of the license] was to facilitate the export of . . . British manufactures . . . to find a market for them abroad, to effect which the goods must be necessarily consigned to foreigners. . . . It seems to me that a construction in favour of such a permission will rather aid than obstruct the object of the licence, by promoting the commerce of the country.[115]

Although the King's Bench in *Usparicha* had concluded that licenses were to be construed liberally, Lord Ellenborough balked in *Mennett v. Bonham*.[116] There, the plaintiffs were British merchants living in London, acting on behalf of a Russian alien enemy residing in St. Petersburg at the time of the voyage. The plaintiffs had received a license to trade with Russia "on behalf of themselves and others," but had not disclosed that the principal was a Russian. The insurance policy gave leave to carry simulated papers. The ship had been confiscated and condemned as prize by the Russian government. The plaintiffs' attorneys relied on *Usparicha* in their arguments, saying that licenses should be construed liberally, and that this particular license had exempted the plaintiffs from any condemnation of property by their home governments.[117] Yet the majority relied on *Conway v. Gray*,[118] in which the

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112. Feise v. Bell, (1811) 128 Eng. Rep. 227 (C.P.); 4 Taunt. 4 (Chief Justice Mansfield said the object of the license was to promote the commerce of the country. The case does not indicate under what circumstances the ship was captured.) A comparable case, Feise v. Newnham, (1812) 104 Eng. Rep. 1063 (K.B.); 16 East 197, was decided on agency principles. There, the King's Bench held that if a license was granted to Favenc "and others," Favenc, as an agent, could procure the license for Schnekonig, his principal and a Prussian alien residing in Britain at the time. By the principal-agent relationship, Schnekonig was covered by the license and thus the beneficiary of an insurance policy, even though Schnekonig's name appeared nowhere in the license.

113. *Feise*, 128 Eng. Rep. at 227; 4 Taunt. at 5. The case was decided during the Anglo-Russian War, fought from 1807 to 1812.

114. *Id.* at 227–28; 4 Taunt. at 5.

115. *Id.* at 228; 4 Taunt. at 7. Mansfield added that "it is perfectly notorious that in a great commercial city, such as this metropolis, there are and must be many merchants who are not natives of the country where they carry on their merchandize, and there is nothing in this license which intimates that it is to be restrained to such as are." *Id.*

116. Mennett v. Bonham, (1812) 104 Eng. Rep. 924 (K.B.) 925; 15 East 477, 480–81.

117. *Id.*

118. Conway v. Gray, (1809) 103 Eng. Rep. 879 (K.B.); 10 East 536. In *Conway*, two of the three plaintiffs were British merchants, one of whom lived in America. The third plaintiff was an American merchant who had consigned the goods to his British counterparts. The invoice and bills of lading were dated December 23, 1807, one day after the American government issued an embargo on all ships in its

court had held that a citizen could not benefit under an insurance policy for losses caused by his own government, and held that the license was not intended to protect an alien enemy. Backtracking on his previous language in *Usparicha*, Ellenborough said that surely the government had not intended to issue a license authorizing trade with the enemy that would benefit enemies under insurance policies. Thus, "and others" must mean fellow British merchants by *ejusdem generis*—"[W]here [a license] is used to cover a trade by . . . an enemy from this country to a hostile port, such an use of it should have been within the contemplation of the Government issuing it; . . . that the Government should not be hoodwinked as to the real object of the parties obtaining it."[119] Furthermore, because the Russian government confiscated the Russian plaintiff's ship, *Conway* was applicable, so that the plaintiff in *Mennett* could not recover in any case.[120] This was so, even though the plaintiff had obtained a license from the British government (an act illegal in his home country), thus implying an intent to dissent from the acts of his home government (which would seemingly be governed by *Usparicha*). Counsel for the plaintiff in *Mennett* also distinguished *Conway*, because the plaintiffs had not there acted in any way to indicate hostility toward their home countries.[121] But according to Lord Ellenborough, if *Conway* and *Usparicha* conflicted, he would prefer *Conway*.[122] Justice Bayley agreed. Justice Le Blanc, however, dissented, primarily for the reasons given by Chief Justice Mansfield in *Fayle* and *Feise*,[123] and it was not long before the authority of *Mennett* was cast into serious doubt.

While the King's Bench vacillated, the Court of Common Pleas, building upon its own precedent and *Usparicha*, continued to expand insurance protection for aliens. In *Morgan v. Oswald*,[124] a license for a ship to import goods from Russia had been granted to Henry Siffkin only, but the cargo was owned by three Russian merchants, Russia then being at war with England. Upon the ship's loss, the insured sought recovery under the policy. Unlike previous cases,[125] this license did not

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ports, so the ship never sailed. The British partners abandoned the ship and attempted to collect on the insurance policy because they had advanced payment of the goods. However, the court said that the plaintiffs could not recover because "each [subject] is a party to the public authoritative acts of its own Government; . . . a foreign subject is as much incapacitated from making the consequences of an act of his own State the foundation of a claim to indemnity upon a British subject in a British Court of Justice, as he would be if such act had been done immediately and individually by such foreign subject himself." *Id.* at 882; 10 East at 545. Because a citizen of a country impliedly consented to all of the acts of his own government, he could not seek to recover on an insurance policy for a loss that his own government had caused. Thus, "the party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done." *Id.* at 883; 10 East at 546.

119. Revealing a fundamental anxiety about these cases, Ellenborough added that "[m]any public inconveniencies might arise from permitting an indiscriminate intercourse to alien enemies between our own ports and those of the enemy." *Mennett*, 104 Eng. Rep. at 930; 15 East. at 494.

120. *See id.* at 930; 15 East. at 495 ("The loss, therefore, in this case having been occasioned by a Russian condemnation, must conclude every Russian subject, and the Russian assured, for whose benefit this action is brought, cannot recover upon either ground of objection.").

121. *Mennett*, 104 Eng. Rep. at 926; 15 East at 482–83.

122. *Id.* at 930; 15 East. at 495.

123. *Id.* at 930; 15 East at 496.

124. Morgan v. Oswald, (1812) 128 Eng. Rep. 219 (C.P.) 220; 3 Taunt. 554, 554–55.

125. *See, e.g.*, Feise v. Waters, (1810) 127 Eng. Rep. 1072 (C.P.) 1072; 2 Taunt. 248, 249 (explaining that a license was given to Thomas Baker and sons to import, but they did not have an interest in the goods involved and so could not receive the benefit of the license).

contain specific language regarding who had to own the cargo or the ship. The general language did not require that the property be owned by Siffkin or for "Siffkin to import," but rather, "to Siffkin for a ship to import."[126] Although previously, there had been cases from Admiralty that strictly interpreted licenses,[127] times had changed and so had Sir William Scott's decisions.[128] Justice Gibbs, in *Morgan*, even interrupted the defendant-underwriter's counsel, claiming that Admiralty decisions had since changed—that when the country's trade "remained in its original state, and the licensed trade was the exception to the general rule, licenses were to be construed strictly, but that since the licensed trade has become the general trade, and the unlicensed trade the exception, licenses are to be construed liberally."[129] After hearing the arguments, Chief Justice Mansfield stated:

> A ship sent to Russia to take in goods, must necessarily be supposed to take in Russian goods, and it must be naturally supposed that those Russian goods are the property of Russian subjects.... It therefore seems to follow, that they may be put on board by a Russian subject;... then it necessarily follows, that, according to the case of *Usparicha v. Noble*, all the rights attach which are necessary for the enjoyment of the right of importing; therefore,... it necessarily follows, that a Russian subject, licensed to import goods into Great Britain, has a right to insure them....

126. *Compare Morgan*, 128 Eng. Rep. at 221; 3 Taunt. at 557, *with* Defflis v. Parry, (1802) 127 Eng. Rep. 2 (C.P.) 3; 3 Bos. & Pul. 3, 3. In *Defflis*, the license had been granted to British merchants (Bridge and Smith) or their agents "or the bearers of their bills of lading on board six ships." The plaintiffs' agents purchased eights casks of madder and had them delivered to the ship, and the captain signed one bill of lading for the whole cargo, which was indorsed by the agents and sent to Bridge and Smith. The court held that this general bill of lading was sufficient to protect the whole cargo from confiscation.

127. *See, e.g.*, *In re* Jonge Johannes, (1802) 165 Eng. Rep. 606 (Adm.) 606–07; 4 C. Rob. 263, 263–66. A license permitted Bridge and Smith, or their agents, or the bearers of their bills of lading, to import cargo in three neutral ships. On the way to Stockholm, the ships were captured and the cargo lost. When Bridge and Smith attempted to recover, the court denied their request because they had consigned the goods to third parties and so did not meet any of the criteria of the license. Sir William Scott held that "a material object of the control which the government exercises over such a trade is that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war.... I do not feel that these goods can be restored by me, without my taking upon myself to say, what I hardly conceive I am upon any principle warranted to declare, that when a license is granted *to one person*, it may be extended to the protection of all other persons who may be permitted by that person to take advantage of it." *Id.* at 607–08; 4 C.Rob. 264–68. See also *In re* Hoffnung, (1799) 165 Eng. Rep. 275 (Adm.) 276; 2 C. Rob. 162, 163–64, in which Scott said, "[I]t is indubitable that the King may, if he pleases, give an enemy liberty to import[,]... but I apprehend, that unless there are very express words to this effect to be found in the license, I am to consider its meaning as not going to that extent, but as giving such a liberty *only to subjects of this country*: it is a license 'to British subjects' to import, and as I understand it, they are to import *on their own account*; and if it appeared that the importation was on the account of other than British merchants, I should hold, that under the terms of the license it could not be considered as a legal importation."

128. *See, e.g.*, *In re* Hendrick, (1810) 12 Eng. Rep. 125 (P.C.) 128; 1 Act. 322, 330 (affirming appeal from Sir William Scott's decision construing license in favor of plaintiff); *In re* Vrow Cornelia, (1810) 165 Eng. Rep. 1134 (Adm.), 1135; Edw. 349, 350 ("In the use and application of licences, the Court will not limit the parties to a literal construction. It is sufficient that they shew under the difficulties of commerce that they come as near as they can to the terms of the licence."), *aff'd*, 12 Eng. Rep. at 181; 2 Act. 66. Members of Parliament later commented on Sir William Scott's liberal interpretation of licenses that resulted in the restoration of previously condemned ships to neutrals: "[T]he conduct of the British High Court of Admiralty had been marked with liberality, almost amounting to injustice towards ourselves; and which had rendered the eminent individual at the head of that court as popular in America as he was in England." Brougham's Motion, *supra* note 23, at 1122.

129. *Morgan*, 128 Eng. Rep. at 222; 3 Taunt. at 562.

> Lord Ellenborough and the Court of King's Bench, in the case of *Usparicha v. Noble*, and other cases, and certainly the Court of Admiralty also, now are of opinion, that licenses ought to be construed liberally, and I think, upon very good ground.[130]

Thus, "under this licence, Russian subjects were at liberty to import their goods into this country; and if a Russian subject had a right to import those goods, he had therefore a right to insure them, and to bring actions to enforce that contract."[131] While *Morgan* was before the Court of Common Pleas, two related cases based on the same ship and license were pending before the King's Bench.[132] Once *Morgan* was decided, the King's Bench followed suit in both cases pending on its docket, *Robinson v. Touray* and *Robinson v. Cheesewright*, after which Common Pleas never looked back.[133]

Given the nature of the Napoleonic wars, not all of the nations that Napoleon subjugated were formal enemies of Britain. This introduced another variant for courts to deal with if such a quasi-enemy captured and condemned a British-insured ship. For instance, if a foreign power forbade trading with Britain (though without a formal declaration of war), an alien could still recover under a policy, even if his own government had done the seizing.[134] In *Simeon v. Bazett*, the ship was bound from London to Prussia, a license to trade with Prussia was issued to British merchants, and the insurance policy allowed the use of simulated papers.[135] Because Prussia was under Napoleon's control at the time, ships from England were routinely confiscated. Simulated papers were therefore made to state that the ship had sailed from

130. *Id.* at 224; 3 Taunt. at 566–67. Mansfield echoed Justice Gibbs' sentiment about what was "normal" during wartime, and he specifically deferred to Sir William Scott's lead in construing licenses more liberally: "This species of license has been considered as an exception out of the general law, but it is now used to carry on a very great part of the trade of the country; and unless it were so carried on, a very great part of the trade must be lost; and for preserving it, the licenses ought to be construed liberally. And though certainly this Court is not bound to follow the authorities in the Court of Admiralty in general, yet as that Court has primary, and even exclusive jurisdiction in several subjects of capture and marine law, from which the Courts of common law have taken all their doctrine relating to these subjects, I think it would be of most mischievous consequence, if hereupon we differed from them." *Id.* at 224; 3 Taunt. at 567.

131. *Id.* at 225; 3 Taunt. at 569.

132. Robinson v. Touray, (1813) 105 Eng. Rep. 81 (K.B.); 1 M. & S. 217; Robinson v. Cheesewright, (1813) 105 Eng. Rep. 83 (K.B.); 1 M. & S. 220. Chief Justice Mansfield noted in *Morgan*, "This question is also before the Court of King's Bench, and it would have been desirable if the Judges of both courts could have met and settled the point; but the term drawing to an end, we think it best to decide as well as we can." *Morgan*, 128 Eng. Rep. at 224; 3 Taunt. at 566.

133. *See* Le Cheminant v. Pearson, (1812) 128 Eng. Rep. 372 (C.P.); 4 Taunt. 367. The attorneys for the plaintiff were confident that it was "clearly established that licences to trade were to be expounded liberally, the opposite doctrine had been long since abandoned, first by the court of admiralty, and since by the courts of Westminster-hall. The policy of the government in granting these licences, was, to encourage British commerce." *Id.* at 374; 4 Taunt. at 372. Justice Chambrè responded to the defendants' assertion that licenses were to be construed strictly: "All the cases in Edwards's Leading Decisions shew, that the opinion of the Judge of the Admiralty Court is directly the reverse; he gives them the most liberal construction." *Id.* at 375–76; 4 Taunt. at 376.

134. Simeon v. Bazett, (1813) 105 Eng. Rep. 317 (K.B.); 2 M. & S. 94, *aff'd*, Bazett v. Meyer, (1814) 128 Eng. Rep. 917 (Ex. Chbr.); 5 Taunt. 824. *See also* Anthony v. Moline, (1814) 128 Eng. Rep. 870 (C.P.); 5 Taunt. 711 (holding that two Prussians were not barred from recovering on insured exported goods that were confiscated by their own government).

135. *Simeon*, 105 Eng. Rep. at 317; 2 M. & S. at 94.

Gothenburg, Sweden. The cargo, though British property, had been consigned to Prussian merchants and the policy had been taken out on their order and account, and their own government confiscated the ship. The insurers resisted payment. The court said that because England was *not* at war with Prussia, the license was immaterial because there was nothing to exempt from the prohibition against trading with the enemy.[136] But this case still did not fall under *Conway* because, unlike the underwriters in *Conway*, who had not contemplated an American embargo, the trading circumstances had long been known to merchant and underwriter alike.[137] In fact, they had built in a premium of forty guineas percent to compensate for the higher risk of confiscation by the Prussian government.[138]

Though the Court of Common Pleas had been fairly consistent in following Admiralty's lead, the Court of Exchequer Chamber in *Flindt v. Scott* finally brought all of the discordant common law cases together and established that alien enemies could indeed recover on policies, even if the licenses were granted to British merchants.[139] There, the policy covered a voyage from London to Archangel with leave to carry simulated papers. The policy was taken out by a British agent on behalf of himself and Zuckerbecker, Klain, and Co. (Russians abroad in Russia, with whom England was then at war). Upon arriving at Archangel, the ship was seized by the Russian government for carrying simulated papers. The plaintiff (Flindt) had applied for a license without disclosing that he was operating on behalf of Russian principals. The license granted "the petition of Flindt and Co. of London, merchants, on behalf of themselves *and others*."[140] The King's Bench had decided in favor of the defendant-insurer, saying that the now-familiar "and others" was *ejusdem generis* and applied to British merchants only (consistent with its own precedent in *Mennett*), and two of the three justices said that the case was more in line with *Conway* than with *Usparicha*.[141] Justice Le Blanc again was the lone dissenter. So eager was the court to side with the defendants that Justice Bayley said, "I think we may throw out of our consideration the decisions in the Admiralty Courts, and confine ourselves to the construction of the licence by the rules of the common law."[142] And according to its own precedents, the Court of King's Bench surmised that the Crown surely had not meant to provide British insurance to an enemy or to allow an enemy to be immune from the acts of his own government.

Upon a writ of error to the Exchequer Chamber, counsel for the underwriter stated that trading with the enemy was illegal and cited the early cases of *Brandon v.*

136. *Id.*

137. *Id.* at 319; 2 M. & S. at 98–99.

138. The premium was 100£ on 250£ worth of goods. The court summarized as follows: "Here the cause of loss arose from the course of commerce, which was carried on by means of simulated papers and clearances, when all direct commerce between Great Britain and the ports in the Baltic was prohibited; and such a course of commerce is found by the verdict to have existed before the time of effecting the insurance, and to have been well known by merchants and underwriters and their agents, to which classes of persons the plaintiffs and defendant respectively belonged. . . . The perils therefore likely to result from such a trade were in the contemplation of the parties at the very time of effecting the policy, and were so expressed in the policy." *Id.* at 319; 2 M. & S. at 99.

139. Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 866–67; 5 Taunt. 675, 699–700. Thus, the King's Bench cases culminating in *Mennett v. Bonham* were overruled.

140. *Id.* at 857; 5 Taunt. at 676 (emphasis added).

141. Flindt v. Scott, (1812) 104 Eng. Rep. 942 (K.B.) 943; 15 East 525, 529.

142. *Id.*

Nesbitt[143] and *Potts v. Bell*.[144] Before counsel for the plaintiff could respond, however, Chief Justice Mansfield interjected, "We consider it as settled, . . . contrarily to what was at first held, that these licences are to receive the most liberal construction, because, even if the court of admiralty had not decided it, yet every one might discern that they were granted merely for the benefit of the country."[145]

To finalize matters, the Exchequer Chamber, in a unanimous opinion by Chief Baron Thomson, reversed the King's Bench ruling and held in favor of the plaintiff.[146] There was "no doubt" that during times of war, the sovereign could authorize trade between British citizens and alien enemies, "[a]nd these licences to trade, however they may have been formerly construed strictly, are now in all courts construed more liberally, and favourably to trade, in order to effectuate the benefits intended to result from them."[147] Also, the terms of the policy "sufficiently indicate that the cargo . . . might legally comprehend the property of enemies," and *Cousinne Marianne* directly controlled.[148] Thomson then turned *Conway v. Gray* on its head by granting the alien enemy the standing of a British citizen under this insurance policy. He said that the underwriters knew all the circumstances and agreed to this bargain; thus, "[t]he effect of the licence is, to convert this Russian, though an alien enemy, as it were, into an alien friend, and so far to separate him from the acts of his government, as concerns the subject matter of this licence."[149] The tug-of-war battle between the King's Bench and the Court of Common Pleas was finally settled.[150] And less than one year later, the Napoleonic Wars would end, making any further argument moot.[151]

CONCLUSION

The license system allowed the use of simulated papers to flourish. Though these papers were ostensibly illegal, courts protected merchants by allowing them to recover under insurance policies, as long as those policies expressly allowed the use of simulated papers. The rationale was that this was necessary to protect British commerce.

Initially, the benefits of such policies applied only to British merchants, but in the early 1810s, first the Admiralty Court, then the common law courts, expanded the construction of insurance policies to benefit alien neutrals, and eventually alien enemies. The irony of these developments was that the end result in practical effect

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143. Brandon v. Nesbitt, (1794) 101 Eng. Rep. 415 (K.B.); 6 T.R. 23.

144. Potts v. Bell, (1800) 101 Eng. Rep. 1540 (K.B.); 8 T.R. 548.

145. *Flindt*, 128 Eng. Rep. at 864; 5 Taunt. at 693–94.

146. *Id.* at 865; 5 Taunt. at 696.

147. *Id.* at 865; 5 Taunt. at 697.

148. *Id.* at 865–866; 5 Taunt. at 699.

149. *Id.* at 866; 5 Taunt. at 699.

150. Subsequent cases followed *Flindt v. Scott*, and the issue was never raised again. *See, e.g.*, Anthony v. Moline, (1814) 128 Eng. Rep. 870 (C.P.); 5 Taunt. 711 (showing that the court waited for the decision in *Flindt* before making its decision); Hullman v. Whitmore, (1815) 105 Eng. Rep. 638 (K.B.); 3 M. & S. 337 (concluding as settled that a license should be read broadly).

151. Even before the end of the Napoleonic Wars, the Continental System had unraveled as more and more ports opened their doors to British trade. By 1813, there was a marked decline in the issuance of licenses. GALPIN, *supra* note 17, at 120.

came close to the forthright arguments advanced by Murray and Ryder in parliamentary debate in 1747, described at the outset of this Article.[152] Commercial revenues from international trade, protected and facilitated by marine insurance coverage, were essential to the British economy, especially while funding the war effort in the Napoleonic era. Judicial rationalizations emasculated the proscription against trading with the enemy, but this was a small price to pay in a country long accustomed to the practical advantages of creative legal fictions.

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152. *See supra* notes 2–3 and accompanying text. In the report in THE TIMES of the case of *Gamba v. Le Mesurier*, (1803) 102 Eng. Rep. 887 (K.B.); 4 East 407, the plaintiffs were Frenchmen who insured a ship and goods before war broke out between France and England. The ship was captured by an English ship during wartime, and after the war ended, the plaintiffs sued the underwriters to recoup their loss. Counsel for the plaintiffs, Charles Warren, invoked the 1747 opinions of Ryder and Murray, but opposing counsel, Serjeant Best, argued that the opinion of Lord Mansfield in his legislative character "was not to be set up against his opinion in his judicial character." It was well-known that Lord Mansfield, as a judge, was of the view that actions such as that in *Gamba* could not be maintained; indeed, Justice Buller had stated that Lord Mansfield had told him so in confidence. Warren protested that betraying a confidence was hardly fair, but Lord Ellenborough thought that what Buller said was "full as likely" to be Mansfield's true opinion as was the report of what he said in the House of Commons in 1747. And in any event, Ellenborough, in 1803, "professed not to have a particle of doubt," nonsuiting the plaintiffs. *See Gamba and another v. Le Mesurier*, TIMES, Nov. 16, 1803, at 3.

APPENDIX: STANDARD LLOYD'S POLICY AT ISSUE IN *Hagedorn v. Oliverson* (1814)

S. G.

Sold by W. GH. & G. WITHERBY, STATIONERS, No. 9, Birchin-Lane.

£2300

Delivered the 4 Day of Aug 1810

106

In the Name of God, Amen. Mr J P H Hagedorn — *as well in* his *own Name, as for and in the Name and Names of all and every other Perſon or Perſons to whom the ſame doth, may, or ſhall appertain, in Part or in All, doth make Aſſurance, and cauſe* himself *and them, and every of them to be Inſured, loſt or not loſt, at and from* Gluckstadt and any port or ports in the River Elbe all or any to any port or ports in the United Kingdom with liberty to carry use and exchange any simulated papers clearances and documents whatever and with leave to seek join and exchange Convoys [illegible] Goods and specie at Heligoland or elsewhere

Upon any Kind of Goods and Merchandizes, and alſo upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Veſſel called the Fiesco

whereof is Maſter, under God, for this preſent Voyage,
or whoſoever elſe ſhall go for Maſter in the ſaid Ship, or by whatſoever other Name or Names the ſame Ship, or the Maſter thereof, is or ſhall be named or called; beginning the Adventure upon the ſaid Goods and Merchandizes from the Loading thereof aboard the ſaid Ship, as above [illegible] &c.
upon the ſaid Ship, &c.

and ſo ſhall continue and endure, during her Abode there, upon the ſaid Ship, &c. And further, until the ſaid Ship, with all her Ordnance, Tackle, Apparel, &c. and Goods and Merchandizes whatſoever ſhall be arrived at her last port of discharge in the United Kingdom
upon the ſaid Ship, &c. until ſhe hath moored at Anchor Twenty-Four Hours in good Safety; and upon the Goods and Merchandizes, until the ſame be there diſcharged and ſafely landed. And it ſhall be lawful for the ſaid Ship, &c. in this Voyage, to proceed and ſail to and touch and ſtay at any Ports or Places whatſoever [illegible] *without Prejudice to this Inſurance. The ſaid Ship, &c. Goods and Merchandizes, &c. for ſo much as concerns the Aſſureds, by Agreement between the Aſſureds and Aſſurers in this Policy, are and ſhall be valued at*

Touching the Adventures and Perils which we the Aſſurers are contented to bear, and do take upon us in this Voyage; they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Counter Mart, Surpriſals, Takings at Sea, Arreſts, Reſtraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality ſoever; Barratry of the Maſter and Mariners, and of all other Perils, Loſſes, and Misfortunes, that have or ſhall come to the Hurt, Detriment, or Damage of the ſaid Goods and Merchandizes and Ship, *&c.* or any Part thereof. And in Caſe of any Loſs or Misfortune, it ſhall be lawful to the Aſſureds, their Factors, Servants, and Aſſigns, to ſue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the ſaid Goods and Merchandizes and Ship, *&c.* or any Part thereof, without Prejudice to this Inſurance; to the Charges whereof we the Aſſurers will contribute each one according to the Rate and Quantity of his Sum herein aſſured. And it is agreed by us the Inſurers, that this Writing or Policy of Aſſurance ſhall be of as much Force and Effect as the ſureſt Writing or Policy of Aſſurance heretofore made in *Lombard-Street*, or in the *Royal-Exchange*, or elſewhere in *London*. And ſo we the Aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own Part, our Heirs, Executors, and Goods, to the Aſſureds, their Executors, Adminiſtrators, and Aſſigns, for the true Performance of the Premiſes, confeſſing ourſelves paid the Conſideration due unto us for this Aſſurance, by the Aſſured at and after the Rate of Four Guineas per Cent to return £2 per Cent for arrival

In Witneſs *whereof, we the Aſſurers have ſubſcribed our Names and Sums aſſured in* London.

N. B. Corn, Fiſh, Salt, Fruit, Flour, and Seed, are warranted free from Average, unleſs general, or the Ship be ſtranded.—Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent.* and all other Goods; alſo the Ship and Freight are warranted free of Average under Three Pounds *per Cent.* unleſs general, or the Ship be ſtranded.

On the Ship valued at £2300 against all risks whatever and in case of loss capture seizure or detention to pay a loss within two Months after receipt of advice thereof without waiting for condemnation — Restitution or any official Documents whatsoever —

Transcription of the first paragraph:

> In the name of God, Amen. Mr. J.P.H. Hagedorn—as well in his own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assurance, and cause himself and them, and every of them to be Insured, lost or not lost, at and from Gluckstadt and any port or ports in

the River Elbe all or to any port or ports in the United Kingdom with liberty to carry use and exchange any simulated papers clearances and documents whatsoever and with leave to seek join and exchange convoys load unload and reload goods and specie of Heligoland or elsewhere. . . .

[dated 4 August 1810]

Source: Dampier Manuscripts, Dampier Paper Book 65, Lincoln's Inn Library, copied courtesy of the Treasurer and Masters of the Bench, Lincoln's Inn, London

Battling Cartels in the New Era of Chinese Antitrust Enforcement

ANDREW W. EICHNER*

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INTRODUCTION

The question of how to best handle cartels is inevitably difficult to answer. Antitrust law, perpetually responsive to the needs of consumers and the decisions of policymakers within a given market, has developed to provide an impressively diverse array of solutions that vary broadly across the international sphere. Which of these approaches is the most effective, however, is a troublesome quandary; regulators must struggle to decide which scalpel works best to remove the economic "cancer"[1] of cartels without permanently scarring the market's overall economic vitality.

In recent years, the People's Republic of China ("PRC") has made substantial changes to its antitrust laws, shuffling around the country's competition regime and leaving businesses and, to a greater degree, the entire global community in a haze of uncertainty regarding Chinese anti-cartel enforcement rules and procedures. Although Chinese cartel law is currently situated in this uncomfortable state, there is reason to hope for a promising and relatively expeditious resolution. By shifting their attention to the rest of the world, the Chinese authorities have the opportunity to discover a considerable number of competition models that can provide useful guidance in the continued effort to hone and develop their own regime.

This Note examines the broad spectrum of anti-cartel laws that have developed around the globe and analyzes them with the purpose of determining the best options for China's anti-cartel authorities as they continue to develop and strengthen their own enforcement rules and procedures. Part I of this Note provides an overview of the history of Chinese antitrust law in the years leading up to the passing of the Anti-monopoly Law ("AML") in 2008 as a means of identifying how dramatically the Chinese antitrust landscape has changed over time and concludes with an outline of the AML itself. Part II explores the successes and failures of the AML by comparing the new Chinese anti-cartel enforcement system to major antitrust regimes in other countries. This part also provides recommendations on means to reform Chinese anti-cartel enforcement in the most effective and efficient ways possible as the country continues to perfect its system.

I. A MODERN HISTORY OF CHINESE ANTITRUST LAW

Before considering where China must go with its anti-cartel enforcement laws, it is first necessary to consider where the country's current antitrust policy has come from. The Anti-monopoly Law, which is "currently regarded as the main legislation that governs cartel arrangements in the PRC,"[2] is only the latest development in a series of significant changes made in China's competition regime starting in the late 1970s. To understand the significance of the AML, it is crucial to consider the

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1. Mario Monti, Former Eur. Comm'r of Competition, Address at the 3rd Nordic Competition Pol'y Conf.: Fighting Cartels Why and How? Why Should We be Concerned with Cartels and Collusive Behaviour? (Sept. 11, 2000), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/295&format=HTML&aged=0&language=EN&guiLanguage=en ("Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and consumers.").

2. Susan Ning, Ding Liang & Jiang Liyong, *China*, *in* GETTING THE DEAL THROUGH: CARTEL REGULATION 2011 44, 44 (Martin Low ed., 11th ed. 2011) [hereinafter GETTING THE DEAL THROUGH 2011].

history of China's economic market and the nature of competition law in the years leading up to this critical piece of legislation. By exploring the history of China's market and the nature of its recent antitrust reforms, it is possible to acquire a more accurate perception of what will be effective in future developments of the law.

A. *Antitrust in China Prior to the Anti-monopoly Law*

By comparative global standards, the implementation of antitrust law in China is a fairly recent development.[3] Until the late 1970s, China maintained a command economy[4] under the authoritarian leader Mao Zedong, where "price [was] determined by administrative fiats [and] not by the interaction of market supply and demand."[5] During this time, "prices were [often] set in accordance with the government's artificial preferences for certain sectors or population groups, resulting in serious distortions in the economy."[6] Under this system, there was no capacity for competition in the Chinese economy;[7] thus, by natural extension, there were no antitrust laws in China in this period either.[8]

With the death of Mao Zedong in 1976[9] and the subsequent launch of the Reform and Opening-Up Policy in 1978, China began to shift away from its command economy and started to enter a new economic phase by beginning to develop a planned market economy that allowed for limited competition.[10] After first "administratively readjusting the relative prices of key sectors . . . to address structural distortions,"[11] the Chinese government began to introduce market forces into its economy in the early 1980s by means of the appropriately named dual-pricing system, which allowed firms to "sell their production volumes in excess of government-set targets at market prices."[12] Despite the fact that dual pricing was introduced only in the petroleum sector in 1981, it "extended to all sectors of the [Chinese] economy by the end of 1985."[13] Although the difference in pricing

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3. By comparison, certain countries in the Western world have antitrust statutes that are more than one hundred years old. Canada, for instance, had anti-cartel legislation as early as 1889, with the Sherman Act following in the United States one year later. *See* Jim Dinning & Mark Katz, *Canada: Cartel Enforcement*, ASIA-PAC. ANTITRUST REV. 2011, 40, 40 (2011).

4. The shift towards a market economy began with a series of economic reforms starting in 1978 with the Reform and Opening-Up Policy. Shang Ming, *Antitrust in China—A Constantly Evolving Subject*, 5 COMPETITION L. INT'L 4, 4 (2009); *see also China Overview*, WORLD BANK, http://www.worldbank.org/en/country/china/overview (last visited June 22, 2011) (outlining the modern history of the Chinese economy).

5. Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 652 (2011).

6. *Id.*

7. Ming, *supra* note 4, at 4.

8. *Id.*

9. For a description of Mao Zedong's life and the announcement of his death, see *On This Day: 9 September 1976*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/9/newsid_3020000/3020374.stm (last visited June 22, 2011).

10. Ming, *supra* note 4, at 4.

11. Zheng, *supra* note 5, at 652.

12. *Id.* at 653.

13. *Id.*; JEAN-JACQUES LAFFONT & CLAUDIA SENIK-LEYGONIE, PRICE CONTROLS AND THE ECONOMICS OF INSTITUTIONS IN CHINA 19 (1997).

between government-priced goods and market goods was extreme at first,[14] the differential decreased dramatically by the early 1990s,[15] allowing for greater price liberalization and better competition in the Chinese markets.

While the economic reforms of the 1980s showed China taking steps towards becoming a market-based economy, there were still considerable barriers to the rapid introduction of any such system. Despite adopting progressive practices such as the dual-pricing system, the Chinese government still "maintained state and collective ownership of enterprises and refused to free prices completely."[16] The reforms did not cast away the old system, but rather built new economic measures along its edges.[17] The shift away from centralized economic planning by the Chinese government was exceptionally gradual;[18] to some degree, "some remnants [of the old economic system are] still evident even today."[19]

The 1990s brought additional economic reforms to China, continuing the progressive trend of the previous decade. The most dramatic and pervasive fiscal reforms during this era came in 1992 under the 14th National Congress of the Chinese Communist Party (CCP). The CCP sustained the drive to transform China into a socialist market economy,[20] bringing China into an economic phase even further distinguished from its roots as a command economy.[21] In 1992, the Chinese government "completely abolished price controls for the vast majority of products in certain key sectors such as raw materials, transportation, agricultural, food, and light industry goods."[22] The changes were dramatic; for example, "[a]mong the 737 raw materials and transportation prices that were controlled by the central government at the end of 1991, 648 were fully liberalized in 1992."[23] Furthermore, 1992 "saw liberalization of fifty out of sixty agricultural prices and of all consumer goods prices except those of salt and certain medicines. . . . [F]ood prices in 844 counties and cities were also liberalized."[24] In subsequent years, price liberalization spread to additional

14. *See* Zheng, *supra* note 5, at 653 (citing THE WORLD BANK, CHINA: INTERNAL MARKET DEVELOPMENT AND REGULATION 22 (1994)) ("[I]n 1985, the market prices of consumer goods as a whole were twenty-eight percent higher than state-controlled prices . . . .").

15. *See id.* ("[B]y 1991, this differential declined to only five percent.").

16. JEAN C. OI, RURAL CHINA TAKES OFF: INSTITUTIONAL FOUNDATIONS OF ECONOMIC REFORM 2 (1999).

17. *Id.*

18. This may not necessarily have been a bad strategy for preserving economic and political stability in China. Unlike "its Leninist cousins, China refused to take bitter medicine to transform its economic system quickly with . . . [a] 'big bang' approach." *Id.* This may help to partially explain why China survived the communist collapses that characterized the Soviet Union and Eastern Europe during the late 1980s and the early 1990s. *Id.* Another possible reason that China may have fared better than its European communist counterparts is the fact that "China structured its industries in a much more decentralized fashion" with less reliance on the central government, thereby creating barriers to economic shock. Zheng, *supra* note 5, at 655.

19. OI, *supra* note 16, at 2.

20. *See* PETER HARROLD & RAJIV LALL, CHINA: REFORM AND DEVELOPMENT IN 1992–93, at 1 (The World Bank, 1993) (describing how the CCP followed the lead set by veteran leader Deng Xiaoping, who promoted renewed investment).

21. *See* Ming, *supra* note 4, at 4 (identifying 1992 as the start of China's third period of antitrust legislation).

22. Zheng, *supra* note 5, at 653.

23. *Id.* at 653 n.36 (citing Yang Jisheng, *Jiage Gaige: Jingji Gaige Zhong de Yibu Xiangi*, YANHUANG CHUNQIU 18, 22 (2009) (China)).

24. *Id.*

industries, including "steel, the majority of machinery products, onshore crude oil, and coal."[25] These practices followed China into the new millennium; by the end of 2005, over ninety percent of Chinese industry had a market-determined price.[26]

As China moved towards a socialized market-economy model and away from its command-economy roots, the need to develop laws to respond to increased competition also became increasingly pressing.[27] The introduction of market forces into the Chinese economy brought with it the threat of illegal practices by companies aimed at circumventing the natural perils of the new market. The years following 1992 brought changes in Chinese law and policy that reflected a heightened awareness of such looming threats and concerns.[28]

Important new pieces of Chinese antitrust legislation were introduced in 1993. The Anti-unfair Competition Law of the People's Republic of China ("Anti-unfair Competition Law"), adopted in September of that year, was designed to prohibit eleven types of illegal conduct, among them, "five types of monopolistic conduct, including bid-rigging, predatory pricing, abuses of dominant market positions by public enterprises and tying."[29] In October, the Chinese government enacted the Law of the People's Republic of China on the Protection of Consumer Rights and Interests, which "contain[ed] rules regulating the market competition conduct of undertakings[] with the aim to protect consumers' rights and interests."[30] The passing of such legislation showed increasing awareness of the perils accompanying the introduction of market forces into the Chinese economy.

Four years later, the Price Law of the People's Republic of China ("Price Law") was enacted "to standardiz[e] the price acts, giving play to the role of price in the rational allocation of resources, stabiliz[e] the overall price level of the market, protect[] the lawful rights and interests of the consumers and operators and promot[e] the sound development of the socialist market economy."[31] The Price Law, as a matter of economic policy, was a double-edged sword. As a means of progressive competition reform, the Price Law was designed to target negative, anticompetitive practices such as "cartels, predatory pricing and price discrimination."[32] Yet the Price Law also "explicitly allow[ed] the government to control prices in certain important sectors, including natural resources, sectors characterized by natural monopolies, and public utilities."[33] In these regulated

25. Zheng, *supra* note 5, at 653.

26. *Id.* at 654.

27. Efforts to regulate competition prior to the 1990s were "isolated and rare." Ming, *supra* note 4, at 4. Two examples of such efforts are the Provisional Regulation on the Development and Protection of Socialist Competition in 1980, which pointed to "the need to curb monopolies, in particular administrative monopolies," and the Regulation on the Administration of Advertisement in the People's Republic of China, which specifically prohibited monopolies and unfair competition in the advertising sector. *Id.*

28. *See id.* ("During [the years following 1992], many laws, regulations, administrative rules and regulatory documents relating to competition [were] passed.").

29. *Id.* at 4–5.

30. *Id.* at 5.

31. Price Law of the People's Republic of China (promulgated by the Standing Comm. of the Eighth Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998) art. 1, *available at* http://en.cnci.gov.cn/Law/LawDetails.aspx?ID=6024.

32. Ming, *supra* note 4, at 5.

33. Zheng, *supra* note 5, at 654; *see also id.* at 654 n.39 (noting Article 18 of the Price Law as the source of the government's renewed price-setting abilities).

sectors, the government had the power to either directly set prices or to set "guidance prices" designed to limit the fluctuation of market prices.[34] Thus, while extending protections designed to regulate unnatural presences in the market, the Price Law also showed an unwillingness of the Chinese government to entirely release its control over the economy. Even today, a number of these historic antitrust provisions are relevant and applicable.[35]

Following the turn of the millennium, China continued to enact additional antitrust laws. In 2000, the State Council[36] adopted the Telecommunications Regulation of the People's Republic of China, which championed competitive principles and threatened to break up monopolies in the telecommunications sector.[37] In 2001, the State Council issued both the Regulation on the Prohibition of Regional Blockades in Market Economy Activities[38] and the Decisions on Rectifying and Standardizing the Market Economic Order,[39] both of which were designed to curb anticompetitive practices. In the years leading up to the enforcement of the AML in 2008, a number of other regulations and laws were passed, all with the objective of increasing competition and perfecting the socialist market economy.[40] The main purposes of these laws and administrative regulations were four-fold: (1) to deter and eliminate cartels, (2) to curb abusive practices such as predatory pricing and

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34. *Id.* at 654. While only thirteen items appeared on the catalogue of products whose prices were controlled by the central government in 2001, many of the controlled prices were for "important products or services such as electricity, basic telecommunications, and gasoline." *Id.*

35. The Price Law, for example, is still enforced by the Chinese government and allows government intervention in important economic sectors. *See, e.g.*, Addison Wiggin, *Running Afoul of China's Price Law*, DAILY RECKONING (May 10, 2011), http://dailyreckoning.com/running-afoul-of-chinas-price-law/#hl-running%20afoul%20of%20china%27s%20price%20law (describing how Unilever was punished for violating the Price Law in 2011).

36. The State Council of the People's Republic of China is synonymous with the Central People's Government and is the "highest executive organ of State power, as well as the highest organ of State administration." *The State Council*, CENT. PEOPLE'S GOV. OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 25, 2005), http://english.gov.cn/links/statecouncil.htm.

37. Ming, *supra* note 4, at 5.

38. The Regulation on the Prohibition of Regional Blockades in Market Economy Activities contained "detailed rules relating to various forms of local protectionism, regional blockades and corresponding sanctions." *Id. See generally* Telecommunications Regulations of the People's Republic of China (promulgated by the State Council on Sep. 25, 2000, effective Sep. 25, 2000), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2000-09-25/18619.shtml.

39. Decisions of the State Council on Rectifying and Standardizing the Market Economic Order (promulgated by the State Council on Apr. 27, 2001, effective Apr. 27, 2001), *available at* http://english.hbdofcom.gov.cn/article_detail.jhtml?newsinfoid=20080403100600937aaZYEddMm0TyF&newskindid=PoliciesRelease.

40. Examples of the laws passed during this time are: Trade Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong. on Apr. 6, 2004, effective July 1, 2004), *available at* http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200703/20070304473373.html; Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, State Administration of Industry and Commerce, and State Administration of Foreign Exchange on Mar. 13, 2003 and effective Apr. 12, 2003), *available at* http://www.cvca.com.hk/template/lawtemplate.asp?ArticleID=498. The Ministry of Foreign Trade and Economic Cooperation has since been reorganized and is merged into the functions of the Ministry of Commerce. *See Ministry of Commerce*, U.S.-CHINA BUS. COUNCIL, http://www.uschina.org/public/china/govstructure/govstructure_part5/4.html (last updated Jan. 11, 2012) (describing the history and responsibilities of the Ministry of Commerce).

tying, (3) to control mergers, and (4) to prevent "regional boycotts and industry monopoly."[41]

When considering all of these laws and regulations leading up to the AML, it is fairly apparent that the pre-AML antitrust regime had a number of problems plaguing the system. A particularly troublesome characteristic of this early antitrust regime was that "the antitrust rules were scattered through all types of law, at various levels, including laws, regulations, administrative rules and regulatory documents."[42] In other words, China did not have a "unified and complete anti-monopoly law and system."[43] Equally troubling, the laws that did exist were written in fairly general terms, making them more impractical than tightly designed, specific rules.[44] These problems, coupled with a lack of respect for the authority of the rules by businesses operating in China and the fact that the penalties and consequences under those rules were arguably insufficient,[45] led to a Chinese antitrust system that was largely paralyzed by its own structural inefficiencies.[46]

It was in these conditions that the AML was introduced by the National People's Congress in August 2007.[47] The law, set to take effect on August 1, 2008,[48] was designed to act as a major stepping-stone in China's continued effort to progressively guide the country's economic development.[49]

B. *The Creation of the Anti-monopoly Law and Hope for Progress in China's Antitrust Regime*

In drafting the AML, Chinese legislators[50] hoped to craft a piece of antitrust legislation that "establish[ed] a unified, open, competitive, orderly, and modern market system in China [while] perfecting the socialist market economy system."[51] It is a crucial development in the field of competition law and is a considerable step forward for Chinese antitrust procedure. It is not, however, entirely without faults. This section explores the objectives and design of the AML and the changes it has brought to Chinese antitrust law.

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41. Zhenguo Wu, *The Anti-Monopoly Law of the People's Republic of China: Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L. J. 73, 76 (2008).

42. Ming, *supra* note 4, at 5.

43. Wu, *supra* note 41, at 76.

44. *Id.*

45. *Id.* For an example of the insufficiency of penalties in the pre-AML antitrust regime, see Price Law, *supra* note 31, arts. 39–46 (describing legal liabilities in vague terms and coupling the liabilities with relatively low monetary penalties).

46. *See* Wu, *supra* note 41, at 76 (noting four major problems with the antitrust legislation prior to the AML).

47. *Id.* at 73, 76.

48. *China Adopts Anti-Monopoly Law*, XINHUA NEWS (Aug. 30, 2007), http://news.xinhuanet.com/english/2007-08/30/content_6632075.htm.

49. Wu, *supra* note 41, at 116.

50. The AML was drafted by the Ministry of Commerce, which is a branch of the State Council that took its current form following administrative restructuring of certain branches of the State Council in 2003. *Id.* at 77.

51. *Id.* at 78.

1. Drafting the Anti-monopoly Law

The drafters of the AML had a daunting task before them. The project of creating a comprehensive piece of antitrust legislation had been on the Chinese legislative agenda for over a decade, though no overarching success had yet been achieved.[52] The new law had to reflect not only antitrust and competition principles, but also a deep understanding of the structural necessities of building and maintaining a socialist market economy.[53]

The Chinese were also faced with the difficult question of how much they should copy from foreign law in the creation of their own comprehensive antitrust regime. While it was necessary that "[t]he AML . . . reflect Chinese characteristics and [be able to] adapt to the development stage of the Chinese economy[,]"[54] in consideration of China's opening-up policies and its involvement in the World Trade Organization,[55] it was also important that "[t]he AML . . . reflect prevailing international practice and borrow from experiences and successful practices of foreign anti-monopoly legislation . . . and adjust them to suit the Chinese situation."[56] In order for the AML to be successful, it would need to reflect these diverse considerations.

The final version of the AML passed by the Standing Committee of the National People's Congress in August 2007 was fifty-seven articles long[57] and addressed many of these drafting concerns. The law "includes the principal contents generally included in the . . . prohibition of monopoly agreements, the prohibition of abuses of dominant market positions, and the control of operator concentrations,"[58] as well as an exemption scheme that reflects common international practices.[59] Notably, the AML also includes a chapter addressing abuse of administrative power

52. *See id.* at 76 ("Thirteen years [had] passed since . . . the former State Economic & Trade Commission . . . was first responsible for the drafting of the AML. In terms of China's legislative practice after . . . opening-up, the AML is perhaps the law with the longest drafting time.").

53. *Id.* at 77.

54. *Id.* at 79.

55. China has been a member of the WTO since December 11, 2001. *China and the WTO*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited June 24, 2011).

56. Wu, *supra* note 41, at 79.

57. These fifty-seven articles are further grouped by topic into eight chapters. Fan Long Duan Fa (反垄断法) [Anti-monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1 2008) art. 15(1) [hereinafter AML], *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

58. *See* Wu, *supra* note 41, at 79–80.

59. *See, e.g.*, AML, *supra* note 57, art. 15(1) (providing an exemption to monopoly agreement provisions where the agreement is made "for the purpose of improving technologies, researching and developing new products"); *see also* Treaty Establishing the European Community art. 85(3), Feb. 7, 1992, 1992 O.J. (C 224) 1 [hereinafter EC Treaty] (stating that an exemption to the monopolistic agreement provisions exists where the agreement "contributes to . . . promoting technical . . . progress"). The EC Treaty has since been replaced and reorganized by the Treaty on the Functioning of the European Union ("TFEU"), which was signed by thirteen member states on December 13, 2007, and entered into force on December 1, 2009. For the modern equivalent of Article 85(3), see Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Because Articles 101 and 102 of the TFEU are substantially the same as Articles 85 and 86 of the EC Treaty, when I cite comparisons between the laws of the European Union and Chinese law, I will henceforth cite exclusively to the TFEU for ease of comparison.

to eliminate or restrict competition,[60] designed to curb abusive practices by businesses that have been empowered by the government's interference in the market.[61] The inclusion of such provisions by the drafters reiterated the government's commitment to continued progress towards more of a market-based economic model.

2. The New Institutional Structure of China's Antitrust Regime

Enforcement of the AML is divided between three different agencies within the Chinese government, each responsible for enforcing a different part of the law. Each of these three agencies has historically held important positions in the enforcement of Chinese law prior to the creation of the AML, and some of their previous administrative roles have carried over into their post-AML functioning. The State Administration for Industry and Commerce ("SAIC"), which "is the ministry . . . in charge of corporate/partnership registration, general market conduct examination, trade mark administration, investigation of business fraud, regulation of advertising and direct marketing, consumer protection[,] and even food distribution"[62] has acted as the sole enforcer of the 1993 Anti-unfair Competition Law.[63] Though the SAIC's role in Chinese antitrust regulation has evolved in the years following the AML, enforcement of the Anti-unfair Competition Law still continues as an important function for the agency.[64]

The National Development and Reform Commission ("NDRC") is, in essence, the modernized, market-economy equivalent of the now-defunct State Planning Commission, which had acted as "'economic czar' in China under the command economy."[65] Like the SAIC, the NDRC also carried with it a number of former responsibilities into the post-AML era. As arguably one of the most important agencies of the Chinese government,[66] the NDRC manages the burden of supervising multiple aspects of the country's economic development, including "formation of strategic industry policy, oversight of infrastructure and energy projects, development of high-tech industry and the associated government funding, development of clean energy, coping with climate change, [and] building up national reservation of strategic resources."[67] Most significantly for the purposes of this

60. AML, *supra* note 57, arts. 32–37.

61. *Id.*; Wu, *supra* note 41, at 95.

62. Richean Zhiyan Li, *Unraveling the Jurisdictional Riddle of China's Antitrust Regime*, CPI ANTITRUST CHRON., Feb. 2011, at 3.

63. *Id.*

64. For an example of the Anti-Unfair Competition Law's continued use and development, see, e.g., *Proposed Amendments to the PRC Anti-Unfair Competition Law*, FRESHFIELDS BRUCKHAUS DERINGER LLP 1 (Mar. 2009), http://www.freshfields.com/publications/pdfs/2009/mar09/25519.pdf.

65. Li, *supra* note 62, at 3.

66. *See id.* ("[The NDRC] may be perhaps the largest and most important Chinese ministry overseeing the country's real economy."); Nathan Bush & Yue Bo, *Adding Antitrust to NDRC's Arsenal*, CPI ANTITRUST CHRON., Feb. 2011, at 2 ("Although some of its powers were transferred to other agencies . . . during a further restructuring in 2008, [the] NDRC remains among the mightiest agencies of the central government.").

67. Li, *supra* note 62, at 3–4.

Note's analysis, the NDRC is also the agency in charge of enforcing China's historic Price Law.[68]

The SAIC and the NDRC share the power to enforce the law against cartels and to preside over cases involving abuse of dominance.[69] The deciding factor in assigning proper jurisdiction on a matter between the SAIC and the NDRC is price: "if the case in question is price-based, it goes to [the] NDRC; otherwise it will be under [the] SAIC's purview."[70] Though this dividing line seems simple enough in its description, the result can often be a convoluted and difficult to enforce legal standard where a case does not clearly fall into either category. This problem is discussed in detail in Part II.B.2.a of this Note.

The Ministry of Commerce ("MOFCOM"), the principle drafter of the AML,[71] also has a long and important history in the Chinese government.[72] MOFCOM functions as "China's principal agency to control the inflow of foreign goods and capital"[73] and has also assumed a number of duties within China's newly established antitrust regime under the AML. In the years between taking its current form in 2003 and the establishment of the AML, MOFCOM handled "antitrust assessments for asset/equity transactions that involved foreign buyers, with the aim to safeguard domestic firms from being unfairly disadvantaged in terms of competition by sophisticated foreign purchasing firms."[74] Gathering expertise and experience in handling such cases, MOFCOM became the ideal agency to take charge of drafting the country's important new antitrust law.[75]

Unlike the NDRC and the SAIC, which share the responsibilities of handling monopolies and punishing monopolistic agreements, MOFCOM holds sole jurisdiction over merger control under the AML.[76] Though MOFCOM plays an undeniably important role in the Chinese government and in the field of mergers and acquisitions, the focus of this Note will primarily be on the NDRC and the SAIC because of their split jurisdiction in handling cartel cases.

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68. *Id.* at 4. For a discussion of the Price Law, see Part II of this Note. It is also worthwhile to note that enforcement of the Price Law had become more active in the years leading up to the AML. *See* Bush & Bo, *supra* note 66, at 3 ("Historically, the Price Law's rules . . . were sparsely enforced. . . . In 2007, however, NDRC began responding more forcefully . . . amidst growing concerns about inflation, with a series of highly-publicized investigations and edicts.").

69. *See* Li, *supra* note 62, at 2 (stating that the NDRC and SAIC "share power to enforce the law against cartels and abuse of dominance").

70. *Id.*

71. *See* Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE 3–4 (Oct. 2007), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct07_Bush10_18f.authcheckdam.pdf ("MOFCOM . . . [took] the lead in drafting the AML.").

72. MOFCOM took its most recent form in 2003, but the agency has evolved out of extensive history of other Chinese governmental agencies spanning back from the late 1940s. For an extensive look at these historical predecessors to MOFCOM, see *The History*, MINISTRY OF COMMERCE: PEOPLE'S REPUBLIC OF CHINA (Dec. 7, 2010), http://english.mofcom.gov.cn/history.shtml.

73. Li, *supra* note 62, at 4.

74. *Id.*

75. *See id.* (describing the skill attained by MOFCOM and how, "not surprisingly, . . . MOFCOM became the new drafting body").

76. *See id.* at 5 ("The merger control aspect of the post-AML enforcement model is clear and undisputed, since jurisdiction now solely belongs to MOFCOM.").

II. THE ANTI-MONOPOLY LAW AND CARTELS: SUCCESSES AND FAILURES

It is undeniable that the AML has revolutionized China's antitrust regime and has marked the start of a new era for the interaction of business and law in the Chinese market. While many provisions of the AML provide helpful instructions for businesses trying to navigate through the new system for anti-cartel enforcement, other aspects of the law offer only ambiguous guidance. More problematic, some topics that are universally important to the field of anti-cartel enforcement remain entirely unaddressed.

This Part highlights both the successes of the drafting and enforcement procedure of the AML as well as the topics of cartel law that need either some degree of further clarification in the new law or, in the most extreme instances, complete reconstruction. As comparative points of reference, this Part draws primarily from three antitrust regimes that are historically established and are largely considered successful by the global community. These three systems are those found in the United States, the European Union, and the United Kingdom.[77] Examples from other countries are used where applicable or appropriate.

A. *Successes of the Anti-monopoly Law in Anti-cartel Enforcement Law and Procedure*

While some aspects of anti-cartel enforcement in the AML need improvement, the law does include many aspects that provide promising and helpful guidelines for enforcement agencies and businesses alike. While the following sections constitute only a limited list, it is unarguable that the AML constitutes a progressive step for China as one of the commanding members of the world economy.

1. Defining Cartels in the Anti-monopoly Law

Cartels, called "monopoly agreements" under the AML, are defined as "agreements, decisions, or other concerted actions which eliminate or restrict competition."[78] According to Article 13 of the AML,[79] examples of such prohibited agreements between competing business operators include: "(1) fixing or changing prices of commodities; (2) limiting the output or sales of commodities; (3) dividing

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77. This is not to say that these anti-cartel regimes are perfect. The systems are, however, considered three definitive examples of functional antitrust regimes that have been looked to for guidance as many countries aimed to develop their own antitrust systems. It has also been suggested that the AML has drawn heavily from such Western antitrust traditions, making these three particular regimes particularly appropriate for comparison purposes. *See* Zheng, *supra* note 5, at 648 ("[T]he AML can be said to be largely a legal transplant shaped in the mold of Western antitrust laws."). It is also important to note that the United Kingdom, as is typical of member states of the European Union, still retains its own system of national rules for antitrust. This antitrust regime is historically developed and coexists with the EU's rules; depending on the circumstances, either the EU rules or the national rules apply.

78. AML, *supra* note 57, art. 13.

79. Though the language is not expressly used in the AML, Article 13 is actually designed to prevent horizontal agreements, which are "agreement[s] reached among operators that are at the same stage in the production or sales process (e.g., among producers, among wholesalers, or among retailers)." Wu, *supra* note 41, at 81.

the sales market or the raw material procurement market; (4) restricting the purchase of new technology or new facilities or the development of new technology or new products; [or] (5) making boycotting transactions."[80] Furthermore, Article 14[81] also prohibits monopoly agreements between business operators and trading counterparts that involve: "(1) fixing the price of commodities for resale to a third party; [or] (2) restricting the minimum price of commodities for resale to a third party."[82] Both of these articles also allow for future flexibility in application of the law by providing a broad general provision that allows the enforcing agencies to find additional types of behavior to constitute a monopolistic agreement in violation of the AML.[83]

Notably, Article 15 of the AML provides an exemption scheme to the prohibited conduct described in Articles 13 and 14 of the law. According to this provision, the prohibitions of Articles 13 and 14 do not apply to agreements between undertakings so long as the undertakings can prove that the agreements were made for the purpose of:

> (1) . . . improving technologies, researching and developing new products; (2) . . . upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division; (3) . . . enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators; (4) . . . achieving public interests such as conserving energy, protecting the environment[,] and relieving the victims of a disaster and so on; (5) . . . mitigating serious decrease[s] in sales volume or obviously excessive production during economic recessions; (6) . . . safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or (7) other circumstances as stipulated by laws and the State Council.[84]

Where sub-clauses (1) to (5) of Article 15 are met, the undertaking also has the burden of proving "that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in [the] relevant market."[85]

Considered in light of both the prevailing international standards and the goals of the law's drafters, the AML's definition of what constitutes a monopolistic agreement is successful. In comparison to international standards, the AML's definition of monopolistic agreement is reflective of the legal definitions of cartels in other countries.

In many ways, the AML's anti-cartel enforcement language is most similar to the law's construction as provided in Article 101 of the Treaty on the Functioning of

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80. AML, *supra* note 57, art. 13(1)–(5).

81. Article 14 of the AML is designed to prevent a second type of agreement that is universally regarded as being cartel-like in nature: the vertical agreement. Vertical agreements are "agreement[s] that are reached among operators that are at different stages in the production or sales process (e.g., between producers and wholesalers, or between wholesalers and retailers)." Wu, *supra* note 41, at 81.

82. AML, *supra* note 57, art. 14(1)–(2).

83. *See id.* arts. 13(6), 14(3) (each providing that violations of the respective articles can be found where the conduct is determined to be a monopoly "by the Anti-monopoly Authority under the State Council").

84. *Id.* art. 15(1)–(7).

85. *Id.* art. 15.

the European Union ("TFEU")[86] and, to a lesser degree, in Section 2 of the United Kingdom's Competition Act.[87] Just like Articles 13 and 14 of the AML, Article 101(1) of the TFEU and Section 2(2) of the Competition Act create lists of specifically prohibited types of cartel conduct.[88] The TFEU also includes a list of specific exemptions to the general prohibitions against cartelist conduct that is similar to Article 15 of the AML.[89]

The breadth and adaptability of the AML's anti-cartel provisions are also reflective of the broadly written anti-cartel laws of Western antitrust regimes. Similar to the AML, both the EU and the UK competition laws prelude their specific cartel prohibitions by first providing a general ban of cartelist conduct that can be properly adapted by enforcement agencies to fit different factual scenarios.[90] The United States, in contrast with the EU and the UK, relies on this broader approach exclusively; instead of listing any specific types of cartel activity, the United States relies entirely on a broad prohibition of cartelist behavior in its antitrust statute.

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86. The TFEU is, generally speaking, the central piece of legislation that establishes the "organizational and functional details" of the European Union. *Treaty on the Functioning of the European Union*, PRAC. L. COMPANY, http://ld.practicallaw.com/2-107-6192 (last visited Jan. 10, 2012). Specifically, Article 101 of the TFEU provides the law prohibiting cartel conduct. *See* Elaine Gibson-Bolton & Simon Holmes, *European Union*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CARTELS & LENIENCY 2011, at 76, 76 (Martin Low ed., 11th ed. 2011) ("Article 101 of the [TFEU] . . . prohibits anti-competitive agreements and arrangements between companies (such as cartel conduct) which may affect trade between EU Member States.").

87. In the United Kingdom, the "two principal pieces of . . . legislation controlling cartel activity . . . [are]: the Competition Act 1998 . . . and the Enterprise Act 2002. In addition, Council Regulation No. 1/2003 allows the UK competition authorities and courts to apply and enforce article 101 (and 102) of the [TFEU]." Sarah Cardell & Lisa Wright, *United Kingdom*, *in* GETTING THE DEAL THROUGH 2011, *supra* note 2, at 274, 274.

88. *See* TFEU, *supra* note 59, art. 101(1) (listing such prohibited conduct in the EU as "all agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; [or] (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"); Competition Act, 1998 c. 41, § 2(2) (U.K.) [hereinafter Competition Act] (listing such prohibited conduct in the United Kingdom as "agreements, decisions or practices which . . . (a) directly or indirectly fix . . . prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties . . . ; [or] (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which . . . have no connection with such contracts").

89. *See id.* art. 101(3) (allowing the possibility of exemption from the general prohibitions if the practice "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit"); *see also* AML, *supra* note 57, art. 15(1)–(7).

90. *See* TFEU, *supra* note 59, art. 101(1) (generally prohibiting "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" before listing any specific prohibitions); Competition Act § 2(1) (prohibiting generally "agreements between undertakings, decisions by associations of undertakings or concerted practices which—(a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom" before listing any specific prohibitions).

Under U.S. law, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with any foreign nations"[91] is deemed prohibited as a form of cartelist behavior under the Sherman Act.[92]

The benefit of including broad language in anti-cartel enforcement statutes is that it allows for considerably greater flexibility in the government's ability to define and subsequently punish anticompetitive activity that may not easily fit into one particular category of prohibited conduct. Though the AML provides helpful guidance to businesses by enumerating some specific examples of what constitutes prohibited behavior in the country's newly restructured antitrust regime, choosing to include a broad provision that permits the government greater discretion in the law's application was also a beneficial decision for the future development of the law. Instead of locking the enforcement agencies into a rigid legal scheme, the breadth of the antitrust laws will allow the law to evolve to meet the particularized needs of the Chinese economic market.

Furthermore, by defining cartelist activities in the AML so as to reflect the standards of other nations, the Chinese drafters were also successfully achieving their own objectives by continuing the effort to open China up to the global community by "further integrat[ing] . . . Chinese practice with the international market rules."[93] Aligning definitions and standards with the enforcement procedures typical of the international community reduces friction in the instances where multiple countries are trying to participate in a coordinated anti-cartel effort, such as multinational dawn raids[94] or even the ultimate prosecution of the cartel. The benefits of this are considerable and are discussed further in the following section.

2. Creating Avenues for Cooperation with Other Nations to Allow for Coordinated Global Anti-cartel Enforcement

Though not actually part of the text of the AML itself, a considerable success of the AML's creation was the additional bonus of opening gateways for China to coordinate its anti-cartel enforcement standards with other major forces in the international community. The field of antitrust enforcement has become increasingly global in nature in the past couple of decades.[95] As the concept of a global economy has solidified, it has become pressingly important that "competition enforcement transcend national boundaries to protect the benefits of competitive and honest markets,"[96] especially for "those agencies dedicated to the detection, investigation,

91. 15 U.S.C. § 1 (2006).

92. The Sherman Act is the United States' primary piece of antitrust legislation. For the handling of cartels, the "relevant legislation is section 1 of the . . . Act, . . . which is enforced by the Antitrust Division of the Department of Justice." Moses Silverman & Aidan Synnott, *United States*, *in* GETTING THE DEAL THROUGH 2011, *supra* note 2, at 285, 285.

93. Wu, *supra* note 41, at 79.

94. Dawn raids are "unannounced on-the-spot inspections at a company's premises in search of evidence that competition laws have been breached." *European Competition Dawn Raid Service*, BAKER & MCKENZIE (2009), http://www.bakermckenzie.com/files/Uploads/Documents/European%20Dawn%20Raid%20Hotline%20(flyer)-3259200-v1-londocs.pdf. Dawn raids are discussed in Chapter Six of the AML. AML, *supra* note 57, arts. 38–45.

95. *See* Wu, *supra* note 41, at 103 ("Anti-monopoly law enforcement is not simply a domestic affair anymore.").

96. Lindsay Donders, *International Cooperation in a New Era of Canadian Cartel Enforcement*, CPI

and prosecution of international cartel activity."[97] Yet the need for worldwide coordination of anti-cartel enforcement also carries with it a share of inherent difficulties. The need for cross-border application of antitrust laws "may cause conflicts between the interests and laws of different countries."[98] These problems are particularly apparent in antitrust regimes that, like China's, have adopted an extraterritorial-effects doctrine.[99]

China has designed its antitrust system so as to reduce these hurdles to effective enforcement. First, because the language of the AML is so similar to the language used in other major antitrust regimes,[100] the likelihood of encountering a second set of laws that is substantially different enough to cause significant problems is at least partially diminished. Second, the cooperation that China showed during the drafting period of the AML and its willingness to cooperate with other countries' antitrust enforcement organizations[101] has created an amiable atmosphere between China and much of the world community, ultimately to the benefit of the effort to identify and prosecute global cartels at both national and international levels.

This atmosphere of cooperation and unity in multinational antitrust enforcement has continued in the years that have passed since the AML was first enacted. In January 2011, China and the United Kingdom signed a Memorandum of Understanding ("MOU") that committed the two countries "to cooperation and the exchange of best practice on competition and consumer policy and enforcement."[102] China has also recently agreed to sign an MOU with the United States,[103] whereby "companies can now expect to see the Chinese authorities participating in coordinated 'dawn raids' and related cooperative enforcement initiatives with the U.S. and EU [antitrust enforcers] in international cartel cases."[104] Beyond signing MOUs, the Chinese government has also worked with the European Commission's Directorate-General for Competition to organize a competition-oriented conference

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ANTITRUST CHRON., Aug. 2010, at 2.

97. *Id.*

98. Wu, *supra* note 41, at 103.

99. *See id.* at 102–03 (noting that China has adopted the extraterritorial-effects doctrine in the AML). The doctrine is listed in the AML. *See* AML, *supra* note 57, art. 2 ("This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China. This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.").

100. *See supra* Part II.A.1.

101. *See, e.g.*, Dina Kallay, *U.S.-China Antitrust Cooperation: Onward and Upward*, CPI ANTITRUST CHRON., Feb. 2011, at 2, *available at* www.ftc.gov/os/2011/02/1102kallay2.pdf ("During the years that led to the AML's adoption in 2008, the U.S. antitrust agencies had repeated opportunities to provide comments and suggestions on successive drafts of the law.... [T]he Chinese agencies and legislature ... obtained a wide variety of views on the AML's proposed provisions from the public and private sectors in China and abroad.").

102. Press Release, Office of Fair Trading, OFT Welcomes Agreement with China on Tackling Competition and Consumer Issues (Mar. 21, 2011), http://www.oft.gov.uk/news-and-updates/press/2011/41-11. Specifically, the agreement was between the United Kingdom's Office of Fair Trading and the SAIC. *Id.*

103. Frank Schoneveld & Joseph F. Winterscheid, *U.S. and Chinese Antitrust Agencies to Sign Cooperation Agreement*, MCDERMOTT WILL & EMERY (July 6, 2011), http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/e04881e3-6f16-4ff2-bc05-1f3d7545618a.cfm.

104. *Id.*

focusing on price-related monopoly agreements.[105] Because "[r]egular contact between the Chinese antitrust authorities and overseas antitrust authorities ensure[s] that the authorities are up to speed in terms of recent antitrust or competition law developments in each [others'] jurisdictions,"[106] such conferences are helpful both for Chinese antitrust authorities as well as other enforcement agencies worldwide.[107]

The significance of this increased cooperation cannot be overstated. International cooperation between different antitrust authorities is "a crucial element . . . of 'busting' large, multijurisdictional cartels."[108] By participating in the global drive towards improving the connections between the world's antitrust and competition law enforcement agencies, China is both enhancing its own ability to effectively topple cartels that affect its economic markets as well as contributing valuable reinforcement to other countries as they aspire to do the same. In regards to drafting the AML to conform to international standards and in such a way that the country's antitrust law remains open to international cooperation, China has designed its new law and antitrust regime in an admirably progressive manner.

B. *Failures of the Anti-monopoly Law in Anti-cartel Enforcement Law and Procedure*

Though there are certainly many aspects of anti-cartel enforcement that the AML addresses and resolves effectively, there are a number of troublesome questions that are poorly answered by the AML. The following sections identify two particular issues in the Chinese antitrust regime, analyzing the problems and proposing possible means for resolution.

1. The Penalty System

One area of the AML that may be suited for improvement is the system of penalties set up for cartels. Before exploring alternatives, it is first necessary to consider the penalty guidelines in their existing form so as to note the limitations therein.

a. China's Current Penalty System for Monopoly Agreements and Its Relation to Other Anti-cartel Regimes

Chapter Seven of the AML provides legal liabilities for prohibited behavior under China's antitrust regime.[109] Specifically, Article 46 provides the liability

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105. Susan Ning, Liu Jia & Angie Ng, *NDRC and EU's DG Competition Organize Conference on Price-related Monopoly Agreements*, CHINA LAW INSIGHT (June 3, 2011), http://www.chinalawinsight.com/2011/06/articles/corporate/antitrust-competition/ndrc-and-eus-dg-competition-organize-conference-on-pr icerelated-monopoly-agreements.

106. *Id.*

107. This fact is clearly acknowledged by the antitrust authorities that attended the conference: the European Union, United States, Germany, Spain, Ireland, Australia, and Greece, in addition to a number of internal agencies from China. *Id.*

108. *Id.*

109. AML, *supra* note 57, arts. 46–54.

guidelines for cartel behavior.[110] According to this provision, "[w]here business operators reach an [sic] monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year."[111] In the instance where the monopoly agreement has yet to be implemented, "a fine of less than 500,000 yuan shall be imposed."[112]

The problem with these penalties for cartels is that, by comparative standards to the other major antitrust and competition authorities, they simply are not severe enough. In the European Union, the sanctions for companies who "either intentionally or negligently infringe[] article 101 of the TFEU . . . [are] up to 10% of its *global turnover* in the preceding business year,"[113] subject to either aggravating or mitigating circumstances as left to the discretion of the Commission.[114] The United Kingdom uses similar fiscal penalties against companies[115] but also includes the threat of individual punishment that does not exist under EU law. Criminal sanctions are possible for individuals found to have violated the criminal cartel offense under the Enterprise Act of 2002[116] and for those that are guilty of "frustrating activities in the context of an OFT investigation under the Competition Act."[117] Furthermore, "under the Company Directors Disqualification Act (as amended by the Enterprise Act) the OFT or relevant sectoral regulator[s] may apply to the High Court . . . for the disqualification of a company director in certain circumstances."[118] The burden of personal responsibility this places on company officials is far greater than the burdens on cartel operators included under the AML.

The United States has arguably the most punishing of the three major antitrust regimes, with a number of harsh penalties for cartelists. In 2004, President George W. Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act into effect, "increas[ing] the maximum criminal fine for companies violating the Sherman Act from US$10 million to US$100 million, making antitrust fines one of the most severe under US criminal laws."[119] This Act also "increased the maximum individual fine from US$350,000 to US$1 million."[120]

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110. *Id.* art. 46.

111. *Id.*

112. *Id.*

113. Gibson-Bolton & Holmes, *supra* note 86, at 79 (citing Council Regulation 1/2003, 2003 O.J. (L1) 1 (EC)) (emphasis added).

114. *See id.* at 79–80 (listing the aggravating and mitigating circumstances considered by the Commission).

115. Cardell & Wright, *supra* note 87, at 278 ("On making an infringement decision under the Competition Act in respect of a breach of article 101 or the chapter 1 prohibition, the OFT may impose a fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its last business year.").

116. The cartel offense is described in Sections 188–191 of the Enterprise Act. Enterprise Act, 2002, c. 40, §§ 188–191. Penalties for this offense include "on conviction on indictment, . . . imprisonment for a term not exceeding five years or . . . a fine, or . . . both; [or] on summary conviction, . . . imprisonment for a term not exceeding six months or . . . a fine not exceeding the statutory maximum, or . . . both." *Id.* at § 190(1).

117. Cardell & Wright, *supra* note 87, at 277.

118. *Id.* at 278; *see* Enterprise Act, 2002, c. 40, § 204 (amending the Company Directors Disqualification Act and providing the present criteria for disqualification of a director).

119. Silverman & Synnott, *supra* note 92, at 288; *see* Sherman Act, 15 U.S.C. § 1 (2006) (including the amended damages).

120. Silverman & Synnott, *supra* note 92, at 289; Sherman Act § 1.

Beyond fiscal penalties, cartelists in the United States also suffer from the added threat of prison sentences that are longer than those found under the United Kingdom's regime. Individuals found guilty of cartel behavior can be imprisoned for up to ten years for their felonious conduct.[121] The use of criminal sentences is not an uncommon punishment in U.S. cartel cases: "Between 2000 and 2009, more than 330 individuals were sentenced and of those, more than 200 were sentenced to serve prison terms in cases prosecuted by the [Department of Justice's Antitrust] Division."[122] In the 2010 fiscal year alone, 26,046 days of imprisonment were imposed on individuals for their cartelist behavior.[123] Conviction of a cartel offense also carries additional penalties that further impact the core rights of individuals who are U.S. citizens; not only will that individual lose the right to contract with the government in future business dealings,[124] but also, an individual that has been convicted of the cartel offense is then a convicted felon and "may lose certain privileges of U.S. citizenship, such as the right to vote."[125]

Criminal penalties are not the only deterrent to cartelists under the U.S. antitrust regime. Though "[m]ost cartel cases are brought as criminal cases,"[126] the Department of Justice's ("DOJ") Antitrust Division has the power to bring civil actions against undertakings as well.[127] Perhaps more important than the DOJ's ability to bring civil claims is the ability of private parties to bring damage claims against cartelists. According to the Clayton Antitrust Act of 1914, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[128] Between January 1990 and December 2007, nearly $19 billion dollars were obtained by private U.S. parties from international cartelists.[129] Though some other antitrust regimes have developed to allow private damages,[130] the unique allowance of treble damages within the United States is an important (and admittedly controversial) deterrent to

121. Sherman Act § 1.

122. Silverman & Synnott, *supra* note 92, at 289.

123. Numbers from surrounding years are also impressive. While fiscal year 2008 only saw a total of 14,331 combined imprisonment days, fiscal year 2007 saw 31,391 combined imprisonment days and fiscal year 2009 saw 25,396. *Criminal Enforcement: Fine and Jail Charts 2000–2010*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/atr/public/criminal/264101.html#c (last visited Mar. 5, 2012).

124. *See* Silverman & Synnott, *supra* note 92, at 289 ("An individual or entity that is convicted of price fixing will be automatically debarred from dealing with the federal government and may be debarred from dealing with state governments.").

125. *Id.*

126. *Id.*

127. *Antitrust Enforcement and the Consumer*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/atr/public/divstats/276198.pdf (last visited Mar. 5, 2012) ("There are three main ways in which the Federal antitrust laws are enforced: [c]riminal and civil enforcement actions brought by the Antitrust Division of the [DOJ;] [c]ivil enforcement actions brought by the Federal Trade Commission[; and] [l]awsuits brought by private parties asserting damage claims.").

128. 15 U.S.C. § 15(a) (2006).

129. *See* John M. Connor, *Anti-Cartel Enforcement by the DOJ: An Appraisal*, 5 COMPETITION L. REV. 89, 120–21 tbl.2 (2008), *available at* http://www.clasf.org/CompLRev/Issues/Vol5Iss1Art3Connor.pdf (stating that the monetary penalties for U.S. direct buyers was $5.767 billion and for U.S. indirect buyers was $225.6 million, for a combined total of $5.9926 billion).

130. Worldwide, "[a]pproximately forty four countries currently allow private enforcement in some form." *Private Enforcement of Antitrust Laws Seen in 44 Countries*, AM. ANTITRUST INST., http://www.antitrustinstitute.org/node/11105 (last visited Jan. 23, 2012).

cartelization efforts either inside or affecting the U.S. market.[131] Considering all of these penalties in their totality, it is clear that "[a]ntitrust defendants [in the United States] face a confluence of potential sanctions that can lead to catastrophic damages in a single matter."[132]

The danger that China's current anti-cartel regime faces from the seeming lack of sufficient penalties is not to be underestimated. The primary risk is the possibility of underdeterrence of cartels, which would threaten the efficacy of China's entire antitrust regime. Cartels are often hard to detect and even more difficult to prosecute.[133] The penalties for cartelization should reflect these difficulties and should ultimately aim to assure that undertakings "are adequately deterred from engaging in antitrust wrongdoing in the first place."[134] The secondary risks of a weak Chinese anti-cartel regime are more widespread in their possible effect. Considering the fact that China's economy is now the world's second biggest,[135] the impact of an ineffective cartel deterrence system has the possibility of resulting in spillover effects in the global economy, ultimately heightening the burden other countries have of policing international cartels. In the interest of preserving the health of the global economy, it is in the world community's overall best interest that China's anti-cartel enforcement measures function in the most efficient and effective way possible.

b. Possible Adaptations to China's Current Penalty System

Having examined China's anti-cartel penalty system in comparison to the penalty systems of other key jurisdictions, the question remains of what measures would be most appropriate and helpful to adopt into China's own enforcement scheme. There is considerable incentive for China to increase the severity of its cartel penalties under the AML. When the fines for cartelization are too low, "the incentive for applying for leniency is low, cartel defections slow, and the likelihood of detection is lowered."[136] Therefore, the results from increasing penalties under the AML would be the beneficial weakening of cartels generally and improved detection rates.[137]

One means of increasing penalties under the AML would be to simply increase the fines that cartelists must pay. A comparative look at recent Chinese cartel cases versus examples from the European Union provides helpful insight into the need for

131. *See* LEON B. GREENFIELD & DAVID F. OLSKY, BRITISH INST. OF INT'L & COMPARATIVE LAW, TREBLE DAMAGES: TO WHAT PURPOSE AND TO WHAT EFFECT? 2 (2007), *available at* http://www.wilmerhale.com/files/Publication/dc8754ff-a713-459e-80aa-f8e5cf50cf12/Presentation/PublicationAttachment/98011e52-2e46-41c1-ae26-019292035734/Treble%20Damages%20Article_%20BIICL%20conference.pdf (last visited Jan. 23, 2012) ("[T]reble damages are . . . a bedrock of the U.S. antitrust landscape . . . .").

132. *Id.*

133. *See id.* at 4. High damages might be necessary simply to account for the "difficulty and expense of uncovering and proving certain types of antitrust violations." *Id.*

134. *Id.*

135. *China Overtakes Japan as World's Second-Biggest Economy*, BBC (Feb. 14, 2011), http://www.bbc.co.uk/news/business-12427321.

136. *See* John M. Connor & Douglas J. Miller, *Determinants of EC Antitrust Fines for Members of Global Cartels*, LEARLAB 6, http://www.learlab.com/learconference_2009/documents/Predicting%20EC%20Fines%20for%20Members%20of%20Global%20Cartels%209-11-09.pdf.

137. *See id.* ("[I]ncreasing penalties will make cartels more fragile and increase detection rates.").

such reform.[138] "[T]he first decision in the public domain imposing fines for cartel behaviour since the entry into force of the Anti-Monopoly Law"[139] resulted in the fining of twenty-one cartel members by the NDRC.[140] In this decision, the three organizers of the cartel[141] received the highest fines amongst those penalized at RMB 100,000 per undertaking[142] (equal to approximately €11,160 or $14,670).[143] In the next case brought by the NDRC, the Green Mung Bean cartel,[144] the fines were considerably higher. The main organizer of the cartel received a fine of RMB 1,000,000[145] (equal to approximately €111,600 or $146,700).[146] Both of these cases seemed to be the product of some combination of the NDRC's "powers under the AML, the Price Law and other Chinese legislation."[147] The SAIC followed the NDRC's cartel cases with its first cartel fines in the concrete industry in January 2011,[148] where the local branch of the SAIC in the Jiangsu Province fined the lead organizer of the cartel RMB 200,000[149] (equal to approximately €22,680 or $30,280).[150]

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138. The reason for comparing these AML fines to the European Union's fines is because, in many ways, the AML's penalty system as it currently stands is most similar to the one used in the EU. *See id.* at 5 ("Many Asian antitrust authorities have adopted the EU model [of anti-cartel enforcement], including the . . . Chinese Antimonopoly Law.").

139. Adrian Emch, *China's Cartel-Buster Flexes Its Muscles*, 8 ASIAN-MENA COUNS. MAG. no. 4, 2010, at 4, 4, *available at* http://www.hoganlovells.com/files/Publication/ec7332a9-c10b-47b7-8d5c-4ad03f15343e/Presentation/PublicationAttachment/baa02326-5179-452e-9b68-532669db9681/Asian%20Counsel_Chinas_cartel-buster_flexes_its_muscles.pdf.

140. *Id.*

141. The cartel was centered on the manufacturing and production of rice noodles. *See id.* ("In . . . 2009, local manufacturers of rice noodles . . . struck a series of agreements to raise wholesale prices in the city of Nanning. In January 2010, the agreement was extended to producers in neighbouring Liuzhou.").

142. *First Price Cartel Cases Under the Chinese AML*, CLEARY GOTTLIEB STEEN & HAMILTON LLP 2 (May 21, 2010), http://www.cgsh.com/files/News/3a5cc286-52ab-4159-9530-0aea6234a36f/Presentation/NewsAttachment/c202e345-2d65-4feb-82b0-0f5497fb1098/CGSH%20Alert%20-%20First%20Price%20Cartel%20Cases%20under%20the%20Chinese%20AM%E2%80%A6.pdf.

143. For purposes of 2010 currency conversion, I used http://www.oanda.com/currency/historical-rates with the "Range" set from January 1, 2010, to December 30, 2010, to get the yearly average conversion. I then multiplied the appropriate exchange rates by the penalty amount.

144. *See* Peter Corne, Charlie Markillie & Wei Zhang, *China Fines Agricultural Companies for Agreeing to Raise the Price of Their Products*, EVERSHEDS (July 16, 2010), https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata/Eversheds/articles/data/en/China_Focus/China_fines_agricultural_companies_for_agreeing_to_raise_the_price_of_their_products ("The Green Mung Bean Cartel was alleged to have been formed on 17 October 2009. . . . Jilin Corn Centre Exchange . . . summoned 109 distributors from 16 provinces, regions and municipalities across China for a so-called 'conference' on the price and production of green mung beans.").

145. *Id.* ("JCCE [the chief coordinator of the cartel] received a fine of RMB1million (£100,000) for its part in organising the 'conference' and producing and circulating fraudulent information.").

146. For my monetary conversion methodology, see *supra* note 143.

147. Corne, Markillie & Zhang, *supra* note 144. It is difficult to determine exactly how the legal aspects of the enforcement played out because "the AML does not require the NDRC to publicise details of enforcement action taken, [meaning a] . . . lack of details and background information" on the cases. *Id.*

148. Henry Chen & Frank Schoneveld, *First Cartel Fines in China Following New Regulations*, MWE CHINA LAW OFFICES (Feb. 25, 2011), http://www.mwechinalaw.com/news/2011/chinalawalert0211c.htm.

149. *Id.*

150. For my monetary conversion methodology, see *supra* note 143. The one difference with this conversion is that the cartel was fined in January 2011 as opposed to during 2010. To account for this later time period, the "Range" parameters were adjusted to match the period from January 1, 2011, to January 31, 2011, for the purposes of accurate representation in consideration of the considerable monetary fluctuation found in the global economy during 2011.

Comparison of these figures with the penalties found under the European Union's enforcement regime exemplify just how significantly different the two systems actually are. In 2010, the same year that the two NDRC cartel fines described above were issued, the European Commission fined the Belgian company Ideal Standard over €326 million[151] (approximately $432.8 million)[152] for its role in a bathroom fittings cartel. In 2011, the Commission fined Proctor & Gamble €211.2 million[153] for its participation in a washing powder cartel.[154] When compared with the fines given to lead cartelists in China, the monetary difference in the penalties is staggering. Even the smaller fine against Proctor & Gamble is more than eighteen hundred times larger than the biggest fine against the lead cartelist in the Green Mung Bean cartel.[155]

The question of how to best calculate the means to bridge this monetary gap is not an easy one to answer and is beyond the scope of this Note. Calculation of the proper fiscal penalty is a task that may be better suited to an economist than a legal scholar. In the effort to find the optimal level for cartel fines in China's antitrust system, however, one fact that is fairly apparent is that China's penalties would not necessarily need to match the high levels found in the EU. In fact, there are some notable arguments to be made against simply increasing the fines to the level found in the EU's system. Some scholars have argued that "[t]he European Union's procedures are so flawed [that] it shouldn't be permitted to dispense such big penalties at all."[156] With the European Commission acting as investigator, prosecutor, and decision maker in cartel cases, critics of the EU system claim that the severity of the fines combined with this plurality of roles actually stands as a violation of human rights.[157] Additionally, there are questions as to just how effective EU fines are at deterring cartel recidivists.[158] Geographically, the "top recidivists are primarily headquartered in the EU."[159]

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151. *Cartel Statistics*, EUROPEAN COMMISSION (July 14, 2011), http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

152. For my monetary conversion methodology, see *supra* note 143.

153. James Kanter, *Unilever and P.&G. Fined for Fixing Price of Detergent*, N.Y. TIMES (April 13, 2011), http://www.nytimes.com/2011/04/14/business/global/14cartel.html.

154. *Id.*

155. *Compare* Corne, Markillie & Zhang, *supra* note 144 and accompanying text (stating that the fine levied against the Green Mung Bean Cartel was the equivalent of approximately €111,600), *with* Paul Sonne & Laurence Norman, *EU Fines Unilever, P&G Over Pricing*, WALL ST. J., Apr. 14, 2011, http://online.wsj.com/article/SB10001424052748703551304576260350721684500.html (stating the fine levied against Proctor & Gamble as €211.2 million).

156. Charles Forelle, *EU Cartel Fines Elicit Human-Rights Argument*, WALL ST. J., May 16, 2011, http://online.wsj.com/article/SB10001424052748704681904576319442582839696.html.

157. *See id.* (describing the argument by some defense lawyers that EU cartel fines are a violation of human rights); *see also* David Anderson & Rachel Cuff, *Cartels in the European Union: Procedural Fairness for Defendants and Claimants*, 34 FORDHAM INT'L L. J. 385, 404–05 (2011) (describing how the cartel fines in the European Union may be so large as to violate human rights laws and explaining the controversy of the European Commission's broad role in cartel proceedings).

158. Recidivism is "the act of a person repeating an undesirable behavior after having been sanctioned previously for that behavior." John M. Connor, *Recidivism Revealed: Private International Cartels 1990–2009*, COMPETITION POL'Y INT'L J., Nov. 5, 2010, at 101, 103 (citing JAMES HENSLIN, SOCIAL PROBLEMS: A DOWN-TO-EARTH APPROACH (2008)).

159. *Id.* at 111.

In light of these considerations, it may be helpful for the Chinese legal system to shift away from its EU-influenced roots as it tries to strengthen its antitrust regime. An alternative solution would be to amend the AML so as to provide criminal penalties for cartel behavior. The use of criminal penalties for cartel conduct is by no means limited to a small number of jurisdictions; countries worldwide have either enacted or are currently considering legislation to criminalize cartel behavior.[160] Nor is it unusual for systems that began without criminal penalties to adopt them at a later stage of their development. In May 2011, Mexico changed its antitrust provisions so that the government "now has the power to impose criminal sanctions for hard-core cartel offences."[161] New Zealand has also taken steps in the direction of criminalizing its cartel offense.[162]

Furthermore, there is data that supports the efficacy of criminalizing the cartelization offense. The United States, which is rightfully regarded as "the primary user of criminal law as an enforcement tool" against cartels,[163] has a lower rate of cartelist recidivism than found in the European Union,[164] suggesting more effective deterrence under the U.S. antitrust model. Furthermore, there has been a general shift in the international antitrust enforcement scheme towards including criminal deterrence measures in developing antitrust regimes, indicating a positive response towards cartel criminalization from the global community. Over thirty countries "have criminalized cartel conduct in some form," most of them since the mid-1990s, "and the list is growing."[165] Included in these countries are Brazil and Russia,[166] considered to be two of the most impressive emerging markets in the world economy.[167]

From an international community perspective, criminalizing the cartel offense could also further align China's antitrust regime with global efforts for anti-cartel enforcement. There has been a recent trend towards multinational cooperation to

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160. *See* Kirby D. Behre, Michael P.A. Cohen & Kristen Warden, *Global Overview*, *in* GETTING THE DEAL THROUGH: CARTEL REGULATION 3, 3 (2010), *available at* http://www.paulhastings.com/assets/publications/1527.pdf ("Nations in six continents have enacted, enhanced or are currently considering legislation criminalising cartel conduct.").

161. Rachel Bull, *Mexico Gets Criminal Powers*, GLOBAL COMPETITION REV. (May 16, 2011), (on file with author, available by subscription at http://www.globalcompetitionreview.com/news/article/30103/mexico-gets-criminal-powers).

162. *See* Richard Davidson and Daniel Street, *The Smoking Gun—Draft Bill to Criminalise Cartels*, CHAPMAN TRIPP (June 20, 2011), http://www.chapmantripp.com/publications/Pages/The-smoking-gun-draft-bill-to-criminalise-cartels.aspx (describing New Zealand's draft criminalization bill).

163. Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 SEDONA CONF. J. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865971.

164. *See* Connor, *supra* note 158, at 111 ("Only five U.S. companies are leading recidivists.").

165. Shaffer & Nesbitt, *supra* note 163, at 2.

166. For Brazil, see Thomas O. Barnett, Asst. Att'y Gen., Antitrust Div., Address at the Universidade de São Paulo, Perspectives on Cartel Enforcement in the United States and Brazil (Apr. 28, 2008), at 5, http://www.justice.gov/atr/public/speeches/236096.pdf (describing how, in Brazil, "cartels can be pursued either criminally or administratively" and noting that "individual defendants may receive up to five years in prison"); for Russia, see Evgeny Maslennikov & Ilia Rachkov, *Russia*, *in* GETTING THE DEAL THROUGH 2011, *supra* note 2, at 217, 220 (describing Article 178 of the Criminal Code of the Russian Federation, which "establishes criminal liability for banning, restricting or eliminating competition" in the form of "a fine of between 300,000 and 500,000 roubles, or of the salary (or other income) of the convicted person for one to two years, or imprisonment for up to three years").

167. *See Bric*, FIN. TIMES LEXICON, http://lexicon.ft.com/Term?term=bric ("The [BRIC] grouping—Brazil, Russia, India and China—has become a shorthand for the rise of emerging markets in the global economy . . . .").

extradite individuals convicted of the criminal cartel offense between jurisdictions for purposes of criminal prosecution.[168] This has become especially important for the United States, where "[s]ince at least the early 1990s, the DOJ's antitrust enforcement has focused heavily on deterring and disbanding international price fixing and market allocation cartels."[169] In the past decade, the DOJ "has successfully prosecuted and imprisoned upwards of three dozen foreign executives from a number of different countries, including France, Germany, Japan, Korea, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom."[170] Opportunities for international extradition, however, are obstructed when countries lack criminal offenses for antitrust violations. Even where an extradition treaty exists between two countries, such "treaties generally provide for extradition only where the offense in the requesting country also is an offense in the requested country."[171] Thus, the introduction of criminal penalties for cartel behavior can allow China to coordinate its penalization practices at the international level and to develop a stronger relationship with other major players in the global antitrust enforcement network.

Another possible means of strengthening China's anti-cartel enforcement would be to bolster the country's systems for private damages against cartelists. As noted in the previous section, many countries, including major antitrust authorities such as the United States and the United Kingdom, offer parties that have been injured by cartelist activities the opportunity to bring private damages suits against the cartel.[172] Though government sanctions "are essential in deterring future antitrust violations, virtually the only way to secure redress for the victims of antitrust violations is through private litigation."[173] Private antitrust claims also provide deterrent effects; in fact, a 2008 empirical study has shown that "the amount recovered in private cases is substantially higher than the aggregate of the criminal antitrust fines imposed during the same period."[174] In the United States, compared to the aggregate $4.232 billion in fines levied by the government until 2008, at least $18.006 billion was recovered from cartelists in private suits,[175] thereby providing "more than four times the [fiscal] deterrence of the criminal fines."[176]

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168. A recent example of multinational extradition procedure is the Marine Hose cartel case. Three British executives faced the threat of extradition to the United States to serve prison sentences but cooperation between the United States and the United Kingdom in their enforcement measures allowed the men to serve their sentences in Britain instead. Michael Peel, *Repatriation to Create Legal Landmark*, FIN. TIMES (Dec. 12, 2007), *available at* http://www.ft.com/intl/cms/s/0/b20e9b0e-a855-11dc-9485-0000779fd2ac.html#axzz1q1Bb15j7.

169. Neal R. Stoll & Shepard Goldfein, *Welcome to the United States, Mr. Norris*, N.Y. L.J., Apr. 20, 2010, *available at* http://www.skadden.com/content/Publications/Publications2049_0.pdf (citation omitted).

170. *Id.* (citation omitted).

171. *Id.* (citation omitted).

172. For the United States, see 15 U.S.C. § 15 (2006) (stating that private parties are entitled to sue for treble damages and many recoup reasonable attorney fees); for the United Kingdom, see Competition Act, 1998, c. 41, § 47A (as inserted by § 18 of the Enterprise Act 2002) (allowing third parties to bring claims for damages for loss or damage suffered from violations of UK or EU competition law).

173. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 883–84 (2008).

174. *Id.* at 893.

175. *Id.*

176. *Id.*

China has recently taken progressive steps towards reformation of its private antitrust litigation regime. On April 1, 2011, "[t]he revised Rules on Civil Causes of Action came into effect[,] . . . confirm[ing] that parties harmed by anticompetitive agreements . . . and abuses of dominant market position may obtain redress in court."[177] Then, on April 25, 2011, the Supreme People's Court published a draft interpretation on civil litigation under the AML.[178] "The draft, [titled] Provisions on Several Issues Applicable to the Trial of Anti-Monopoly Private Litigation Cases represents the first substantive guidance on the Anti-monopoly Law . . . to be issued by the Supreme People's Court (SPC)."[179] While before this point parties trying to use the AML as a means of pursuing private litigation had found little success,[180] the Provisions have the potential to "pave the way for a significant increase in AML litigation."[181] By clarifying topics "such as the possibility of stand-alone and follow-on actions, burden of proof, standing and time limits,"[182] the Provisions are an important measure in the continued effort to perfect the Chinese antitrust system and reinforce a useful means of cartel deterrence.

Considering the above options, there is no single correct way for China to improve its cartel penalization system. Between the three models described, Chinese legislators have the opportunity to modify or hybridize their regime to create a system that satisfactorily addresses the country's specific domestic and international objectives for antitrust enforcement.

2. The Leniency Program

Another aspect of the AML that may be suited for improvement is the structure of the leniency program. The system as it is currently set up is prone to create difficulties, especially as the country's antitrust regime gathers strength and becomes an increasingly common presence in both China and the global market.

a. China's Current Leniency Program for Monopoly Agreements: A Problematic Design

Leniency regimes have come to serve an increasingly significant role in the effort to detect and prosecute cartels at both national and international levels. The concept of a leniency program is to create a system whereby "partial or total exoneration from the penalties that would otherwise be applicable [is granted] to a cartel member which reports its cartel membership to a competition enforcement

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177. Peter J. Wang, Sébastien J. Evrard & Yizhe Jang, *Antitrust Alert: China's Supreme Court to Set Framework for Antitrust Litigation*, JONES DAY (May 23, 2011), http://www.jonesday.com/antitrust-alert--chinas-supreme-court-to-set-framework-for-antitrust-litigation-05-23-2011.

178. Phil Taylor, *China's Top Court Clarifies Rules for Private Antitrust Litigation*, INT'L BAR ASS'N (May 10, 2011), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=08FA9F48-0034-4F3F-A114-D9A8D8ACAC23.

179. *Id.*

180. *See id.* ("Until now, the lack of detail has slowed down court enforcement of the law: individuals have attempted to sue domestic companies under Article 50 of the AML, but official statistics show that by the end of 2010 only 43 such cases had been accepted and few had been sustained.").

181. Wang, Evrard & Jang, *supra* note 177.

182. Taylor, *supra* note 178.

agency."[183] Leniency programs serve a number of important functions within the anti-cartel enforcement system. The programs are designed to "encourage violators to confess and implicate their co-conspirators, providing first-hand, direct 'insider' evidence of conduct that the other parties to the cartel want to conceal,"[184] subsequently making the cartel easier to prosecute. Furthermore, such programs provide inherent deterrent force by threatening to "uncover conspiracies that would otherwise go undetected and can destabilize existing cartels"[185] as the cartelists themselves threaten to undermine each other. After the United States pioneered the idea of a leniency program, a worldwide effort to create similar programs began to emerge.[186] The movement has been so effective that "[t]oday[] leniency programs span the globe from Canada to the United Kingdom to Japan to South Africa to Brazil."[187]

Article 46 of the AML provides the legislative framework for China's leniency regime. According to this provision, "[w]here any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidence[] to the anti-monopoly authority, it may [] impose[] a mitigated punishment or exemption from punishment as the case may be."[188] The two AML Enforcement Authorities being referenced are the SAIC and the NDRC.[189] As mentioned above in Part I.B.2 of this Note, the SAIC's enforcement capacity is limited to non-price-related monopoly agreements, while the NDRC is in charge of handling price-related cartels.

Three central aspects of an effective leniency program are: "(1) severe sanctions; (2) perceived high risk of detection; and (3) transparency and predictability to the greatest extent possible."[190] Though China has taken the first step towards instituting a leniency program by including leniency provisions under Article 46 of the AML, the statutory design of the leniency program is far from satisfactorily meeting these three criteria. As noted previously, the sanctions for cartel behavior under the AML are not particularly severe when compared to sanctions in other major antitrust regimes,[191] thus having a lower chance of coaxing an uneasy cartel participant into betraying its fellow cartelists solely as a means to avoid fiscal penalization.

Furthermore, since the sanctions are not sufficiently high and the likelihood of a cartelist unveiling its participation in (and the workings of) the cartel is thereby low, there is a lessened perception amongst cartelists that their behavior will be detected

183. INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL ch. 2, at 2 (2009), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.

184. *Id.*

185. *Id.*

186. MYONG-HUN CHANG & JOSEPH E. HARRINGTON, JR., NORTHWESTERN LAW, THE IMPACT OF A CORPORATE LENIENCY PROGRAM ON ANTITRUST ENFORCEMENT AND CARTELIZATION 2 (2010), *available at* www.law.northwestern.edu/searlecenter/papers/Harrington_Leniency.pdf ("The widespread usage of the leniency program in the U.S. soon led to the adoption of similar programs in other countries. In 1996, the European Commission (EC) instituted a leniency program and a decade later 24 out of 27 EU members had one.").

187. *Id.*

188. AML, *supra* note 57, art. 46.

189. For a description of the functions of the NDRC and the SAIC, see *supra* Part I.B.2.

190. Anderson & Cuff, *supra* note 157, at 398.

191. *See supra* Part II.B.1.a.

by the enforcement authorities. Because it is crucial that cartelists "perceive that there is a real risk of detection and that, in the absence of a leniency application, subsequent enforcement action will necessarily follow"[192] in order to convince participants to step forward and confess their behavior, these factors are damaging to the functioning of the leniency system as a whole and threaten to undermine its efficacy.

Fortunately, resolving these preliminary issues may be relatively straightforward. By changing the AML's penalty system so that punishment results in more severe consequences for cartel behavior, not only will the threat of severe sanctions be bolstered but the risk of detection should also increase. As discussed in Part II.B.1.b, the options available to the Chinese government for changing its penalty system are plentiful and an appropriate resolution is surely available.

A more difficult problem lies in addressing the need for a transparent and predictable system. The current leniency program is structured in such a way that predictability is virtually nonexistent. This, in part, is due to the decision to divide cartel enforcement between the SAIC and the NDRC based on whether the monopoly agreement was price-based.[193] While the dividing line sounds simple to draw in theory, it is actually very difficult to define in application. For instance, in a situation where the cartelists' behavior creates only an indirect effect on prices without any intention of direct effect, a cartelist may be confused as to whether an application for leniency should be made to the SAIC or the NDRC.[194] Equally troublesome are situations where the case "involv[es] both price-related and non-price-related conduct."[195] Because "none of the rules yet issued by [the] NDRC or [the] SAIC formally address such scenarios,"[196] leniency-seeking businesses are left to struggle without guidance against the ambiguous legal standards.

These problems are exacerbated by the general lack of transparency in China's antitrust regulatory system. Because there is no clear guidance as to how such scenarios should be resolved, businesses seeking leniency are placed in a difficult scenario. These undertakings are at risk of falling victim to misdirection in the application process and are subsequently threatened with being held in a disadvantageous position in their efforts to obtain leniency. Equally troublesome, cartelists that are already hesitant to come forward are likely to be further deterred by the unresolved ambiguities of the system.[197] In order to persuade these borderline leniency applicants to speak out, it is critical that "applicant[s] . . . be able to predict

192. INT'L COMPETITION NETWORK, *supra* note 183, at 3.

193. *See* Bush & Bo, *supra* note 66, at 5–6 (discussing the division of jurisdiction over pricing and non-pricing related violations of the AML by the NDRC and SAIC, respectively).

194. *See id.* at 5 ("[I]t remains to be seen how [the] NDRC and [the] SAIC will distinguish anticompetitive practices that are explicitly price-related from other anticompetitive practices with indirect effects on prices.").

195. *Id.*

196. *Id.*

197. According to studies conducted by the International Competition Network ("ICN"), such possibilities can act as a considerable deterrent for companies that would otherwise apply for leniency. In speaking with "attorneys who have represented leniency applicants in the past [about] issues that could inhibit potential applicants from self-reporting in some jurisdictions," the ICN found that conditions which lead applicants to question their ability to receive leniency often deterred those undertakings from reporting. INT'L COMPETITION NETWORK, *supra* note 183, at 4.

with a high degree of certainty how [they] will be treated if [they] report[] the[ir] conduct and what the consequences will be if [they] do[] not come forward."[198]

b. Options for Improving the Chinese Leniency Program

In order for the Chinese anti-cartel enforcement regime to function to its utmost capacity, fixing the leniency program needs to be a top priority for the AML enforcement agencies. There are a number of available options to successfully achieve this goal that are readily achievable and do not require drastic measures such as merging the two enforcement agencies or substantially overhauling the AML.

One possibility for improving the leniency program is for Chinese regulators to provide a clarified definition of the division between the SAIC and the NDRC for purposes of anti-cartel enforcement. Procedural clarifications can be administered effectively in a number of different stages of the enforcement process. Perhaps the most apparent opportunity for clarity is in the standard that determines which enforcement agency handles a particular cartel. So long as the vague determinant of price continues acting as the current dividing line for the types of cartels that are handled by each of the enforcement agencies,[199] companies are going to continue to be confused as to which agency they should be seeking leniency from.[200]

Thankfully, the SAIC and the NDRC have taken some steps towards clarifying case distribution under the price element. In January 2011, "both agencies produced regulations to announce how to jointly enforce the law against cartels and abuse of dominance."[201] These regulations offered some much-needed clarification regarding the division of antitrust jurisdiction between the authorities and provided encouraging "evidence of good coordination between the agencies . . . [as] they were announced almost simultaneously (within three days)[] and defined [most of] the major terms consistently."[202] These regulations provide greater clarity about which types of matters are handled by the specific organizations, designating the NDRC as the leading organization for price-fixing horizontal anticompetitive agreements, resale price maintenance, and floor price-setting vertical agreements and indicating that the SAIC will handle horizontal anticompetitive agreements that have the effect of output restriction, market allocation, market restriction, or group boycotting.[203]

198. *Id.* at 3.

199. *See supra* Part I.B.2.

200. Companies are not even able to look at other antitrust jurisdictions for guidance in this regard because "no other established antitrust regime has ever used the price element to divide antitrust jurisdiction." Li, *supra* note 62, at 5.

201. *Id.* at 6. The NDRC's regulation is called the Anti-price Monopoly Regulation, while the SAIC's regulation is known as the Regulation on the Prohibition of Acts Involving Monopolistic Agreements. These were released with a set of other regulations from the agencies designed to clarify antitrust enforcement under the AML. Jun Wei, Adrian Emch, Andrew McGinty & Henry Wheare, *Newly Enacted NDRC and SAIC Rules May Usher in New Anti-monopoly Enforcement Phase*, HOGAN LOVELLS 1–2 (Jan. 2011), http://www.hoganlovells.com/antitrust-competition-and-economic-regulat ion-e-alert---china-newly-enacted-ndrc-and-saic-rules-may-usher-in-new-anti-monopoly-enforcement-phase-01-12-2011 (select "Read the 'full alert'" hyperlink).

202. Li, *supra* note 62, at 6.

203. *Id.*

While these regulations are a step forward in clarifying enforcement division for cartels between the two agencies, they still contain some critical inconsistencies and leave a number of key issues unresolved.[204] One particularly troubling issue is that the regulations still do not answer the question of which agency handles a cartel that has both price-related and non-price-related elements; the new regulations "are [still] based on the presumption that all cases are in a single dimension"[205] and do not involve these dually inclusive scenarios. This means some of the more complicated leniency application questions discussed in the preceding section of this Note still remain largely unresolved. Additionally, the regulations do not provide helpful clarification to the two agencies' leniency programs themselves. Critically important terms to the leniency procedure are still defined differently between the NDRC and the SAIC,[206] meaning that businesses are torn not only between different agencies but also different legal standards. Thus, while the regulations are an advancement in the effort to resolve ambiguity in the AML, further development of the law is still necessary in order to "help firms to better foresee . . . legal outcome[s]."[207]

Another option available to Chinese regulators is to look at other leniency programs in the global antitrust community and to adopt practices that appropriately fit the Chinese anti-cartel enforcement model. In particular, the structure of the leniency system in Canada may provide some helpful guidance for reform in China's own leniency program.

Canada, like China, has a bifurcated system where a couple of different enforcement agencies are involved in the handling of cartels. Primary enforcement of Canada's Competition Act falls to the Commissioner of Competition, who serves as the head of the country's Competition Bureau.[208] The Competition Bureau "has considerable powers at its disposal to investigate alleged conspiracies, such as the authority to obtain judicially authorized search warrants . . . , document production orders, orders compelling testimony and written returns under oath, and wiretaps."[209] The Bureau is not, however, responsible for prosecuting criminal violations of the Competition Act.[210] Instead, "[p]rosecution is the responsibility of the Public Prosecution Service of Canada (PPSC), which is headed by the [D]irector of [P]ublic [P]rosecutions (DPP)."[211] In this dual agency system, "[t]he Bureau will refer criminal matters to the DPP, who then must decide whether it is in the public interest to commence proceedings."[212]

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204. *See id.* at 7 ("There are still many questions left unanswered in these newly published regulations."); Wei, Emch, McGinty & Wheare, *supra* note 201, at 3 ("[B]usinesses in China will face a number of challenges when trying to comply with these regulations.").

205. Li, *supra* note 62, at 7.

206. One example is the use of the term "important evidence." In order to receive leniency from either agency, the applicant must "voluntarily come forward to disclose the illegal conduct and provide 'important evidence.'" Wei, Emch, McGinty & Wheare, *supra* note 201, at 3. Unfortunately for businesses, the term is "defined differently between the two programs." *Id.*

207. Li, *supra* note 62, at 7.

208. D. Martin Low, Mark Opanishov & Casey Halladay, *Canada*, *in* GETTING THE DEAL THROUGH 2011, *supra* note 2, at 30, 30.

209. Katz & Dinning, *supra* note 3, at 41 (citation omitted).

210. *See id.* ("Although the Bureau is responsible for investigating alleged conspiracies, it does not prosecute criminal violations of the Act.").

211. *Id.*

212. *Id.*

Like most other developed antitrust systems, Canada has come to rely on its leniency program in its effort to successfully identify and prosecute cartels.[213] Unlike China, Canada has managed to develop a means of coordinating its leniency program between the two parties that does not result in excessive confusion for applicants. Rather than leaving the applicant in a position where it must decide which agency it needs to apply to, all "[r]equests for immunity are made to the Bureau, which then decides whether to recommend to the DPP that the request be granted."[214] While the Commissioner's recommendation "does not legally bind the DPP, . . . there is a high degree of predictability that, on a party's compliance with the [leniency] policy, a recommendation by the [C]ommissioner [will] be followed."[215]

Canada's system demonstrates an application filing procedure that could be used to considerably enhance the Chinese leniency program. Following Canada's lead, rather than leaving businesses to struggle with the difficult price division element in preparing a leniency application, the Chinese system could be adapted so that one agency is the designated leniency application recipient.[216] This would serve the interests of both predictability and transparency. Rather than forcing companies and lawyers to guess which agency is best suited for a particular leniency application, applicants would be able to confidently apply for leniency to one particular place without fear of mistake, thereby making the system more transparent and navigable. Applying through a single agency also allows businesses to effectively determine their likelihood of being "first in" for leniency without fear of having applied to the wrong agency.[217] This is particularly important for international cartelists seeking leniency because it aids in their effort to accurately predict their ability to obtain leniency in other jurisdictions as well.[218]

Another leniency policy that Chinese regulators should consider is a program used both in Canada and the United Kingdom that provides a mechanism known as hypothetical leniency.[219] Hypothetical leniency "takes the form of a 'hypothetical'

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213. *Id.* at 42 ("The Bureau's success in obtaining cartel convictions in recent years is due in large part to the availability of its immunity programme . . . .").

214. *Id.*

215. Low, Opashinov & Halladay, *supra* note 208, at 34. To date, it appears "that no recommendation for immunity in a competition case has ever been rejected." *Id.*

216. This agency could be an existing agency like the NDRC or the SAIC, or it could be a new agency to which the Chinese government delegates the task.

217. In most jurisdictions, being the first applicant for leniency means being granted conditional immunity. *See* INT'L COMPETITION NETWORK, *supra* note 183, at 3 (describing the "first through the door" policy). Typically, applicants after the first applicant still receive some level of leniency, though not at the same level as the first. *Id.* at 5.

218. *See* Bruce A. Baird, David W. Hull & Steven J. Rosenbaum, *International Cartels: Corporate Leniency Applications*, ANTITRUST REV. OF AMERICAS 2003, at 3, 3 ("As a general rule, enforcement authorities . . . should be contacted simultaneously to avoid the possibility of gaining protection in one jurisdiction but losing it in another.").

219. For Canada, see Madeleine Renaud & Dominic Thérien, *The Competition Bureau Releases Its Final Leniency Program*, MCCARTHY TÉTRAULT (Mar. 1, 2011), http://news.mccarthy.ca/en/news_template.asp?pub_code=5297&news_code=1478&single_page=1 ("The applicant first requests a 'marker' to determine whether leniency is available . . . . At the marker stage, information may be provided on a hypothetical basis. If leniency is available, the Bureau advises the applicant of its place in the line . . . ."). For the United Kingdom, see Amanda Butler, Philipp Girardet & Simon Holmes, *Cartel Regulation in the United Kingdom*, *in* EUR. ANTITRUST REV. 2010, at 237, 241 ("Companies considering applying for leniency may approach the OFT for confidential guidance before deciding whether to come forward.").

discussion on a no-names basis about a particular factual scenario, with the idea being that the company can be reasonably sure of its position . . . [in the leniency queue] before making an application."[220] A hypothetical leniency model can be designed with limitations and qualifications as the governmental authorities see properly fit.[221]

By allowing companies to investigate leniency hypothetically before revealing themselves, the Chinese enforcement agencies would be addressing many of the problems that currently exist in its leniency program. Applicants struggling with their choice of antitrust agency due to the price element dividing line would be able to reach out to the NDRC and the SAIC in confidence and would be better able to assess their situation and plan their decisions moving forward. Mistakes can be resolved efficiently and anonymously without fear of reprisal or the possibility of alerting other cartelists to a hopeful applicant's intentions, which would thereby sacrifice their opportunity to potentially qualify for higher leniency benefits.

China's leniency program is currently designed in a difficult to navigate manner; this system is untenable and further development is inevitable. As noted above, there are plenty of clarifying solutions available to the enforcement authorities, ranging from additional explanatory regulations to broader institutional changes. Hopefully, future reforms will only further increase predictability and transparency in enforcement of the Chinese leniency program.

CONCLUSION

China has made undeniably impressive progress in the country's effort to develop an effective antitrust system and anti-cartel enforcement regime. While the work of Chinese regulators and enforcement agencies is commendable, the task of establishing a fully effective system for fighting cartels is not yet complete. This Note has identified some of the primary areas where China's anti-cartel practices and policies can be improved and has suggested a number of possible solutions to address those concerns. By working to improve such areas as cartel penalization and the leniency program, the Chinese anti-cartel enforcement regime can easily match the efficacy of similar programs found in other major world powers.

Ultimately, the significance of such constructive reforms and revisions in Chinese anti-cartel enforcement extends well beyond the territorial boundaries of the country and impacts the entire international community. With the increasingly prominent role that China has come to play in the global economy, it is imperative that the Chinese anti-cartel enforcement system is capable of halting anticompetitive practices that affect the national market. With perseverant development of its antitrust procedure and continued dedication to the global anti-cartel initiative, China has tremendous potential to become a world leader in the field of anti-cartel enforcement.

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220. Butler, Girardet & Holmes, *supra* note 219, at 241.

221. For instance, in the United Kingdom, "[p]urely hypothetical applications for a marker will not be entertained by the OFT." *Id.* Additionally, "[t]he undertaking must . . . have a 'genuine intention to confess,' . . . [meaning] there must be an acceptance by the undertaking that as a matter of fact and law the available information suggests it has been engaged in cartel conduct." *Id.*

Cyber War Inc.: The Law of War Implications of the Private Sector's Role in Cyber Conflict

HANNAH LOBEL*

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INTRODUCTION

On June 1, 2011, Google Inc., the world's leading search engine and a major email services provider, announced on its blog that hackers in Jinan, China, had accessed the personal email accounts of "hundreds of users including, among others, senior U.S. government officials, Chinese political activists, officials in several Asian countries (predominantly South Korea), military personnel and journalists."[1] The hack was a spear-phishing campaign, meaning it targeted specific individuals with carefully crafted emails deployed to trick users into disclosing personal information like email account passwords,[2] and it had been noticed as early as February by an independent blogger who helped tip off Google.[3]

The following day Secretary of State Hillary Clinton called Google's allegation "very serious" and announced an investigation by the Federal Bureau of Investigation.[4] Chinese Foreign Ministry spokesman Hong Lei deemed Google's claim "a complete fabrication out of ulterior motives."[5] An editorial in the *Global Times*, a Chinese nationalist newspaper, elaborated, calling Google "snotty-nosed" and disgruntled about its poor market position in China.[6]

The incident was the second major hack that Google had traced back to China. In January 2010, the company announced that a "cyber attack" originating from China had tried to steal the company's intellectual property and had targeted the email accounts of Chinese human rights advocates.[7] In response, Google reversed its controversial decision to permit China to censor its search results,[8] thus dooming the company's market aspirations in the country. Google stressed that it was not the only company that had been targeted, but felt compelled to publicize the attack because of the "security and human rights implications" and the "global debate about freedom of speech."[9] A month later, the *Washington Post* reported that Google was seeking help from the National Security Agency to help bolster its defenses against future attacks.[10]

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1. Eric Grosse, *Ensuring Your Information Is Safe Online*, THE OFFICIAL GOOGLE BLOG (June 1, 2011, 12:42 PM), http://googleblog.blogspot.com/2011/06/ensuring-your-information-is-safe.html.

2. Matt Richtel & Verne G. Kopytoff, *E-Mail Fraud Hides Behind Friendly Face*, N.Y. TIMES, June 2, 2011, http://www.nytimes.com/2011/06/03/technology/03hack.html.

3. Amir Efrati & Siobhan Gorman, *Google Mail Hack Blamed on China*, WALL ST. J., June 2, 2011, http://online.wsj.com/article/SB10001424052702303657404576359770243517568.html.

4. Devlin Barrett & Siobhan Gorman, *Gmail Hack Targeted White House*, WALL ST. J., June 3, 2011, http://online.wsj.com/article/SB10001424052702304563104576361863723857124.html.

5. Hong Lei, Foreign Ministry Spokesperson, Regular Press Conference at Embassy of the People's Republic of China in the United States of America (June 2, 2011), http://www.fmprc.gov.cn/eng/xwfw/s2510/t828426.htm.

6. Jonathan Watts, *China Brands Google 'Snotty-Nosed' as Cyber Feud Intensifies*, GUARDIAN, June 3, 2011, http://www.guardian.co.uk/world/2011/jun/03/china-google-cyber-warfare.

7. David Drummond, *A New Approach to China*, THE OFFICIAL GOOGLE BLOG (Jan. 12, 2010, 3:00 PM), http://googleblog.blogspot.com/2010/01/new-approach-to-china.html.

8. *Id.*

9. *Id.*

10. Ellen Nakashima, *Google to Enlist NSA to Help It Ward Off Cyberattacks*, WASH. POST, Feb. 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020304057.html.

The more recent Google incident coincided with several other high-profile cyber operations targeting U.S. corporations.[11] For example, a few months earlier hackers had infiltrated RSA Security's systems to steal data that could decode security tokens used by companies the world over to provide secure remote access to their networks.[12] The hackers then used that data to access the networks of Lockheed Martin,[13] the federal government's leading supplier of arms and information technology.[14]

These incidents coincided with a volley of announcements from the United States and China regarding cyber conflict policies. In May of 2011, the U.S. State Department released the Administration's International Strategy for Cyberspace, which indicated that the United States would consider certain cyber attacks as triggering its right to self-defense.[15] China announced the formation of an "Online Blue Army"[16] to complement its traditional Red Army.[17] Referencing China's well-known pool of homegrown hackers, one former Chinese general commented, "It is just like ping-pong. We have more people playing it, so we are very good at it."[18] The Pentagon then leaked its new, classified cyber strategy document determining that a cyber attack from a foreign nation could constitute an act of war to which the United States might respond militarily.[19] A U.S. military official characterized the policy determination more bluntly: "If you shut down our power grid, maybe we will

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11. *See* Bianca Bosker, *Pentagon Considers Cyber Attacks to Be Acts of War: WSJ*, HUFFINGTON POST (May 31, 2011, 11:34 AM), http://www.huffingtonpost.com/2011/05/31/pentagon-cyber-attack-act-of-war_n_869014.html (listing recent cyber operations against Epsilon, Sony, and Lockheed Martin).

12. Christopher Drew, *Stolen Data Is Tracked to Hacking at Lockheed*, N.Y. TIMES, June 3, 2011, http://www.nytimes.com/2011/06/04/technology/04security.html. Security tokens are designed to provide security via a "two-factor authentication system[]" in which a "user account is linked to a token, and each token generates a pseudo-random number that changes periodically, typically every 30 or 60 seconds." Peter Bright, *RSA Finally Comes Clean: SecureID Is Compromised*, ARS TECHNICA, June 2, 2011, http://arstechnica.com/security/news/2011/06/rsa-finally-comes-clean-securid-is-compromised.ars. The number is generated via the combination of an algorithm and a "seed value" specific to an individual security token. *Id.* The hackers reportedly compromised seed values, which, when combined with the already-known algorithm, apparently allowed for the generation of the numbers intended to provide identity authentication. *Id.*; Stephen Pritchard, *RSA: Life After Breach*, INFOSECURITY.COM, Aug. 12, 2011, http://www.infosecurity-magazine.com/view/20076/rsa-life-after-breach-/.

13. Angela Moscaritolo, *RSA Confirms Lockheed Hack Linked to SecureID Breach*, SC MAG., June 7, 2011, http://www.scmagazineus.com/rsa-confirms-lockheed-hack-linked-to-securid-breach/article/204744.

14. Jim Wolf & Jim Finkle, *Analysis: Lockheed Hack Highlights Cyber-blame Snags*, REUTERS, May 30, 2011, http://www.reuters.com/article/2011/05/30/us-usa-defense-hackers-idUSTRE74Q6VY20110530?feedType=RSS&feedName=everything&virtualBrandChannel=11563.

15. EXEC. OFFICE OF THE PRESIDENT, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD 10, 14 (May 2011) [hereinafter INTERNATIONAL STRATEGY].

16. Ye Xin, *PLA Establishes 'Online Blue Army' to Protect Network Security*, PEOPLE'S DAILY ONLINE, May 26, 2011, http://english.peopledaily.com.cn/90001/90776/90786/7392182.html.

17. L. Gordon Crovitz, *China Goes Phishing*, WALL ST. J., June 6, 2011, http://online.wsj.com/article/SB10001424052702303657404576363374283504838.html.

18. Leo Lewis, *China's Blue Army of 30 Computer Experts Could Deploy Cyber Warfare on Foreign Powers*, AUSTRALIAN, May 27, 2011, http://www.theaustralian.com.au/australian-it/chinas-blue-army-could-conduct-cyber-warfare-on-foreign-powers/story-e6frgakx-1226064132826.

19. Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War*, WALL ST. J., May 31, 2011, http://online.wsj.com/article/SB10001424052702304563104576355623135782718.html.

put a missile down one of your smokestacks."[20] Soon thereafter, the State Department acknowledged Administration initiatives to create "shadow" Internet and mobile-phone systems that could be used to support dissidents in countries facing communications crackdowns from oppressive regimes.[21] By June 22—just three weeks after Google reported the latest hack against it—China apparently felt compelled to clarify that the country was not at cyber war with the United States.[22] When the Pentagon officially released the unclassified version of its cyber strategy document in mid-July, it was sanitized of the bellicose posturing that accompanied the leak of the full, classified strategy document just six weeks earlier.[23]

The growing onslaught of cyber operations against U.S. companies and the escalating cyber-war rhetoric between the United States and China point up key complexities in the already fuzzy realm of "cyber war": What role does or should the private sector play in cyber conflict and what are the rules regulating private sector conduct?

Because cyber conflict is a new, largely untested, and secretive domain,[24] there is great debate about what law of war rules, if any, regulate it. States have been relatively tight-lipped about their cyber attack capabilities and reluctant to bind themselves to rules in this emerging battlefield.[25] Indeed the United States, which has of late routinely called for international cooperation in articulating regulatory norms to guide cyber policies,[26] has steadfastly refused to disclose information regarding its offensive cyber capabilities, focusing public declarations that might

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20. *Id.*

21. James Glanz & John Markoff, *U.S. Underwrites Internet Detour Around Censors*, N.Y. TIMES, June 12, 2011, http://www.nytimes.com/2011/06/12/world/12internet.html?pagewanted=1&_r=1&hp.

22. Don Durfee, *China Says No Cyber Warfare with U.S.*, REUTERS, June 22, 2011, http://www.reuters.com/article/2011/06/22/us-china-usa-cyberwar-idUSTRE75L1VJ20110622.

23. *See generally* DEP'T OF DEF., DEPARTMENT OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE (July 2011) [hereinafter STRATEGY FOR OPERATING IN CYBERSPACE]; *see* Interview by Jonathan Masters with Adam Segal, Ira A. Lipman Senior Fellow for Counterterrorism and National Security Studies [hereinafter Masters Interview], COUNCIL ON FOREIGN RELATIONS, (July 21, 2011), http://www.cfr.org/cybersecurity/pentagons-cyberstrategy/p25527 (noting that the cyber strategy released by the Pentagon was "clearly an effort to downplay foreign countries' perceptions that the United States is going to militarize cyberspace"); Noah Schachtman, *Pentagon Makes Love, Not Cyber War, in New Strategy*, WIRED, July 14, 2011, http://www.wired.com/dangerroom/2011/07/make-love-not-cyber-war (commenting upon the strategy's release that "despite a drumbeat of scare talk and digital sabre-rattling in Washington, the document takes a measured, reasonable approach").

24. In 2010, U.S. Deputy Secretary of Defense William J. Lynn III announced that the Pentagon had "formally recognized cyberspace as a new domain of warfare. . . . just as critical to military operations as land, sea, air, and space." William J. Lynn III, *Defending a New Domain: The Pentagon's Cyberstrategy*, 89 FOREIGN AFF. 97, 101 (2010).

25. *See* Scott J. Shackelford, *Estonia Three Years Later: A Progress Report on Combating Cyber Attacks*, 13 J. INTERNET L. 22, 22 (2010) ("Many nations, including the United States, have found mutual benefit in the status quo strategic ambiguity.").

26. *See, e.g.*, DEP'T OF DEF., DEPARTMENT OF DEFENSE CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, SECTION 934, at 8–9 (Nov. 2011) [hereinafter CYBERSPACE POLICY REPORT] ("Significant multinational work remains to clarify the application of norms and principles of customary international law to cyberspace."); INTERNATIONAL STRATEGY, *supra* note 15, at 9 ("We will continue to work internationally to forge consensus regarding how norms of behavior apply to cyberspace . . . ."); EXEC. OFFICE OF THE PRESIDENT, CYBERSPACE POLICY REVIEW at iv (2009) [hereinafter CYBERSPACE POLICY REVIEW] ("The Nation also needs a strategy for cybersecurity designed to shape the international environment and bring like-minded nations together on a host of issues, such as . . . acceptable legal norms regarding territorial jurisdiction, sovereign responsibility, and use of force.").

serve to shape international norms exclusively on defensive capacity.[27] The nature of the cyber domain itself fosters this secrecy by favoring stealth actions by anonymous actors.[28] Moreover, to date, it is unclear whether any cyber operation has definitively triggered the application of the law of war.[29] Thus, legal scholarship on cyber conflict is largely an exercise in crafting hypotheticals, with scholars positing varieties of cyber-scenarios and mapping current law of war principles onto them.

The Google incidents provide excellent fodder for reality-based hypothetical queries that tease out some of the complexities that arise when private companies become primary players in a legal regime geared toward states. Was a private entity critical to the nation's digital infrastructure targeted by state-sponsored hackers in order to pilfer actionable intelligence on U.S. government officials? Did an American company, increasingly shut out of the world's fastest growing Internet market, strategically escalate tensions between the United States and China by painting China as an aggressor? Did the Chinese government, driven by national security concerns, target an American company in retaliation for U.S.-backed efforts at spreading "Internet freedom"? Did an unknown third-party hack an obvious U.S. target and spoof an IP address to frame China and escalate tensions between the United States and its burgeoning superpower rival? Might Google have violated China's sovereignty in tracing the hacking activity back to Jinan province? Should Google have been allowed to strike back at the hackers targeting it? And should a major player in the United States' communications infrastructure have to rely on a blogger to notice that its systems were hacked, particularly after it already had partnered with the NSA to better defend its network after its first go-around with Chinese hackers?

This Note seeks to situate these and other inquiries regarding the private sector and cyber conflict within the law of war framework and, in doing so, identify lacunae that should be addressed in crafting a legally sound policy regarding the cybersecurity threat facing the private sector and the federal government. In Part I, I briefly characterize how scholars have mapped the law of war onto cyber conflict

27. *See* CYBERSPACE POLICY REPORT, *supra* note 26, at 5 (responding to a congressional inquiry regarding "U.S. cyber capabilities" by stating that "[t]he dynamic and sensitive nature of cyberspace operations makes it difficult to declassify specific capabilities. However, the Department has the capability to conduct offensive operations in cyberspace to defend our Nation, Allies and interests."); Masters Interview, *supra* note 23 (noting the unclassified version of the Pentagon's cyber strategy "is really entirely about defense. There is no mention on how the Pentagon might use cyberweapons in an offensive capability.").

28. *See infra* notes 43–47 and accompanying text.

29. *See* Duncan B. Hollis, *An E-SOS for Cyberspace*, 52 HARV. INT'L L.J. 374, 405 (2011) (noting lack of consensus on whether any state has violated international law by engaging in a cyber attack); Michael N. Schmitt, *Cyber Operations and the* Jus in Bello*: Key Issues*, 41 ISR. Y.B. HUM. RTS. 113, 120–23 (2011) [hereinafter Schmitt, *Cyber Operations and the* Jus in Bello] (arguing that cyber attacks launched against Georgia during the armed conflict between Georgia and Russia in South Ossetia in August 2008 did not constitute "attacks" under international humanitarian law); Shackelford, *supra* note 25, at 26 (suggesting that the cyber attacks against Estonia in 2007, which emanated from Russia, did not rise to the level of "armed attack" to trigger the law of war); Duncan B. Hollis, *Could Deploying Stuxnet Be a War Crime?*, OPINIO JURIS (Jan. 25, 2011, 11:54 AM), http://opiniojuris.org/2011/01/25/could-deploying-stuxnet-be-a-war-crime (determining that, under some approaches to applying law of war principles to cyber attacks, the Stuxnet worm that targeted an Iranian nuclear facility, discussed *infra*, would constitute a "use of force" or "armed attack" under the U.N. Charter if it were attributable to a state).

generally, considering both *jus ad bellum* and *jus in bello* regimes.[30] This analysis is key to understanding how the ambiguities plaguing the application of the law of war to cyber conflict are further complicated when the private sector plays a role. In Part II, I consider the Obama administration's proposal to foster public-private partnerships as a means of combating cyber attacks, as well as a few current models proposed by legal scholars to address this dilemma. I then point out law of war blind spots in these political and scholarly proposals and argue that how these issues are resolved will have important implications for the development of customary international law in cyber conflicts. My primary concerns in this regard are the erosion of the state's monopoly on the use of force and the eroding standard for imputation of non-state actor conduct to states. The last section offers a brief conclusion.

I. MAPPING THE LAW OF WAR ONTO CYBER CONFLICT

In order to understand the complexities surrounding the private sector's role in cyber conflict, it is necessary to first examine how the traditional law of war maps onto cyber conflict generally. This Part first considers the threshold triggers necessary for cyber operations to implicate the law of war. It then outlines how, once the law of war is triggered, its rules apply, considering both *jus ad bellum* and *jus in bello* regimes.

A. *Threshold Questions*

Determining whether the law of war governs a cyber operation can be difficult to resolve with any certainty. The thresholds of applicability can be broken down into four generalized questions: (1) What is the purpose of the cyber operation? (2) Who is the perpetrator? (3) What are the consequences or intended consequences of the cyber operation? (4) Is there an ongoing armed conflict to which the cyber operation is connected? As will be seen, the answers to all of these questions may be unanswerable at the point in time when a victim seeks to calibrate and launch countermeasures.

1. What Is the Purpose of the Cyber Operation?

Offensive cyber operations can be broadly classified into two categories: computer network attacks and computer network exploitations. Computer network attacks (CNA) aim to "alter, disrupt, deceive, degrade, or destroy adversary computer systems or networks or the information and/or programs resident in or transiting these systems or networks."[31] Computer network exploitations (CNE), on

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30. *Jus ad bellum* refers to the body of international law regulating when a state may use force against another state. *Jus in bello* refers to laws regulating the conduct of hostilities. This paper uses "law of war" as an umbrella term covering both regimes. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE INT'L. L.J. 47, 50 n.15 (2009) (explaining the usage of the terms "law of war," *jus ad bellum*, *jus in bello*, "international humanitarian law," and "law of armed conflict," and delineating between them).

31. NATIONAL RESEARCH COUNCIL, TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 80 (William A. Owens, Kenneth W. Dam & Herbert S. Lin eds., 2009) [Hereinafter NRC REPORT].

the other hand, aim to extract information and "may cause no explicit disruption or destruction at all."[32] The differences are intent, effects, and the governing legal regime.

A CNE is a form of espionage and, as in the physical domain, is not barred by the law of war but rather by domestic law.[33] Thus, the law of war is not concerned with CNEs.[34] The problem in the cyber domain, however, is that a CNE is often not readily distinguishable from a CNA because its effects may not be immediately apparent and the intent may not be readily intelligible by technical means. Both CNAs and CNEs seek to take advantage of a vulnerability in a system in order to access the system and execute a payload.[35] The type of payload is what distinguishes the two operations, and that difference may be difficult to distinguish technically.[36]

Take, for example, the Stuxnet worm that crept through Windows systems for more than a year before security experts from around the globe were able to piece together clues that it was targeting Iranian uranium-enrichment centrifuges.[37] In the initial phases of deconstructing Stuxnet's code, security experts discovered that the worm was "stealing configuration and design data from [control] systems, presumably to allow a competitor to duplicate a factory's production layout."[38] Thus, Stuxnet looked like "just another case of industrial espionage."[39] But as the experts continued to chip away at what many considered the most complex malware ever discovered, they found that Stuxnet's espionage functions were actually targeting functions and that the worm also carried a destructive payload.[40] Once the worm reached its intended target—an industrial controller—it ran dual programs: one replaced the commands sent to the controller with malicious commands, while the other masked the code doing the destructive work.[41] But the experts still could not identify exactly what Stuxnet's specific purpose or specific target was. It was only after the effects of the operation became evident—after it became public that

32. David D. Clark & Susan Landau, *Untangling Attribution*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS 25, 28 (National Research Council ed., 2010).

33. *See* Michael N. Schmitt, *Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflicts*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 151, 156 [hereinafter Schmitt, *Cyber Operations*] (noting that it is "well accepted that the international law governing the use of force does not prohibit propaganda, psychological warfare or espionage").

34. An exception to this general rule would be a CNE gathering information prefatory to an attack during an armed conflict. In this instance, *jus in bello* rules may permit the perpetrator of a CNE to be targeted.

35. NRC REPORT, *supra* note 31, at 81.

36. *Id.*

37. The earliest version of Stuxnet was apparently released in the summer of 2009. In September 2010 an industrial-control-systems-security expert in Hamburg announced that he had reverse-engineered the virus's payload and discovered its ultimate purpose: sabotaging certain Siemens-made programmable-logic controllers operating under certain conditions. The certain controllers operating under certain conditions are now widely believed to have been those at an Iranian nuclear site. Michael Joseph Gross, *A Declaration of Cyber-War*, VANITY FAIR, April 2011, http://www.vanityfair.com/culture/features/2011/04/stuxnet-201104.

38. Kim Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History*, WIRED, July 11, 2011, http://www.wired.com/threatlevel/2011/07/how-digital-detectives-deciphered-stuxnet/all/1.

39. *Id.*

40. *Id.*

41. *Id.*

centrifuges had been failing in droves at the Natanz nuclear facility in Iran—that it became definitively clear that the worm had been directing the centrifuges to secretly spin out of control[42] and that Stuxnet was not only a CNE but also a CNA.

As Stuxnet shows, a state seeking to respond to a cyber operation might not know whether a cyber operation is a CNA or CNE because the state might not be able to identify the operation's purpose. The effect of this ambiguity is that the state might not know what legal regime—international or domestic—governs its behavior.

2. Who Is the Perpetrator?

In the cyber context, attribution can refer to the identification of a cyber operation's perpetrator or to the computer or location from which the operation emanates.[43] Like a cyber operation's purpose, attribution can be tricky to ascertain with certainty, particularly when it regards a perpetrator's identity.[44] The technical hurdles to attribution stem from the myriad means that cyberspace affords actors anonymity.[45] For example, tracing an internet-based cyber operation back to an IP address does not necessarily constitute identification of the perpetrator. A perpetrator might forge an IP address or use anonymizers to leave a false trail of IP addresses.[46] Even if a cyber operation is traced back to an IP address from which the operation emanates, the attacking computer might have been unwittingly co-opted by a botnet being anonymously controlled by the actual perpetrator.[47] In this instance, the computer responsible for part of the operation can be identified, but the actual actor perpetrating the operation may not be determined.

Attribution also can impact whether the cyber operation—and a response to it—is governed by a domestic law-enforcement regime or by the law of war.[48] A

42. William J. Broad, John Markoff & David E. Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 15, 2011, http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html.

43. *See* Clark & Landau, *supra* note 32, at 25–26 ("Attribution on the Internet can mean the owner of the machine (e.g., the Enron Corporation), the physical location of the machine (e.g., Houston, Estonia, China), or the individual who is actually responsible for the actions."). My discussion of "attribution" here focuses on identifying the actual perpetrator of a cyber operation. This usage is different from a common use of "attribution" in international law to refer to the concept of attributing a non-state actor's actions to a state. Later in this Note, I refer to this latter concept as "imputation" in order to keep the two concepts distinct.

44. Rose McDermott, *Decision Making Under Uncertainty*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 227, 229 ("[U]nlike most military attacks, cyberattacks defy easy assessments of perpetrator and purpose.").

45. *See* Clark & Landau, *supra* note 32, at 26–27 (describing how the Internet's reliance on packet-switching and network-layering allows for anonymity).

46. Hollis, *supra* note 29, at 399.

47. A botnet is "a network of thousands or even millions of computers under the control of an attacker that is used to carry out a wide range of services." Tyler Moore, *Introducing the Economics of Cybersecurity: Principles and Policy Options*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 3, 6. In this regard, a botnet can serve as a "force multiplier" by allowing one actor to harness the capacity of thousands or millions of computers. *See* David Gerwitz, *10 Things You Should Know About the Pentagon's New Cyberwarfare Strategy*, ZDNET GOVERNMENT (June 2, 2011, 5:00 AM), http://www.zdnet.com/blog/government/10-things-you-should-know-about-the-pentagons-new-cyberwarfare-strategy/10429 ("[A]ny small group with a pile of PCs (or even PlayStations) can mount a hugely damaging attack, especially if they make use of zombie botnets as a force multiplier.").

48. Hollis, *supra* note 29, at 405 ("If you do not know who authored an attack, how can you know whether to treat it as a crime or an act of war?").

range of different types of actors are at work in the cyber operations realm: garden-variety criminals, non-state actors with political motivations,[49] white-hat hackers,[50] state-sponsored hackers, and military actors, to name a few. While the category that a perpetrator falls into might not definitively determine the applicable legal regime, it is an important part of the calculus. For example, a teenage resident hacking a city's electrical grid likely would be subject to domestic criminal law; a foreign state doing the same, with destructive effect, might be governed by the law of war.[51]

The attribution problem complicates not only whether the law of war applies but also how states can act in compliance with law of war rules without certainty regarding who the actual attackers are. This complication is discussed more in-depth below, but a few general examples elucidate the point. An attacker might use a "false flag" operation[52] to dupe one state into thinking it was attacked by another state, thereby instigating a catalytic conflict.[53] Or an attacker might leave a false trail that leads a victim state to retaliate against a network that, if subjected to countermeasures, could have indirect effects upon civilians, including the victim's own citizens.

3. What Are the Consequences or Intended Consequences of the Cyber Operation?

The law governing when states can resort to force, *jus ad bellum*, and the law governing states' conduct during armed conflict, *jus in bello*, were written with the kinetic realm in mind. "Use of force"[54] and "armed attack"[55]—key thresholds in *jus ad bellum*—necessarily imply physical concepts. "Armed conflict,"[56] "attack,"[57] and

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49. *See* ENEKEN TIKK, KADRI KASKA & LIIS VIHUL, INTERNATIONAL CYBER INCIDENTS: LEGAL CONSIDERATIONS 31–32 (2010) (describing the "emerging trend of 'patriotic hacking'").

50. *See Definition of: white hat hacker*, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=white+hat+hacker&i=54434,00.asp (last visited Jan. 6, 2012) (defining "white-hat hackers" as the "good guys," i.e., "concerned employees or security professionals who are paid to find vulnerabilities").

51. *See* Schmitt, *Cyber Operations and the* Jus in Bello, *supra* note 29, at 131 ("[A]ny [cyber] operation by or attributable to a State which results in damage to or destruction of objects or injury to or death of individuals of another State would commence an international armed conflict.").

52. *See* Dancho Danchev, *Should a Targeted Country Strike Back at the Cyber Attackers?*, ZERO DAY, (May 10, 2010, 2:03 PM), http://www.zdnet.com/blog/security/should-a-targeted-country-strike-back-at-the-cyber-attackers/6194 (describing "false flag cyber operations" as "impersonating a particular country" in order to "engineer[] cyber warfare tensions by relying on the negative reputation of 'usual' suspects").

53. A catalytic conflict is one "in which a third party instigates conflict between two other parties." NRC REPORT, *supra* note 31, at 312.

54. *See* U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

55. *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .").

56. Common Article 2 of the four Geneva Conventions stipulates the Conventions' application trigger as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 135; Geneva Convention

"acts of violence,"[58] critical concepts in *jus in bello*, do as well. Thus, some have questioned whether the law of war can or should govern cyber conflicts.[59] But this assessment has been generally rejected.[60] Though cyber operations take place in a non-physical realm, they can have physical effects such as destruction, injury, and death. A cyber network attack upon an electrical grid's network could shut a city's electricity down, causing casualties by wreaking havoc on traffic systems or cutting off life-sustaining energy to hospitals. A cyber network attack on a nuclear reactor's control system might cause a meltdown and catastrophic release of radiation. Because international law seeks to protect certain entities, namely civilians and civilian objects, from such effects, the legal regime applies in the cyber conflict realm.[61]

Thus, to translate the law of war's kinetic concepts to the cyber realm, legal scholars have generally focused on the consequences or intended consequences of a cyber network attack to determine whether *jus ad bellum* or *jus in bello* principles are implicated.[62] The specifics of when these regimes might be triggered and, if so, how they regulate conduct are discussed in-depth below. Of note here is simply that the consequences of a cyber network operation must reach a certain threshold to even implicate law of war principles.

Relative to the Treatment of Prisoners of War, 12 August 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287.

57. *See* Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(2), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); *id.* art. 51(4) ("Indiscriminate attacks are prohibited."); *id.* art. 52(1) ("Civilian objects shall not be the object of attack or of reprisals."); *id.* art. 52(2) ("Attacks shall be limited strictly to military objectives."); *id.* art. 49(1) ("'Attacks' means acts of violence against the adversary, whether in offence or in defence."); *id.* art. 49(2) ("The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted . . . .").

58. *See id.* art. 49(1) ("'Attacks' means acts of violence against the adversary, whether in offence or in defence."); *id.* art. 51(2) ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.").

59. *See, e.g.*, Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011, 1031 (2010) ("Because the UN Charter was written long before the Internet existed, it was clearly not intended to encompass cyberattacks. Therefore, it is reasonable to assume that the Charter encompasses only kinetic attacks. Since cyberattacks will almost certainly not involve the use of physical force, the Charter and the contemporary [Law of Armed Conflict] probably do not apply.").

60. *See, e.g.*, Michael N. Schmitt, *Wired Warfare: Computer Network Attack and* Jus in Bello, 84 INT'L REV. OF THE RED CROSS 365, 368–73 (2002) [hereinafter Schmitt, *Wired Warfare*] (dispelling arguments that the law of war does not apply to computer network attacks because they arose after the relevant treaty regime, are not addressed by treaty law, or apply only to kinetic conflict); CYBERSPACE POLICY REPORT, *supra* note 26, at 9 ("International legal norms, such as those found in the UN Charter and the law of armed conflict, which apply to the physical domains (i.e., sea, air, land, and space), also apply to the cyberspace domain.").

61. Schmitt, *Wired Warfare*, *supra* note 60, at 373.

62. *See generally* Schmitt, *Wired Warfare*, *supra* note 60; Schmitt, *Cyber Operations*, *supra* note 33; Paul A. Walker, *Rethinking Computer Network 'Attack': Implications for Law and U.S. Doctrine*, 1 NAT'L SEC. L. BR. 33; NRC REPORT, *supra* note 31, at 67–68, 252.

4. Is There an Ongoing Armed Conflict to Which the Cyber Operation Is Connected?

Armed conflict is the threshold condition for application of *jus in bello* rules (also known as international humanitarian law (IHL) or the law of armed conflict (LOAC)).[63] While addressing "armed conflict" as a threshold of IHL application may seem repetitive given the consequences-based threshold discussed above, the two matters are actually distinct. The latter seeks to clarify that consequences must be of a certain kind to implicate both *jus ad bellum* and *jus in bello* rules. The former clarifies that cyber network attacks are regulated under *jus in bello* rules only if an armed conflict exists. The National Research Council's Committee on Offensive Information Warfare provides a helpful elaboration:

> [T]he difficult legal and ethical policy issues regarding the appropriateness of using cyberattack seem to arise mostly in a prekinetic situation, where traditional armed conflict has not yet arisen (and may never arise). In this context, decision makers must determine whether a cyberattack would be equivalent to "the use of force" or "an armed attack." ... As for the situation in which a "kinetic" conflict has already broken out, cyberattack is just one more tactical military option to be evaluated along with other such options—that is, when U.S. military forces are engaged in traditional tactical armed conflict and except in extraordinary circumstances, there is no reason that any non-LOAC restrictions should be placed on the use of cyberattack vis-à-vis any other tactical military option.[64]

This analysis, however, is helpful only to a point. It seems to leave uncovered those cyber network attacks "in situations that fall short of actual armed conflict."[65]

Thus, the discussion of the application of *jus in bello* rules of proportionality and distinction that follows proceeds from the position that these rules apply to cyber attacks during an armed conflict in progress or when a cyber attack rises to the threshold of instigating an armed conflict and that the rules are instructive normative guides—though not legally binding—in cyber network attacks that neither occur during an armed conflict nor instigate an armed conflict. Indeed, the case for applying *jus in bello* principles in situations falling short of armed conflict is particularly compelling in the cyber realm, where the outcomes of cyber operations are more uncertain and cascading effects are more likely.[66]

B. Applying the Law of War to Cyber Conflicts Generally

The previous section examined the key thresholds that must be met to trigger the application of the law of war to cyber operations. This section provides a brief

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63. *See supra* note 56.

64. NRC REPORT, *supra* note 31, at 67.

65. *Id.* at 68. The committee notes that "the relevant international law under such circumstances is poorly developed at best." *Id.* To address this gap, the committee recommends applying "the moral and ethical principles underlying the law of armed conflict to cyberattack even in situations that fall short of actual armed conflict." *Id.*

66. *See infra* notes 94–95 and accompanying text.

overview of how, once triggered, law of war principles apply to cyber network attacks. It also highlights problematic ambiguities in the cyber realm, which—as will be discussed later—are made more problematic by the private sector's involvement in cyber conflict.

1. *Jus ad Bellum*

Article 2(4) of the U.N. Charter prohibits states from "the threat or use of force against the territorial integrity or political independence of any state."[67] Scholars disagree on whether "use of force" amounts to "armed force,"[68] though there is general agreement that it does not include economic coercion.[69]

Article 2(4)'s prohibition does not indicate a remedy for states subjected to an illegal threat or use of force, rather it "merely set[s] a threshold for breach of international law."[70] Article 51, however, assures a state of its right to act in self-defense against an "armed attack."[71] The daylight between Article 2(4)'s "use of force" and Article 51's "armed attack" is another subject of debate among legal scholars.[72]

For those who see daylight, all armed attacks would amount to uses of force, but not all uses of force would trigger a state's right to self-defense. In 1999 Professor Michael Schmitt applied this dual regime to cyber network attacks, proposing six factors that could be used to determine whether a computer network attack constitutes a use of force: severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy.[73] Schmitt applied a more exacting standard, however, for computer network attacks that amount to armed attack triggering the right to self-defense under the U.N. Charter, using a consequences-based analysis to require death, injury, damage, or destruction.[74]

The confirmation hearing testimony of Lieutenant General Keith Alexander, however, indicates that the new head of the Pentagon Cyber Command conflates use of force and armed attack in the cyber realm:

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67. *See supra* note 54.

68. *See, e.g.*, Schmitt, *Cyber Operations*, *supra* note 33 (noting that "armed" does not appear in Article 2(4) and citing the International Court of Justice's opinion in the *Nicaragua* case to argue that "[t]he threshold for a use of force must therefore lie somewhere along the continuum between economic and political coercion on the one hand and acts which cause physical harm on the other"); Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 427–28 (using textual references to support the "the dominant view in the United States and among its major allies [which] has long been that the Article 2(4) prohibition of force and the complementary Article 51 right of self-defense apply to military attacks or armed violence").

69. *See* Schmitt, *Cyber Operations*, *supra* note 33 (noting that during the Charter's drafting "a proposal to extend the reach of Article 2(4) to economic coercion was decisively defeated").

70. *Id.* at 154.

71. *See supra* note 55.

72. Waxman, *supra* note 68, at 427 n.23.

73. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 914–15 (1999) [hereinafter Schmitt, *Computer Network Attack*]. These factors remain influential fence posts today. Schmitt later added a seventh factor, state responsibility. Schmitt, *Cyber Operations*, *supra* note 33, at 156.

74. Schmitt, *Cyber Operations*, *supra* note 33, at 164; Schmitt, *Computer Network Attack*, *supra* note 73, at 929.

> [I]f the President determines a cyber event does meet the threshold of a use of force/armed attack, he may determine that the activity is of such scope, duration, or intensity that it warrants exercising our right to self-defense and/or the initiation of hostilities as an appropriate response.[75]

This lack of clarity is potentially compounded by the application of the doctrine of anticipatory self-defense, which is based on the idea that a state need not wait to be attacked in order to defend itself.[76] According to this doctrine, a state may act in self-defense when an attack against it is imminent, as judged by a "last feasible window of opportunity" standard.[77] Applying an anticipatory self-defense standard to the cyber realm might follow the following course:

> Consider a State's introduction of cyber vulnerabilities into another State's critical infrastructure. Such an action might amount to a use of force, but the victim-State may not react forcefully until it reasonably concludes that (1) its opponent has decided to actually exploit those vulnerabilities; (2) the strike is likely to generate consequences at the armed attack level; and (3) it must act immediately to defend itself.[78]

The clarity of such a scenario is enticing, but it is not evident that it encapsulates an analysis that can be concretely applied. For example, the standard for determining what is "imminent" is a matter of controversy, with the United States urging a more elastic notion of imminence to permit earlier self-defense actions.[79] Furthermore, evidentiary matters regarding the justification for exercising anticipatory self-defense already are problematic in the physical realm of warfare.[80] These evidentiary concerns are compounded in the cyber realm, where anonymity reigns, the opportunity for deceit is abundant, and attacks can be carried out within seconds—perhaps forcing potential victims to make quick decisions by shortchanging certainty.

2. *Jus in Bello*

As noted above, armed conflict is the trigger for application of the *jus in bello* regime.[81] When that threshold is met, or a computer network attack itself engenders

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75. Advance Questions for Lieutenant General Keith Alexander, USA Nominee for Commander, United States Cyber Command: Before the S. Armed Services Comm., 11th Cong. 11 (Apr. 15, 2010), *available at* http://armed-services.senate.gov/statemnt/2010/04%20April/Alexander%2004-15-10.pdf, cited in Waxman, *supra* note 68, at 433.

76. Schmitt, *Cyber Operations*, *supra* note 33, at 165.

77. *Id.* at 166.

78. *Id.*

79. Waxman, *supra* note 68, at 437.

80. The weak evidence of Iraq's alleged possession of weapons of mass destruction, which was used to justify the U.S. invasion of the country in 2003, is a well-known case in point. *See generally* JOSEPH CIRINCIONE ET. AL., WMD IN IRAQ: EVIDENCE AND IMPLICATIONS (Carnegie Endowment for International Peace, 2004), *available at* http://www.carnegieendowment.org/publications/?fa=view&id=1435 (detailing weak evidence regarding Iraq's imminent threat to the United States and undue influence of policy on intelligence gathering).

81. *See supra* note 56 and text accompanying notes 63–65. Citing the International Red Cross Committee's commentaries to the Geneva Convention and the Additional Protocols, and reasoning from

a state of armed conflict,[82] one must consider whether any ensuing computer network operations are "attacks" regulated by *jus in bello*. Again a consequences-based analysis indicates that a computer network operation constitutes an "attack" when it results in "violent consequences":

> A cyber operation, like any other operation, is an attack when resulting in death or injury of individuals, whether civilian or combatants, or damage to or destruction of objects, whether military objectives or civilian objects.
>
> A cyber operation that is intended, but fails, to generate such results would be encompassed in the concept, in much the same way that a rifle shot that misses its target is nevertheless an attack in IHL.[83]

When a computer network operation rises to this threshold of "attack," it is regulated by *jus in bello* principles. The following sections focus on two of those principles: distinction and proportionality.

a. Distinction

Parties to a conflict must distinguish between combatants and civilians. This duty, rooted in customary international law[84] and codified in Protocol I Additional to the Geneva Conventions,[85] includes the outward-looking obligation not to target civilians and civilian objects[86] and the inward-looking obligations for combatants to

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the "underlying purposes of humanitarian law," Schmitt derives an operable definition of armed conflict as occurring: "when a group takes measures that injure, kill, damage or destroy." The term also includes actions intended to cause such results or which are the foreseeable consequences thereof. Because the issue is *jus in bello* rather than *ad bellum*, the motivation underlying the actions is irrelevant. So too is their wrongfulness or legitimacy. Thus, for example, the party that commences the armed conflict by committing such acts may be acting in legitimate anticipatory (or interceptive) self-defense; nevertheless, as long as the actions were intended to injure, kill, damage or destroy, humanitarian law governs them. Schmitt, *Wired Warfare*, *supra* note 60, at 373–74.

82. For an analysis of when cyber attacks might initiate an armed conflict, see Schmitt, *Cyber Operations and the* Jus in Bello, *supra* note 29, at 15–18. Schmitt explains that different analyses are necessary for cyber attacks that would initiate international armed conflict (either because they are launched by a state or by a non-state actor whose actions are imputable to a state) and cyber attacks that would initiate non-international armed conflict.

83. *Id.* at 6.

84. *Customary IHL: Rule 1. The Principle of Distinction Between Civilians and Combatants*, INTERNATIONAL COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Mar. 30, 2012).

85. Additional Protocol I, *supra* note 57, art. 48 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

86. *Id.* art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); *id.* art. 51(4) ("Indiscriminate attacks are prohibited."); *id.* art. 52(1) ("Civilian objects shall not be the object of attack or of reprisals."); *id.* art. 52(2) ("Attacks shall be limited strictly to military objectives.").

distinguish themselves[87] and to take precautions to protect civilians from military operations.[88]

The anonymity afforded by cyberspace makes distinction a difficult obligation with which to comply. First, the attribution problem can make it exceedingly difficult to identify a legitimate target with certainty, and cases of doubt regarding a person or object's civilian status are to be resolved in favor of civilian status.[89] As discussed earlier, a savvy cyber combatant can trick an adversary into attacking a civilian network by spoofing an IP address or having a botnet do his bidding.[90] A state must take reasonable steps to ensure its target is not a civilian or civilian object,[91] but it is unclear how this requirement will be calibrated in cyberspace.

Secondly, there are no uniforms in cyberspace. It is unclear, technically, how states could comply with this distinction obligation other than through barring use of anonymizers and other means of leaving false trails that might lead an adversary to retaliate, erroneously, against a civilian or civilian object. Lastly, at this late date in the Internet's infrastructural development, it is unlikely that a state such as the United States could take precautions against the effect of attacks on military objectives by separating military objectives from civilians and civilian objects in cyberspace. This is because of the "interconnectedness of U.S. government and civilian systems and the near-complete government reliance on civilian companies for the supply, support, and maintenance of its cyber capabilities."[92]

b. Proportionality

The principle of proportionality seeks to limit collateral damage to civilians and civilian objects when launching attacks.[93] Proportionality assessments likely will

87. *Id.* art. 44(3) ("In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.").

88. *Id.* art. 58 ("The Parties to the conflict shall, to the maximum extent feasible: (a) . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.").

89. *Id.* art. 50 ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.") and art. 52(3) ("In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.").

90. *See supra* text accompanying notes 46–47. Also unclear is whether a state could target an innocent civilian's computer, taken over by a botnet, as directly participating in hostilities.

91. *See, e.g.*, Additional Protocol I, *supra* note 57, art. 57(2)(a)(i) ("[T]hose who plan or decide upon an attack shall . . . do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.").

92. Eric Talbot Jensen, *Cyber Warfare and Precautions Against the Effects of Attacks*, 88 TEX. L. REV. 1533, 1551 (2010).

93. Additional Protocol I, *supra* note 57, art. 57(2)(a)(ii)-(iii) ("[T]hose who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects . . . [and] refrain from deciding to launch any attack which may be expected to cause

prove particularly precarious in cyberspace, where outcomes are more difficult to predict than in the physical world:

> Physical attacks at least have the "advantage" of physics and chemistry to work with. Because, say, the blast radius of a thousand-pound bomb is fairly well understood, one can predict what definitely lies outside the blast radius and what definitely lies inside. Error bands in cyberattack are much wider . . . ."[94]

Because cyberspace is such an interconnected domain, the effects of an attack "can spread unpredictably, far beyond the target and even back to the attacker."[95]

Stuxnet[96] offers an interesting look at what a proportionality assessment might look like in the cyber conflict age. *The New York Times* reported that Israel and the United States, the countries many believe to be behind the worm, tested Stuxnet first on centrifuges at Israel's Dimona complex.[97] The worm also included "'fail safe' features to limit its propagation," remained passive if an infected computer was not targeted, and was programmed to self-destruct on June 24, 2012, by "eras[ing] itself from every infected machine."[98] While such practices and features may serve operational goals of efficacy and stealth, they also indicate a concern with containing the worm's impact on non-targets. As Richard Clarke, the National Security Council's chief counter-terrorism adviser during the administrations of Presidents Clinton and Bush, told *Vanity Fair*, Stuxnet "just says lawyers all over it."[99]

II. THE LAW OF WAR IMPLICATIONS OF THE PRIVATE SECTOR'S ROLE IN CYBER CONFLICT

In Part I, I examined how the law of war maps onto cyber conflict generally and pointed out important law of war ambiguities and complexities that arise in the cyber realm. Part II examines how these ambiguities and complexities are amplified by the private sector's role in cyber conflict.

The law of war is geared toward states. The rise of asymmetric warfare, particularly the Global War on Terror, has reconfigured much law of war discourse toward analyzing the role of non-state actors such as terrorists. But there has been very little focus on the private sector's role in armed conflict. This is a dangerous blind spot in the domain of cyber conflict, both because the private sector's current

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incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."). The principle of proportionality is regarded as customary international law. *Customary IHL: Rule 14. Proportionality in Attack*, INTERNATIONAL COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14 (last visited Mar. 30, 2012).

94. Martin Libicki, *Pulling Punches in Cyberspace*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 123, 126.

95. Patrick M. Morgan, *Applicability of Traditional Deterrence Concepts and Theory to the Cyber Realm*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 55, 61. *See also* Libicki, *supra* note 94, at 127 (noting that the "world's information systems are collectively approaching spaghetti status in terms of their interconnections and dependencies").

96. *See supra* notes 37–42 and accompanying text for a description of Stuxnet.

97. Broad, *supra* note 42.

98. Gross, *supra* note 37.

99. *Id.*

vulnerabilities implicate real national security concerns[100] and because this vulnerability could lead to the private sector or the government taking actions that impact law of war development and compliance in negative or non-strategic ways. My primary concern in this regard is the lack of legal clarity regarding the use of "active defenses" by the private sector.

Active defense is a broad and somewhat ambiguous concept.[101] One expert describes active defense as "a potpourri of techniques designed to limit the ability of others to carry out cyberattacks or help characterize and attribute past cyberattacks" and points out that the techniques "may straddle the fuzzy line between defense, espionage, and offense."[102] One form of active defenses uses trace-back technology to follow a cyber operation to its source and then actively disrupt the attack.[103] Active defenses are often described as counterstriking, countermeasures, "hacking back," or—as two cyber defense strategists put it—"Hack *us*? Hack *this* . . . ."[104] The point is that active defenses can go beyond simply warding off an attack with passive security measures like firewalls and instead involve actively attacking the attacker.[105]

The use of active defenses appears to be gaining support in the private sector as a means of combating cyber operations given the general consensus that passive defenses have failed as a deterrence strategy.[106] Advocates draw upon the law of self-defense as a legal justification for such actions, but the practice is of very uncertain legal pedigree in the domestic and international law context.[107] Nevertheless, active

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100. More than half of the information technology and security executives at critical national infrastructure enterprises in fourteen countries reported experiencing large-scale distributed denial of service (DDoS) attacks and "stealthy infiltrations," with about 60 percent of them believing foreign states had been involved in the operations. STEWART BAKER ET. AL, MCAFEE/CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, IN THE CROSSFIRE: CRITICAL INFRASTRUCTURE IN THE AGE OF CYBER WAR 4 (2010). A third of respondents said monthly large-scale DDoS attacks had impacted their operations. *Id.* at 5. The 2010 Annual Threat Assessment of the Intelligence Community began by addressing the cyber threat, warning "[m]alicious cyber activity is occurring on an unprecedented scale with extraordinary sophistication" and calling for a coordinated effort among the private sector and the federal government. DENIS C. BLAIR, DIRECTOR OF NATIONAL INTELLIGENCE, ANNUAL THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE 2 (Feb. 12, 2009).

101. *See* Masters Interview, *supra* note 23 (calling what is meant by "active defense" "not really clear" and "not spelled out very clearly").

102. Libicki, *supra* note 94, at 124.

103. Jay P. Kesan & Carol M. Hayes, *Thinking Through Active Defense in Cyberspace*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 327, 328.

104. George Rattray & Jason Healey, *Categorizing and Understanding Offensive Cyber Capabilities and Their Use*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 77, 83.

105. See Clark & Landau, *supra* note 32, at 37 (describing active defenses as "a system under attack reach[ing] out and somehow disabl[ing] the attacking machine").

106. *See* Scott J. Shackelford, *State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem*, *in* CONFERENCE ON CYBER CONFLICT PROCEEDINGS 197, 200 (C. Czosseck & K. Podins eds., 2010) ("Cyberwarfare is an arms race that cannot be won by defense alone"); W. Earl Boebert, *A Survey of Challenges in Attribution*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 41, 48 (noting that the limitations of attribution and frustrations with "adverse trends in cyber security" may increase "'hack back' activity, with or without authorization"); Kesan & Hayes, *supra* note 103, at 328 (noting that passive defenses may not be effective in mitigating harm from an attack or deterring attacks).

107. *See* NRC REPORT, *supra* note 31, at 204–12 (describing the arguments for and against applying the law of self-defense in this context).

defenses are widely believed to be deployed by the private sector.[108] General Michael Hayden, former CIA director, explained the appeal of active defenses this way: "Right now, the sheriff isn't there.... Everybody has to defend themselves, so everyone's carrying a gun."[109]

Keeping the prospect of the private sector's use of active defenses in mind, this Part addresses the law of war implications of the private sector's role in cyber conflict. It first examines the Obama Administration's public-private partnership proposal as a means of addressing the national security concerns regarding critical national infrastructure. It also briefly outlines various proposals from legal scholars regarding the private sector's cybersecurity dilemma. It then identifies important and problematic law of war implications raised by these proposals as a means of highlighting key areas of concern regarding the development of customary law of war principles in the cyber realm.

A. *The Obama Administration's Public-Private Partnership Plan*

In May 2009, the Obama administration issued its Cyberspace Policy Review.[110] The report is the latest policy review in more than a decade of proposals and executive directives aimed at designing an effective policy to protect the nation's privately owned critical national infrastructure, coherently designating federal agencies' responsibilities for various private sectors, and, more recently, responding to increased cyber intrusions on businesses' networks that have resulted in billions in economic losses.[111] The report reiterated the necessity of building private-public partnerships to facilitate cyber incident information sharing and to coordinate efforts to "detect, prevent, and respond to significant cybersecurity incidents."[112]

While the report is clear about the motivations for these partnerships—national and economic security—it is ambiguous regarding how they will be structured and leaves the roles played by the government and industry undefined. For example, the report simultaneously asserts that the federal government has the "core responsibility" of defending privately owned critical national infrastructure but maintains that the private sector should retain autonomy in its approach to defending its systems. One passage indicates that the federal government will take the defensive lead, but remains sparse on details:

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108. *See id.* at 207 (noting "anecdotal evidence and personal experience of committee members" that the private sector is deploying active defenses "even though such actions have never been acknowledged openly or done in ways that draw attention to them"); Kesan & Hayes, *supra* note 103, at 328 (noting that counterstriking is practiced in the IT industry); Jensen, *supra* note 92, at 1566 (noting that "there is evidence that many corporations are already using hack back as a defensive option); Danchev, *supra* note 52 (discussing the marketing of off-the-shelf software as a "commercial offensive cyber warfare solution").

109. BAKER ET. AL, *supra* note 100, at 26.

110. CYBERSPACE POLICY REVIEW, *supra* note 26.

111. For overviews of the history of the federal government's cybersecurity policy development and how responsibilities for various sectors of critical national infrastructure have been divvied among federal agencies, see Paul Rosenzweig, *The Organization of the United States Government and Private Sector for Achieving Cyber Deterrence*, *in* PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS, *supra* note 32, at 245, 247–50; Stephanie A. Devos, *The Google-NSA Alliance: Developing Cybersecurity Policy at Internet Speed*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 179–90 (2010); Jensen, *supra* note 92, at 1555–61; CYBERSPACE POLICY REVIEW, *supra* note 26, at 4–5.

112. CYBERSPACE POLICY REVIEW, *supra* note 26, at v, 23.

> Most private network operators and service providers consider it to be their responsibility to maintain and defend their own networks, but key elements of the private sector have indicated a willingness to work toward a framework under which the government would pursue malicious actors and assist with information and technical support to enable private-sector operators to defend their own networks.[113]

The report noted that "changes in law and policy" might be required because "[c]urrent law permits the use of some tools to protect government but not private networks, and vice versa."[114] The report did not, however, elaborate on which laws the government had in mind and how those laws would need to change. It also noted that roles should be clearly defined, but did not go on to do so.

The report's ambiguity regarding the legal dimensions of the proposed partnerships reflects the fine line it hopes to walk in asserting government control while assuaging fears among the private sector and privacy advocates. Private companies worry about government regulation and forced "information sharing" with competitors,[115] while civil liberty advocates are concerned that this information sharing might invade individuals' privacy.[116] While the report seems at pains to address these concerns, there is little in it regarding the implications public-private partnerships could have on compliance with the law of war. Key among these concerns is the parameters of the private sector's ability to defend its networks. In the absence of effective government-managed defenses, can a private business launch countermeasures against a cyber network attack? If such active defenses are permissible, how are they to be regulated?

These lacunae carried over into the administration's 2011 legislative proposal, which aims to create a cybersecurity incident-reporting regime for the private sector.[117] The proposed legislation stipulates that the Secretary of the Department of Homeland Security may direct "countermeasures" to protect federal systems[118] from cybersecurity threats.[119] Countermeasures are defined as:

> automated actions with defensive intent to modify or block data packets associated with electronic or wire communications, Internet traffic, program code, or other system traffic transiting to or from or stored on an information system for the purpose of protecting the information system

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113. *Id.* at 28.

114. *Id.* at 17.

115. *See id.* at 27 (noting industry concerns about the "negative impacts from resulting shareholder concerns, market reactions, or regulatory action").

116. *See id.* at 9 (noting that "structures will be needed to help ensure that civil liberties and privacy rights are protected").

117. Department of Homeland Security Cybersecurity Authority and Information Sharing Act of 2011 (proposed legislation) [hereinafter Proposed Information Sharing Act], *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/letters/dhs-cybersecurity-authority.pdf. In February and March of 2012, senators introduced competing cybersecurity bills. For analysis of the legislative proposals' private-sector information-sharing provisions, see generally Paul Rosenzweig's posts on Lawfare, available at www.lawfareblog.com/author/paul.

118. "Federal systems" are defined as "all information systems owned, operated, leased, or otherwise controlled by an agency, except for national security systems or those information systems under the control of the Department of Defense." *Id.* § 242(9).

119. *Id.* § 244(a)(1).

> from cybersecurity threats, conducted on an information system or information systems owned or operated by or on behalf of the party to be protected or operated by a private entity acting as a provider of electronic communication services, remote computing services, or cybersecurity services to the party to be protected.[120]

The proposed legislation does not indicate that the federal government may engage in these countermeasures to protect private entities other than those providing services to federal systems, nor does it indicate whether private entities can take these measures themselves.[121] Instead, it directs the Secretary to "develop a national cybersecurity incident response plan . . . in collaboration . . . with owners and operators of critical national infrastructure . . . based on applicable law, that describe the specific roles and responsibilities of governmental and private entities during cyber incidents."[122]

Other recent policy documents released by the Administration have not shed light on these ambiguities. For example, the State Department's May 2011 International Strategy for Cyberspace reiterates the need to partner with the private sector, but does not provide clarity regarding how private-public partnerships could be implemented in compliance with the law of war.[123] The Pentagon's recent Strategy for Operating in Cyberspace lists partnering with the private sector as one of its five key "strategic initiatives"; it also notes the Department of Defense's use of "active cyber defense . . . to discover, detect, analyze, and mitigate threats and vulnerabilities."[124] But it does not address how these public-private partnerships could be constituted in a manner that adequately considers law of war issues nor does it address the likely use of active defenses by the private sector. One document, the Cyberspace Policy Report the Pentagon prepared for Congress in November 2011, provides perhaps the most considered treatment of law of war issues in the cyber realm that has been released of late, but it does not address how these issues

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120. *Id.* § 242(4).

121. I identified only one source indicating that the federal government might regard the private sector as having such power, so far as critical national infrastructure is concerned. The Department of Homeland Security's 2009 National Infrastructure Protection Plan outlines the public-private partnership between the federal government and "critical infrastructure and key resources," focusing on coordinating responses to a terrorist attack or other catastrophe. The report defines the "protection" envisioned by the plan to include "a wide range of activities, such as improving security protocols, hardening facilities, building resiliency and redundancy, incorporating hazard resistance into facility design, initiating *active* or passive *countermeasures*, installing security systems, leveraging 'self-healing' technologies, promoting workforce surety programs, implementing cybersecurity measures, training and exercises, business continuity planning, and restoration and recovery actions, among various others." DEPT. OF HOMELAND SEC., THE NATIONAL INFRASTRUCTURE PROTECTION PLAN 1 (2009) (emphasis added). Though the report does not specify who is providing this protection, many of the included activities are those that likely would be implemented by the private entity itself.

122. Proposed Information Sharing Act, *supra* note 117, § 243(c)(9).

123. INTERNATIONAL STRATEGY, *supra* note 15, at 13. The report does include other important statements on the law of war. As mentioned earlier, it provides a clear policy statement that a cyber network attack could trigger the right to self-defense. *See supra* note 15 and accompanying text. It also makes clear that the administration does not regard it as necessary to "reinvent" customary international law to address cyber conflict issues but rather intends to work within the current framework to build consensus regarding how those norms apply in the cyber conflict realm, thus indicating that it does not deem a separate treaty necessary to address the issue. *Id.* at 9.

124. STRATEGY FOR OPERATING IN CYBERSPACE, *supra* note 23, at 8–9.

are implicated by the private sector's role in cyber conflict or the Administration's proposal to foster public-private partnerships.[125]

B. *Scholarly Proposals to Protect the Private Sector*

Not surprisingly, international law scholars have focused more explicitly on law of war issues regarding the private sector in cyber conflict. This section briefly introduces a few ideas circulating in the current scholarship before discussing, generally, some of the problematic implications of both policy and scholarly treatments of the private sector's role in cyber conflict.

One proposal is for government to regulate the private sector's use of active defenses.[126] This idea envisions some type of tort liability that would protect innocent third parties who fall victim to the private sector's misfires.[127] Government regulation would aim to ensure necessary and proportionate countermeasures and require a certain accuracy rating regarding attribution confidence to permit the use of countermeasures.[128] Related to this proposal is the idea that a government-based entity could be created to pursue countermeasures on behalf of the private sector.[129]

Other proposals reach back to earlier legal mechanisms granting private actors the right to use similar defenses. For instance, one proposal suggests issuing "letters of licensing" akin to letters of marquee and reprisal that grant private actors the right to pursue "threat neutralization" under certain circumstances.[130] Another envisions a system built upon the law of the sea's Duty to Assist, whereby a cyber network attack victim could send out an "e-SOS" and certain authorized private entities such as internet service providers could respond.[131] One proposal goes rather far, pushing the idea of a "Cyberwar National Guard" that would require cyber-savvy individuals in the private sector to help bolster defenses of critical national infrastructure.[132] Another takes a tamer approach, arguing that the government should set regulatory security standards for private entities and that the executive should have the authority to defend vulnerable private entities with active defenses.[133]

C. *The Law of War and the Private Sector's Role in Cyber Conflict*

The political and scholarly proposals detailed above respond to real concerns about the national security threat posed by vulnerabilities in the cyber defenses of privately owned critical national infrastructure. But they also reveal blind spots that should be addressed as norms regarding cyber conflicts begin to materialize.[134]

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125. *See generally* CYBERSPACE POLICY REPORT, *supra* note 26.

126. Kesan & Hayes, *supra* note 103, at 328.

127. *Id.* at 329.

128. *Id.* at 331.

129. NRC Report, *supra* note 31, at 7.

130. *Id.* at 208.

131. Hollis, *supra* note 29, at 378–79.

132. Brenner & Clarke, *supra* note 59, at 1063–67.

133. Jensen, *supra* note 92, at 1563–68.

134. *See* Rosenzweig, *supra* note 111, at 245 (warning of the dangers of making "critical decisions that may set precedent . . . in an ad hoc manner . . . without the benefit of either the time or inclination for a

Careful attention to these issues is particularly important given the unlikelihood that states will come together to craft a new treaty delineating cyber conflict rules.[135] Rather, it seems much more likely that this area of the law of war will develop via customary international law,[136] with the applicable rules established by state practice and the articulation by states of norms they regard as legally binding.[137]

The final sections of this Note identify and discuss two key blind spots: an erosion in the state's monopoly on the use of force and an erosion in the standard of imputation.

1. Erosion of the State's Monopoly on the Use of Force

The state's monopoly on the use of force serves a key function in law of war compliance. By maintaining control of who can use violence on behalf of the state, the state is able to institutionalize *jus in bello* rules via clear rules of engagement for its military forces and the use of trained military lawyers specialized in the field. The military's internal justice system also uniquely reinforces the institutionalization of the *jus in bello* regime by punishing breaches in those rules.[138]

The problem in the context of the private sector and cyber conflict is two-fold. First, the rules themselves are unclear. Second, the private sector lacks the kind of organizational structure and institutional competence that facilitates compliance with law of war rules.[139] Cyber conflict is a new war domain, with unique obstacles to applying existing norms. As discussed above, proportionality assessments are made difficult by the uncertain outcomes and cascading effects of cyber operations. Technical attribution problems make distinction a more onerous and perhaps impossible affair. Added to this fuzziness in the rules is the fact that military commanders and lawyers do not yet have an experiential basis to draw from in applying the rules.[140]

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broader and comprehensive consideration of the policy implications of the decisions").

135. *See* Jack Goldsmith, *Cybersecurity Treaties: A Skeptical View*, *in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 5 (Peter Berkowitz ed., 2011), *available at* http://www.hoover.org/taskforces/national-security/challenges (explaining that powerful states' interests are not sufficiently aligned to motivate them to hash out a treaty); Schmitt, *Cyber Operations*, *supra* note 33, at 177 (noting that "it is highly unlikely that any meaningful treaty will be negotiated to govern cyber operations in the foreseeable future"); *see also supra* note 123.

136. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: SOURCES OF INTERNATIONAL LAW § 102(2) (1987) (defining customary international law as "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation").

137. *See* Steven G. Bradbury, *The Developing Legal Framework for Defensive and Offensive Cyber Operations*, Keynote Address at the 2011 Harvard National Security Journal Symposium: Cybersecurity: Law, Privacy, and Warfare in a Digital World (Mar. 4, 2011), *available at* http://harvardnsj.com/2011/04/the-developing-legal-framework-for-defensive-and-offensive-cyber-operations (noting that how the U.S. armed forces conduct cyber operations "will significantly influence the development of customary international law"); INTERNATIONAL STRATEGY, *supra* note 15, at 9 (articulating the Obama Administration's intention to focus on the "development of norms for state conduct in cyberspace").

138. *See* LAURA A. DICKINSON, OUTSOURCING WAR & PEACE 171 (2011) (describing judge advocates' roles in "protecting the public values that are embedded in military rules").

139. *See generally id.* at 144–95 (applying organizational theory to illustrate the obstacles to IHL compliance by private contractors in Iraq).

140. NRC REPORT, *supra* note 31, at 271–72 ("[W]hen there is little or no experience on which to draw, the congruence between the course of action proposed by commanders and what the lawyers would say is more likely to break down.").

The already difficult problem of institutionalizing operable rules in the cyber domain is further complicated if the private sector is deputized to use active defenses. Private entities face the same fuzzy rules, but have no background in the law of war or experience in armed conflict upon which to draw. More importantly, a private entity's primary motivation is likely not national security but rather the corporate bottom line. A state military can enforce the unity of command principle of war, which ensures that a single commander is directing forces in service of a common purpose,[141] that is, the nation's security. If the private sector uses active defenses against a foreign state or individuals acting on a foreign state's behalf, it may not be clear whether private or public interests are at stake.[142] Given the fact that the vast majority of cyber operations are essentially corporate espionage or criminal ventures,[143] this is a real concern. The private sector might not only erode the state's monopoly on the use of force, but also use that force in service of ends that do not serve the public interest.

2. Erosion of the Standard of Imputation

The post-September 11, 2001, international law regime already has seen the lowering of the standard for imputing to a state liability for private conduct.[144] Once a test of whether a state exercised effective or overall control over the non-state actor, the emerging standard now appears to be whether a state "harbored" or "supported" the non-state actor.[145] Given the difficulty of technical attribution in the cyber domain, some scholars are pushing the idea that imputation standards should follow this trend in relaxation in order to lift the "veil of plausible deniability" that allows states to "escape accountability" by hiding behind private hackers.[146]

The call for a relaxed standard is likely motivated by the belief that Russia and China are tapping their native hacking talent to launch a relentless stream of cyber attacks against the United States.[147] But in the rush to impute liability, this analysis misses two crucial points. The first is that the United States is no innocent. Rather, the United States is viewed as the "number one source of cyber threats" in the

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141. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 516 (2004–05) (citing Joint Chiefs of Staff's *Joint Publication 3-0 Doctrine for Joint Operations*).

142. Indeed, as discussed earlier, it also may not be clear whether public or private interests are being targeted.

143. *Talk of the Nation, Cyber Attacks May Be "Acts of War"*, NAT'L PUB. RADIO (June 3, 2011), *available at* http://www.npr.org/2011/06/03/136925541/cyber-attacks-may-be-acts-of-war.

144. Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 83–84.

145. *Id.* at 88–90.

146. *See, e.g.*, Shackelford, *supra* note 106, at 198; Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 7 (2009) (arguing that attribution problems "perpetuate the response crisis" in which states find themselves).

147. *See* Waxman, *supra* note 68, at 456 (noting reports that Russia and China "exploit informal relationships with private actors (i.e., 'citizen hackers') to conduct attacks and collect intelligence in cyberspace"). For an analysis calling into question the Chinese army's alleged widespread use of the country's hacker community, see NORTHMAN GRUMMAN, CAPABILITY OF THE PEOPLE'S REPUBLIC OF CHINA TO CONDUCT CYBER WARFARE AND COMPUTER NETWORK EXPLOITATION 7 (Oct. 9, 2009).

world.[148] More importantly to developing sound law of war rules, however, is that a relaxed standard of imputation would likely confound the main underlying purpose of attribution, which is to properly identify the perpetrator and make sure that counterstrikes are directed at the right actors. Until the technical side of attribution develops to a point that instills confidence,[149] the best course is to maintain a stricter standard for imputation. This better serves the goals of international law of protecting civilians from harm and suffering. It also will serve as a disincentive to those non-state actors seeking to exploit a relaxed imputation standard by pursuing "false flag" operations or other techniques that turn innocents into virtual human shields.

CONCLUSION

The foregoing analysis does not seek to hinder policy-makers from crafting effective policies to protect the private sector from cyber attacks capable of wreaking catastrophic devastation. It is, however, meant to point out critical lacunae in the current thinking on the subject. The norms to which states profess to be obligated and the practices they pursue will be critical to establishing the rules in this emerging war domain. A coherent and sound policy must be tailored to address both national security interests and the underlying protective goals of international law.

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148. Hollis, *supra* note 29, at 401.

149. *See* CYBERSPACE POLICY REPORT, *supra* note 26, at 4 (emphasizing the Pentagon's focus on improving its "attribution capabilities").

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