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A TRIBUTE TO MYRES S. MCDOUGAL

VED P. NANDA

The first issue of this Journal was dedicated to my teacher, Myres S. McDougal. He was and remains the most influential person in my professional career, who not only taught me the majesty of international law but also gave me an insight into human relationships. No matter how busy he was and no matter how many commitments he had, he always had time for his students.

There is no dearth of brilliant minds in our profession. As a revered teacher, as a most creative and prolific scholar, and as one of the most influential international lawyers of his time, Professor Myres McDougal stands as a giant. But it is that human touch that really matters, and set him apart from others.

My study at Yale was not coincidental. As a student at the University of Delhi Faculty of Law, I was familiar with Professor McDougal's work and was hoping one day to study with him. It was, however, at Northwestern University, where I was completing my L.L.M., when I finally made up my mind. My advisor, Professor Brunson MacChesney, was most gracious in wanting me to pursue my J.S.D. at Northwestern University and offered me a handsome fellowship to do so. But when I asked him about Yale and Professor McDougal, he was most generous with McDougal's praise and said that he would not mind my going to Yale. And I vividly recall the first day I was at Yale and visited with Professor McDougal, and I especially remember the warmth with which he welcomed me. It was not just me. With all his students, he made them feel very special. I hope that I have learned from his example.

As I started teaching at the University of Denver, Professor McDougal's imprint was clear. The Denver journal was named the *Denver Journal of International Law and Policy*. The curriculum at the University of Denver was heavily influenced by his teaching. I know that the most fitting tribute to him is his students' commitment and scholarship in the pursuit of the goals he so elegantly articulated and lived by—the establishment of an international order based on human dignity.

TOBACCO, GLOBAL PUBLIC HEALTH, AND NON-GOVERNMENTAL ORGANIZATIONS: AN EMINENT PANDEMIC OR JUST ANOTHER LEGAL PRODUCT?

DAVID J. MALCOLM ^{*}

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“Smoking is the chief single avoidable cause of death in our society and the most important health issue of our time.”¹

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1. Joachim Roski & Robert Jeddloh, *Tobacco Use Control*, MED. J. ALLINA, Winter 1997, at 8 (quoting C. Everett Koop). “Cigarette smoking remains the most important cause of preventable morbidity and early demise in developed countries.” LAWRENCE M. TIERNY JR. ET AL., CURRENT MEDICAL DIAGNOSIS AND TREATMENT 5 (1997). “Cigarette

"Tobacco products have no safe level of consumption, and are the only legal consumer products that kill when used exactly as the manufacturer intends."²

I. INTRODUCTION

American actions and perspectives regarding tobacco have profoundly influenced the world in many ways. Health concerns first articulated by the Surgeon General in 1964³ led to a new paradigm in how we view tobacco, public health, and smoking in general. The Surgeon General's 1964 report proved to be a watershed in America. It was the first of many government publications to detail the unhealthy medical effects of tobacco.⁴ As a result, the U.S. government now regulates the

smoking is the chief preventable cause of death in our society." U.S. DEPT HEALTH & HUM. SERVS., *SMOKING AND HEALTH: A NATIONAL STATUS REPORT 1* (2d ed. 1990) (statement of Louis W. Sullivan) [hereinafter 1990 REPORT]. "Smoking is emerging as the world's largest single preventable cause of illness and death." WORLD HEALTH ORGANIZATION (WHO), *THE WORLD HEALTH REPORT 1995: BRIDGING THE GAPS 34* (1995) [hereinafter WORLD HEALTH REPORT 1995].

2. WHO, *The Public Health Implications of the Economics of Tobacco* (visited Mar. 30, 1999) <<http://www.who.org/programmes/psa/pres2.htm>>. "Tobacco is the leading preventable cause of death: cigarettes and other tobacco products kill 420,000 American smokers and 53,000 nonsmokers every year. This toll exceeds the deaths resulting from alcohol abuse, AIDS, traffic accidents, homicides, and suicides *combined*." STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

3. U.S. DEPT HEALTH, EDUC. & WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964) [hereinafter 1964 REPORT].

4. See, e.g., *Nicotine in Cigarettes and Smokeless Tobacco Products is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act*, 60 Fed. Reg. 41,454 (1995) [hereinafter 1995 FDA Nicotine Report]; SURGEON GENERAL, U.S. DEPT HEALTH & HUM. SERVS., *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL* (1994) [hereinafter PREVENTING TOBACCO 1994]; U.S. ENVTL. PROTECTION AGENCY, *RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISEASES* (1993) [hereinafter PASSIVE SMOKING 1993]; 1990 REPORT, *supra* note 1, at 7-9, 37-48; SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUMAN SVCS., *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS* (1989); SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION* (1988); ADVISORY COMM. TO THE SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF USING SMOKELESS TOBACCO* (1986) [hereinafter SMOKELESS TOBACCO 1986]; SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING* (1986); SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE* (1984); SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE* (1983); 1964 REPORT, *supra* note 3; U.S. Center for Disease Control (CDC), *CDC's TIPS - Tobacco Use in the United States* (visited Mar. 21, 1999) <http://www.cdc.gov/nccdphp/osh/tobus_us.htm> (listing diseases and other adverse effects); CDC, *CDC's TIPS - Maternal Smoking During Pregnancy* (visited Mar. 21, 1999) <<http://www.cdc.gov/nccdphp/osh/matsmkg.htm>> (describing the relationship between

formerly unfettered tobacco industry based, in part, on continuing medical revelations.⁵ Despite a significant minority⁶ of the American

mental retardation and prenatal smoking).

5. See ENVIRONMENTAL TOBACCO SMOKE: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY 1989 (Donald J. Ecobichon & Joseph M. Wu eds., 1990); NAT'L RES. COUNCIL, ENVIRONMENTAL TOBACCO SMOKE MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986); A.K. Hackshaw et al., *The Accumulated Evidence on Lung Cancer and Environmental Tobacco Smoke*, 315 BRIT. MED. J. 980 (1997); M.R. Law et al., *Environmental Tobacco Smoke Exposure and Ischaemic Heart Disease: An Evaluation of the Evidence*, 315 BRIT. MED. J. 973 (Oct. 18, 1997); Eliseo J. Pérez-Stable et al., *Nicotine Metabolism and Intake in Black and White Smokers*, 280 JAMA 152 (1998) (suggesting racial differences may be due to behavioral and biological factors)); CNN Financial News: *CEO Admits Smoking Risk* (CNN cable broadcast, Aug. 21, 1997) (acknowledging a possible link between smoking and death); *Filter Cigarettes Linked to Form of Cancer*, TIMES UNION, Nov. 5, 1997, at A9 (use of filtered low-tar cigarettes and resultant deeper inhaling closely parallels deaths from adenocarcinoma, a cancer deep in the lungs); Robert Langreth, *Secondhand Smoke, Past Tobacco Use Found to Irreversibly Damage Arteries*, WALL ST. J., Jan. 14, 1998, at A3 (reporting on George Howard et al., *Cigarette Smoking and Progression of Atherosclerosis: The Atherosclerosis Risk in Communities (ARIC) Study*, 279 JAMA 119 (1998)); Thomas H. Maugh II, *Study Links Gene Pattern to Strong Smoking Addiction Health: Finding Supports View that an Impaired Ability to Feel Pleasure Plays a Role in the Addictive Process*, L.A. TIMES, Mar. 4, 1998, at A1; Nat'l Ctr. on Addiction & Substance Abuse at Columbia Univ., *Fetal Tobacco Syndrome* (visited Mar. 19, 1998) <<http://www.casacolumbia.org/pubs/jun96/tob4.htm>>; A. Ott et al., *Smoking and Risk of Dementia and Alzheimer's Disease in a Population-Based Cohort Study: The Rotterdam Study*, 351 THE LANCET 1840-43 (1998) (reporting on the relationship between smoking and dementia); Andrea Petersen, *A Study Warns of Cigars' Role in Some Heart Diseases*, WALL ST. J., Mar. 20, 1998, at B1; John Schwartz, *Perez-Stable, Suffer Greater Smoking Toll, Studies Say*, WASH. POST, July 8, 1998, at A3 (citing Ralph S. Caraballo et al., *Racial and Ethnic Differences in Serum Cotinine Levels of Cigarette Smokers: Third National Health and Nutrition Examination Survey, 1988-1991*, 280 JAMA 135 (1998) (finding that black smokers retained substantially higher levels of cotinine than white smokers); John Schwartz & Sandra Torry, *Contrite Tobacco Executives Admit Health Risks Before Congress*, WASH. POST, Jan. 30, 1998, at A14; Cf. Henry Weinstein, *Judge Orders Tobacco Firms to Turn over Secret Papers*, THE OREGONIAN, Mar. 8, 1998, at A1 (revealing industry documents indicating knowledge of tobacco's detrimental effects long before the public did); Henry Weinstein, *Yearly Medicaid Cost of Smoking Put at \$12 Billion*, L.A. TIMES, Mar. 10, 1998, at A1 (reporting on annual Medicaid costs without including funding from any other federal program or private insurers).

Cigarettes are now responsible for one in every five deaths in the USA. . . .

Tobacco dependence may have a genetic component. Smokers have twice the risk of fatal heart disease, ten times the risk of lung cancer, and several times the risk of cancers of the mouth, throat, esophagus, pancreas, kidney, bladder, and cervix; a two- to threefold higher incidence of stroke and peptic ulcers (which heal less well than in nonsmokers); a two- to fourfold greater risk of fractures of the hip, wrist and vertebrae; and a twofold risk of developing cataracts. . . . Smokers die 5-8 years earlier than never smokers. Smoking cessation lessens the risk of death and of myocardial infarction in men and women with coronary artery disease; lessens the risk of stroke; slows the rate of progression of carotid arteriosclerosis; and is associated with a reversal of bronchitis and improved pulmonary function. . . . The children of parents who smoke have lower birth weights, more frequent respiratory infections, less efficient pulmonary function, and a higher incidence of

population that disagrees with the federal government, Congress and several executive agencies have enacted many laws and rules to regulate tobacco: including labeling,⁷ advertising,⁸ workplace rules,⁹ and reporting.¹⁰ Proposed federal regulations continue to surface.¹¹ The march to regulate tobacco consumption continues nationwide.¹² Anti-

chronic ear infections than children of non-smokers and are more likely to become smokers themselves.

TIERNY JR. ET AL., *supra* note 1, at 5.

6. See, e.g., U.S. Senator Ford (D-KY) announcing his opposition to a FDA rule to limit tobacco products sales and marketing to children. "It's like calling in the FBI for a speeding ticket." *Senator Wendell Ford Criticized for Remark on Kids' Smoking Issues*, in American Cancer Soc'y (ACS), *Great American Smokeout GASP: The Dirt* (visited Mar. 2, 1998) <<http://www.cancer.org/smokeout/thedirt/html>> [hereinafter *The Dirt*].

7. See, e.g., Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-08 (1994) [hereinafter 1986 Smokeless Tobacco Act]; Comprehensive Smoking Education Act of 1984, 15 U.S.C. §§ 1331-41 (1994); Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-41 (1994) [hereinafter 1969 Cigarette Smoking Act]; Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-41 (1994) [hereinafter 1965 Cigarette Labeling & Advertising Act].

8. See, e.g., Little Cigar Act of 1973, 15 U.S.C. §§ 1331-40 (1994); 1969 Cigarette Smoking Act, *supra* note 7; 1965 Cigarette Labeling & Advertising Act, *supra* note 7.

9. See, e.g., Pro-Children Act of 1994, 20 U.S.C. §§ 6081-84 (1994); Smoking Aboard Aircraft, 14 C.F.R. § 252 (1973); Prohibition Against Smoking on Scheduled Flights, 49 U.S.C. § 41706 (1994).

10. See, e.g., Federal Trade Commission, *FTC Requires Cigar Companies to Supply Data on Cigar Sales and Advertising Expenditures*, available in 1998 WL 49964; 1986 Smokeless Tobacco Act, *supra* note 7; FTC, *1997 Smokeless Tobacco Report* (visited Mar. 22, 1999) <<http://www.ftc.gov/bcp/reports/smokeless97.htm>> (made pursuant to the 1986 Smokeless Tobacco Act and reporting smokeless tobacco sales and promotions).

11. See, e.g., *Safety & Health: OSHA Suggests Legislating Workplace Ban; Language Would Protect Rule From Lawsuits*, Daily Labor Rep. (BNA) No. 37, at A-7 (Feb. 25, 1998) (proposal to regulate smoking in the workplace); Tobacco Disclosure and Warning Act of 1997, S. 527, 105th Cong. (1997) (requiring a contents listing, tougher warnings, and explicit labeling). Compare Brad Sherman, *Valley Perspective for Sake of Children, Congress Must Ban "Kiddie Packs" Tobacco Companies' Marketing Strategy Clearly Targets the Young*, L.A. TIMES, Mar. 1, 1998, at B17 (proposal to ban sales of packages with less than 15 cigarettes), with Myron Levin, *Tobacco Deal Spurs Bonanza for Lobbyists*, Mar. 1, 1998, L.A. TIMES, at A1 (describing Single Stick Inc., an Arizona tobacco firm, that markets single cigarette packs).

12. See, e.g., CAL. LABOR CODE § 6404.5 (West Supp. 1998) (first state to ban smoking in bars, effective Jan. 1, 1998); N.Y. CITY ADMIN. CODE § 17-501 to 514 (Smoke-Free Air Act); 1986 Minn. Laws 352 § 2 (repealed 1987) (first state to ban free samples of smokeless tobacco); UTAH CODE ANN. § 76-10-102 (1995) (first state to ban outdoor advertising, excepting dealers); Minneapolis Code Ord. § 281.55 (with St. Paul, first cities to ban free samples in 1979); ARIZ. REV. STAT. ANN. § 36-601.01 (West 1993) (first state to restrict public smoking). See generally Alan Henderson, *Snuff Out Attempts Aimed at Repealing Smoke-Free Bar Law to Shine Golfer's Remarks Show How You Can Drive Your Reputation into the Rough*, BUS. J. (SAN JOSE), Mar. 30, 1998, available in 1998 WL 8035727 (reporting on the success of smoke-free bars and the tobacco industry's misinformation campaign); Barry Meier, *New Laws Take Anti-Tobacco Penalties Straight to Kids*, THE OREGONIAN, Dec. 7, 1997, at A10 (listing penalties for minors buying or possessing tobacco products such as fines up to \$1000 or suspended driving privileges); Lynne Tuohy, *Proposal to Ban Sales of Tobacco Splits Small Town*, THE OREGONIAN, Oct. 19, 1997, at

tobacco public announcements¹³ and publications¹⁴ are relatively common.

America continues a leading role in the legal arena too. Tobacco litigation in America entered its third wave¹⁵ when states sued the tobacco industry. States claimed that the industry committed fraud, deception, and racketeering upon the public, thereby creating a causal relationship between public smoking and excess state Medicaid expenses.¹⁶ By focusing on the industry's actions in the third wave of litigation, and not the smokers' behavior, the states avoid the winning industry defense of assumption of risk because the states¹⁷ are third

A14 (proposing to ban tobacco product sales).

13. See *Vice President Gore Launches New Campaign to Help Stop Tobacco Sales to Children*, M2 PRESSWIRE, Mar. 6, 1998, available in 1998 WL 10219859; California Dep't Health Serv., *California Launches Aggressive New Anti-Tobacco Advertising Campaign*, (visited Feb. 16, 1998) <<http://www.dhs.cahwnet.gov/prssrels/1997/16-97.htm>> (describing counter-advertising directed at youth); Roski & Jeddelloh, *supra* note 1, at 15 (discussing partnering between the CDC & managed care organizations to counter-advertise).

14. See GLANTZ ET AL., *supra* note 2 (examining 4,000 pages of formerly secret internal tobacco industry documents).

15. See Heather Cooper, *Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating The Hazards Associated With Tobacco Products*, 16 BROOK. J. INT'L L. 275, 279-89 (1990); Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U.L. REV. 1, 11-16 (1991) (describing the first wave in the 1950s and 1960s, based upon fraud, negligence, and breach of warranty theories, and the second wave during the 1980s and 1990s based upon failure to warn and design defect theories); Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking*, 72 IND. L.J. 235 (1996). See generally Marc. Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90 (1986); Donald W. Garner, *Cigarette Dependency: Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980).

16. See, e.g., *State v. American Tobacco Co.*, No. 94-1429 (Ch. Ct. Jackson County, 1994) (first state to sue the industry for Medicaid expenses). See Henry Weinstein, *Big Tobacco Settles Minnesota Lawsuit for \$6.6 Billion: Accord is Reached Hours Before Jury was to Begin Deliberations. Industry Agrees to Ban Payments to Entertainment Sources and Disband Research Council*, L.A. TIMES, May 9, 1998, at A1. See generally Christa Sarafa, *Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act*, 2 DEPAUL J. HEALTH CARE L. 123 (1997); Warren Richey, *Big Tobacco Hit by Florida Strategy, Global Assault*, THE OREGONIAN, Aug. 10, 1997, at G1-2; Lawrence J. Goodman, *Hearings Show Quagmire of Issues in Tobacco Deal*, THE OREGONIAN, Dec. 14, 1997, at A18. After individual settlements with Florida, Minnesota, Mississippi, and Texas, the tobacco industry settled with the remaining 46 states. Milo Geyelin, *Tobacco Companies and 46 States Agree to \$206 Billion Tobacco Deal*, WALL ST. J. EUROPE, Nov. 23, 1998, at 3, available in 1998 WL 21154753.

17. Cf. Christopher Clark, *Cities Stake Claim for Share of States' Tobacco Money: Municipalities are Watching Closely an Attempt by St. Louis and a Group of Missouri Hospitals to Recoup Their Smoking-Related Costs*, THE OREGONIAN, Dec. 14, 1998, at A13; Deborah Pines, *Unions' Tobacco Suit Cleared to Proceed Class Action Claims Higher Health Care Costs*, N.Y. L.J., Mar. 27, 1998, at 1 (reporting on *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.*); Sandra Torry, *Foreign Nations Sue Tobacco Companies The Governments of Guatemala, Nicaragua and Panama File Lawsuits Patented on the Actions Brought by U.S. States*, THE OREGONIAN, Jan. 19, 1999, at A5; Bob

parties that never smoked.¹⁸ The tobacco companies settled out of court with the states, agreeing to payments totaling \$206 billion over the next twenty-six years. Additional conditions of the settlement are bans on advertising directed toward teens and children, and tobacco company-funded study of programs to reduce teen smoking and prevent tobacco related disease.¹⁹ Non-smokers adopted similar strategies to sue the industry.²⁰

Changing public perceptions and laws are like tremors that shake the tobacco industry's foundation. In 1997, California removed tobacco from a list of inherently unsafe consumer products that shielded manufacturers from product liability actions.²¹ While in the 1970s Florida manufactured cigarettes and supplied them while in state prisons and hospitals, by 1994 Florida's position had changed diametrically from ratification to confrontation.²² Congressional legislation may radically

Van Voris, *Tribal Court to Judge Tobacco*, THE NAT'L L.J., Mar. 2, 1998, at A6 (describing *Beaver v. American Tobacco Co. et al.*, No. CV97-27 (Dist. Ct. Muscogee Creek Nation, 1997) and other Native American lawsuits against the tobacco industry); Richard B. Schmidt, *Tribal Courts Draw Adroit Lawyers*, WALL ST. J., Mar. 20, 1998, at B1.

18. Cf. Sarafa, *supra* note 16, at 132-43. *But see* State *ex rel.* Miller v. R.J. Reynolds Tobacco Co. et al., No. CL 71048 (Polk County Dist. Ct., 1996). Judge Linda Reade dismissed part of Iowa's suit against tobacco companies and stated, "Iowa, unlike Florida, has not enacted any legislation which specifically grants the state the right to proceed directly against tobacco companies to recover for medical expenses paid by the state for alleged smoking-related illnesses." Renee Montage, *Morning Edition: Iowa Smoking* (Nat'l Pub. Radio broadcast, Aug. 27, 1997). Cf. Nancy Meersman, *NH High Court Reinstates Tobacco Suit; Second-Hand Smoke Case Seen as Precedent Setting*, THE UNION LEADER (Manchester, NH), May 30, 1998, at A1 (noting the adoption of tort law making suppliers of dangerous products subject to bystanders' negligence claims); *N.H.'s Highest Court Reinstates Secondhand Smoke Lawsuit; The Estate of Roxanne Ramsey-Buckingham, an Nonsmoker Who Died of Lung Cancer, Wins the Chance to Go to Trial*, PROVIDENCE SUNDAY J., May 31, 1998, at 6A, available in 1998 WL 12188143.

19. *Tobacco Settlement Summary* (visited June 14, 1999) <<http://www.naag.org/glance.htm>>; *See also Multi State Settlement* (visited June 14, 1999) <www.tobaccofreekids.org/html/multi-state_settlement.html> (detailing how much money each state will receive from the settlement and what plans the states have made for the money).

20. *See* Debbie Elliott & Scott Simon, *Weekend Edition: Smoke Suit Settled* (Nat'l Pub. Radio broadcast, Oct. 11, 1997) (describing settlement of the Florida flight attendant class action suit involving second-hand smoke); John Schwartz, *Firms Not Liable in Secondhand Smoke Death*, WASH. POST, Mar. 20, 1998, at A17 (prevailing over Mildred Wiley's estate in the first American wrongful death suit involving environmental tobacco smoke (ETS)); Robert Siegel, *All Things Considered Tobacco Year in Review* (Nat'l Pub. Radio broadcast, Dec. 31, 1997) (flight attendant suit). *But see* Myron Levin, *Verdict Deals Tobacco Firms a Historic Defeat*, L.A. TIMES, June 11, 1998, at A1 (reporting on a \$1 million judgment for the estate of Roland Maddox, a smoker, against Brown & Williamson that included the first punitive damages ever awarded against a cigarette company).

21. CAL. CIVIL CODE § 1714.45 (West Supp. 1998) (enabling individuals to sue tobacco companies).

22. *See* Sarafa, *supra* note 16, at 138 (citing *Florida Trial Court Strikes Affirmative Defenses of Tobacco Companies*, TOBACCO LITIG. REP., Feb. 14, 1997).

alter the present situation by shifting liability on a national scale.²³

Although recent events continue to alter the American legal landscape on a regular basis, an in-depth analysis of the changes in the third wave of litigation and legislative proceedings affecting tobacco are beyond the scope of this article. This article's discussion of the changing legal strategies and results is limited to a general analysis as applicable in a global context.

Global attitudes concerning tobacco are similar to the predominate American perspective, but less pervasive in the public recognition of tobacco's dangers and set within a broader spectrum of beliefs, behaviors, and knowledge. Health issues are the leading reason for concern,²⁴ due in large part to world events in the later part of this century.²⁵ Several factors contribute to increasing tobacco consumption: rising living standards, the globalization of economies, technological innovations, and modern advertising.²⁶ Predictably, tobacco consumption increased dramatically in recent decades.²⁷ International and domestic health organizations are leaders in the anti-tobacco war.²⁸

23. See Library of Congress, *Thomas Jefferson Congressional Information Web Site* (visited June 14, 1999) <<http://thomas.loc.gov/cgi-bin/query>> (listing 50 bills that have been introduced to the United States Senate and House of Representatives proposing tobacco regulation).

24. See THE GLOBAL BURDEN OF DISEASE (Christopher J.L. Murray & Alan D. Lopez eds. 1996) ("By 2020, tobacco is expected to kill more people than any single disease surpassing even the HIV epidemic." Figs. 3 (*DALYs [Disability-Adjusted Life Years] Attributable to Diarrhoea, HIV and Tobacco, 1990-2020*) & 4 (*By 2020, Tobacco is Expected to Cause More Premature Death and Disability than any Single Disease*)); RICHARD PETO ET AL., MORTALITY FROM SMOKING IN DEVELOPED COUNTRIES 1950-2000 (1994); WHO, *Answers to Some Commonly Asked Questions About Tobacco* (visited Mar. 22, 1999) <<http://www.who.int/psa/toh/Alert/jul96/E/6.htm>> [hereinafter *Tobacco Questions*].

The World Health Organization estimates that . . . [o]n current evidence, lifelong smokers, on average, have a 1 in 2 chance of dying from tobacco. And half of these, or 1 in 4 of all smokers, will die in middle age, before age seventy. Smokers who die will lose, on average, about 22 years off their normal life expectancy.

Id. See also *China's Cigarette Production Down, Profits Up*, AGENCE FRANCE-PRESSE, Mar. 24, 1998, available in 1998 WL 2247296.

25. See generally PAN AMERICAN HEALTH ORGANIZATION, *INTERNATIONAL HEALTH: A NORTH-SOUTH DEBATE* (1992).

26. WHO, *Smoking Trends, in Tobacco and Health: The Facts* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/pres3.htm>>.

27. *Id.* (smoking in China increased by 20% from 1985 to 1992); WHO, *Tobacco Consumption* (visited Aug. Mar. 22, 1999) <<http://www.who.int/psa/toh/Alert/apr96/3.html>> (documenting the 260% increase in Chinese cigarette consumption from 1970-72 to 1990-92). See generally, Chip Jones, *Tobacco Growers Get Survival Strategy "Never Seen Situation So Serious,"* RICHMOND TIMES-DISPATCH, Mar. 7, 1998, at C1 (placing hopes on emerging markets such as Turkey and Vietnam).

28. See, e.g., organizations such as: Action on Smoking and Health, International Agency for Research on Cancer (IARC), International Union Against Cancer, International Union Against Tuberculosis and Lung Disease, Pan American Health Organization,

This article analyzes global tobacco issues within the context of non-governmental organizations (NGOs). Part II reviews the health aspects associated with tobacco. Part III examines public education and awareness in a global scope together with local, regional, and international efforts and resultant effects. Part IV addresses tobacco's effects upon children. Part V studies the matter of tobacco consumption as a vehicle for drug delivery within the scope of substance control. Part VI surveys the wide ranging economic issues that involve tobacco, including advertising, taxes, and workplace conditions. Part VII notes the call for an international framework for tobacco control and analyzes desirable subject matter for inclusion. Part VIII concludes with a summary of suggested actions to increase the effectiveness of the worldwide anti-tobacco struggle.

II. TOBACCO AND HEALTH

Although cigarettes are the most prevalent form of tobacco consumption, many other forms exist.²⁹ There are approximately 1.1 billion smokers worldwide, comprising about one third of the global population age fifteen and over.³⁰ Global estimates indicate 47% of men and 12% of women smoke.³¹ Many smokers begin at an early age (in many coun-

and WHO.

29. Different types of cigarettes include commercially manufactured (the most common), "roll-your-own," bidis (tobacco wrapped in a temburni leaf), and kreteks (cigarettes made with tobacco and cloves). Other means of smoking tobacco include cigars, pipes, water pipes. Types of smokeless tobacco include chewing tobacco (plug, loose-leaf, and twist), pan (betel quid, a combination of sliced betel (areca) nut, tobacco, lime, catechu, and assorted spices wrapped in a betel leaf), and snuff (nasal (dry) and oral (moist)). See generally CONTROL OF TOBACCO-RELATED CANCERS AND OTHER DISEASES: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM 13 (Parkash C. Gupta et al. eds., 1992); SURGEON GENERAL ET AL., U.S. DEPT. OF HEALTH & HUM. SERVS., SMOKING AND HEALTH IN THE AMERICAS (1992); IARC, *IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Habits Other than Smoking; Betel-Quid and Areca-Nut Chewing; and Some Related Nitrosamines*, 37 IARC (1985); IARC, *IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Smoking*, 38 IARC (1986).

30. WHO, *Smoking Prevalence* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/apr96/2.html>>.

31. *Id.* In developed countries, 42% of men and 24% of women smoke while in developing countries 48% of men and 7% of women smoke. Male smoking varies by region (less than 30% smoke in the African region while 60% do in the western Pacific region) and national economies (37% in established market economies compared to 60% in formerly socialist central and eastern Europe). Female smoking is most prevalent in formerly socialist central and eastern Europe (28%), countries with established market economies (23%), and Latin American and Caribbean nations (21%) while in all other regions the rate is below 10%. *Id.* WHO, *Table 2, Daily Smoking Prevalence, Men and Women Aged 15 and Over, Selected Regions, Early 1990s* (visited Mar. 22, 1999) <<http://www.who.int/toh/Alert/apr96/gifs/table2.gif>> ; WHO, *Table 3, Estimated Smoking Prevalence Among Men and Women 15 Years of Age and Over by Country, Latest Available Year* (visited Aug. Mar. 22, 1999) <<http://www.who.int/psa/toh/Alert/apr96/gifs/table3.gif>>. For

tries the median age of initiation is below age fifteen), thereby lowering the age when a smoker will suffer smoking-related diseases and death.³² As a result of nicotine addition, nicotine tolerance increases over time and causes smokers to increase their consumption to the extent they can afford.

Tobacco is known to cause undesirable health effects. Medical sources cataloged the effects over the last few decades.³³ Although the tobacco industry and some others still generally dispute the medical knowledge implicating tobacco,³⁴ the tide has changed since the early 1960s. The addictiveness of nicotine is a material factor in continued tobacco consumption.³⁵

Smoking in developing countries became widespread in recent years. Trends indicate an increasing daily consumption per smoker as

an in depth analysis of female tobacco consumption, see CLAIRE CHOLLAT-TRAQUET, WHO, WOMEN AND TOBACCO 9-29 (1992).

32. *Smoking Prevalence*, *supra* note 30. In France and Spain 40% of the population aged 18-24 smokes. Over half the men under age 35 in South Africa smoke. *Id.*

33. See TIERNY JR. ET AL., *supra* note 1; 1995 FDA Nicotine Report, *supra* note 4; IARC, WHO, CANCER: CAUSES, OCCURRENCE AND CONTROL 169-80 (L. Tomatis et al. eds., 1990); WHO, *The State of World Health*, in THE WORLD HEALTH REPORT 1997: CONQUERING SUFFERING, ENRICHING HUMANITY 1 (1997) [hereinafter WORLD HEALTH REPORT 1997] (describing the circulatory diseases: coronary heart disease, cerebrovascular disease, cardiomyopathies, and hypertension; and fatal cancers: lung, stomach, breast, colon-rectum, mouth, liver, cervix, and esophagus, which all share tobacco consumption as a major risk factor); CHOLLAT-TRAQUET, *supra* note 31, at 31-56 (detailing tobacco's effects on females). See also *supra* notes 1, 3-5 and accompanying texts; Deborah Josefson, *Passive Smoking Doubles Risk of Heart Disease*, 314 BRIT. MED. J. at 1572 (1997) (reporting on study by Dr. Ichiro Kawachi of the Harvard School of Public Health). In comparison, tobacco often competes with food as a necessary item for the poverty-stricken smoker in the developing world. The indirect danger this presents is dietary deficiencies that lowers the body's resistance to diseases. SIMON CHAPMAN & WONG W. LENG, TOBACCO CONTROL IN THE THIRD WORLD: A RESOURCE ATLAS 18 (1990) (further noting that a poor Bangladeshi smoking five cigarettes daily could incur a monthly 8,000 calorie deficit (citing N. Cohen, *Smoking, Health, and Survival: Prospects in Bangladesh*, THE LANCET 1090-03 (1981))). But see David Leff, *French Clone Human Hemoglobin in Tobacco to Avoid Contamination*, BIOWORLD TODAY, Mar. 6, 1997, available in LEXIS, News Library, Curnws File (reporting on *Human Hemoglobin from Transgenic Tobacco*, NATURE, Mar. 6, 1997); NIST *Bets on Transgenic Tobacco*, Mar. 2, 1998, POINTCAST (reporting on biopharmaceutical research to develop therapeutic peptides and proteins).

34. See Phillip Cole & Brad Rodu, *Would a Switch from Cigarettes to Smokeless Tobacco Benefit Public Health? Yes*, PRIORITIES FOR LONG LIFE & GOOD HEALTH, Winter 1995, at 24 (arguing the relative safety of switching tobacco products; "Smokeless Tobacco Is A Lifesaver."); John Schwartz, *Tobacco CEO Won't Make Cancer Link, Phillip Morris Chief Appears for First Time Before a Jury in Damages Case*, WASH. POST, Mar. 3, 1998, at A2.

35. 1995 FDA Nicotine Report, *supra* note 4, at 41, 463-520; NICOTINE ADDICTION 1988, *supra* note 4; TIERNY JR. ET AL., *supra* note 1, at 997; GLANTZ ET AL., *supra* note 2, at 58-107. See Schwartz, *supra* note 5; *Smoking: One Tough Addiction* (visited Feb. 27, 1998) <<http://www.abcnews.com/sections/living/smoking1217/index.html>>.

economic conditions improve worldwide.³⁶ Despite decreasing consumption in developed countries, the rapid increase in developing countries kept world consumption from decreasing.³⁷ While global cigarette consumption per adult remained steady through the early 1990s, global consumption increased as world population increased.³⁸

Increased tobacco consumption corresponds with burgeoning health effects on the world's population.³⁹ Costs are more than just individual health; they include environmental, quality of life, and economic costs.⁴⁰

36. *Smoking Prevalence*, *supra* note 30. See Robert Weissman, *Tobacco Legislation Should Restrict the Overseas Marketing of Cigarettes*, LEGAL TIMES, May 18, 1998, at 27.

37. WHO, *Figure 2, Trends in per Adult Cigarette Consumption in Developed and Developing Countries, 1970-92* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/apr96/gifs/fig2.gif>>; WHO, *Table 4, Global and Regional Estimates and Trends in Consumption of Cigarettes per Adult 15 years and over, 1970-72 to 1990-92* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/apr96/gifs/fig4.gif>>. In the early 1970s, cigarette consumption was highest in Canada, Switzerland, the United States, Australia, and the United Kingdom (in order of ranking and above 3,000 per capita). In the early 1990s, the cigarette consumption ranked highest in Poland, Greece (both above 3,500 per capita), Hungary, Japan, and the Republic of Korea (above 3,000 per capita). WHO, *Table 5, Estimated per Capita Consumption of Cigarettes per Adult 15 Years and over, Selected Countries, 1970-72 to 1990-92* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/apr96/gifs/table4.gif>>.

38. See *Tobacco Consumption*, *supra* note 27.

39. "Tobacco causes six per cent of all deaths in the world and the mortality toll is increasing rapidly. Tobacco causes more deaths than all other forms of substance abuse combined." WHO, *Tobacco or Health* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh.htm>>. "In another three decades, unless the trend changes drastically, we can expect about 10 million people to be killed each year by tobacco products, with 70% of these deaths occurring in developing countries." WHO, *Message from the Director-General of the World Health Organization for World No-Tobacco Day 1997* (visited Aug. 4, 1997) <<http://www.who.int/ntday97/ta1e.htm>>. "The biggest and sharpest increases in disease burden are expected in China and India, where the use of tobacco has grown most steeply. If current trends continue, two to three million annual tobacco-caused deaths are predicted for China alone by the 2020s." WHO, *Tobacco Use: A Public Health Disaster* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/4-96/E/ta3.htm>>. See generally Jane Moir, *Most Workers at Risk from Tobacco Smoke*, S. CHINA MORNING POST, Mar. 6, 1998, at 8 (noting 80% of the workforce is at risk from ETS in Hong Kong).

40. Deforestation and chemical use are some of the environmental costs of tobacco consumption. See *Acceptance Speech from President Nelson Mandela on Receiving the Tobacco or Health Commemorative Medal and Certificate* (visited Feb. 14, 1998) <<http://www.who.ch/psa/tajuly1.htm>> (detailing health, economic, and quality of life costs); *The Economic and Human Costs of Tobacco Use*, in WHO, *Costs of Tobacco Use* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/pres4.htm>>; *The Environmental Costs of Production in Panos; Tobacco: The Smoke Blows South* (visited Mar. 13, 1998) <<http://www.oneworld.org/panos/briefing/tobacco.htm>>. Employer costs are substantial. Employee excess illness costs (e.g., healthcare claims, workers' compensation, and other benefits) were the most costly factor, over twice that of obesity, the second most costly factor. Robert L. Bertera, *The Effects of Behavioral Risks on Absenteeism and Health-Care Costs in the Workplace*, 33 J. OCCUP. MED. 1119-24 (1991). See *Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary*, 105th Cong. (1998) (statement of William L. Roper) [hereinafter Roper]. A World Bank economist estimates that tobacco use results in a global net loss of \$200 billion per year, with developing coun-

While life expectancy lengthens, the risks of infectious diseases decrease and the likelihood of noncommunicable or chronic diseases increases.⁴¹ Chronic diseases remain incurable and the best solution, presently, is prevention. Associated with this situation is the “epidemiological transition”⁴² that occurs as the developing states become more developed. The improving world economic condition generally accelerates tobacco consumption (a detrimental lifestyle risk factor), the epidemiological transition, and the increasing burden of suffering and disease caused by tobacco. Fortunately, prevention or cessation of tobacco consumption are effective means of countering tobacco’s ill effects.⁴³

Strong arguments exist for minimizing tobacco consumption. A simple economic argument posits that despite the short-term economic gains from tobacco,⁴⁴ the insidious nature of tobacco addiction and its long-term costs far outweigh the industry’s economic value overall. In other words, if governments internalize the health care costs and lifetime productivity losses to offset tobacco benefits (e.g., jobs and revenues), the tobacco habit is a net drain on national economies overall.⁴⁵ A moral argument also exists for keeping adolescents from consuming tobacco or becoming industry targets.⁴⁶

International law supports a fundamental right to a healthy life,⁴⁷

tries suffering half the losses. Sources include direct medical care, work absenteeism, fire losses, reduced productivity, and lost income due to premature demise. WHO, *Working Towards Comprehensive Tobacco Control: A Shared Responsibility* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/4-96/E/ta5.htm>>.

41. WHO, *World Health Report, Chapter 2, The Double Burden: Emerging Epidemics and Persistent Problems*, (visited June 14, 1999) <<http://www.who.int/whr/1999/en/report.htm>>.

42. “Epidemiological transition” denotes the changing pattern of health, where *undeveloped* states gain the problems of developed states. This includes associated diseases of developed states and the harmful effects of risky lifestyle factors such as tobacco, alcohol, and drug use, along with accidents, suicide, and violence. WORLD HEALTH REPORT 1997, *supra* note 33. See THE GLOBAL BURDEN OF DISEASE, *supra* note 24, at 1, 31-39 (describing the changing causes of death in developing countries that represent 80% of the world’s population).

43. *The Benefits of Quitting Smoking* (visited June 14, 1999) <<http://www.who.int/toh/worldnotobacco99/english/Health.htm>>.

44. Such gains include jobs from farming, manufacturing, and sales, revenue from taxes and monopolies, and profits from a high margin manufacturing industry with a loyal customer base.

45. *The Causes and Consequences of a Lucrative but Dangerous Trade, in The Economic and Human Costs of Tobacco Use*, *supra* note 40 (consuming 1,000 tons of tobacco equates to a net drain of \$27.2 million to the world economy; world consumption was over 7 million tons in 1995). In the United States, private tobacco-related medical insurance costs are almost four times the aggregate amount spent by Medicare, Medicaid, and individuals. Roski & Jeddelloh, *supra* note 1, at 16, fig. 1 (citing U.S. DEP’T OF HEALTH & HUM. SERVS., THE ECONOMIC IMPLICATIONS OF SMOKING AND SMOKING CESSATION (1996)). In Minnesota, lost income is nearly 150% of healthcare costs. *Id.* at 16, fig. 2.

46. See *infra* Part IV. See also Weissman, *supra* note 36.

47. See, e.g., “Everyone has the right to life” Universal Declaration of Human

and indirectly supports anti-tobacco public health efforts.⁴⁸ States are obligated to protect their citizens' health, but, within the anti-tobacco arena, such protection is slow in coming, if it comes at all. Naturally, the state interest in its citizens' health should be balanced with personal choice. While promoting a legal and broadly accepted product, along with the individual right to consume tobacco, the tobacco industry generally prevented states from acting upon their legal obligations to protect and improve public health in this arena. Fortunately, the tide is turning against the industry due in large part to relentless efforts of NGOs.⁴⁹

The increasing predominance of global tobacco consumption causes mixed opinions. Some organizations, for example the World Health Organization (WHO) and the U.S. Department of Health and Human Services (HHS), are quite alarmed by the trends and projected statistics.⁵⁰ The WHO's Constitution obligates it to minimize tobacco's unhealthy influence.⁵¹ Although neutral in their stance, many governments implicitly condone the industry through their inaction. At the opposite end of the spectrum, the tobacco industry continues to zealously promote tobacco as a legal product. If one views the decades of medical re-

Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948). "States Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts. 12, 1, 993 U.N.T.S. 3, 8. "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable." European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, 92. The Right to Safe and Healthy Working Conditions; *id.* at art. 11. "1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good" Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156, 164, at art. 10. "Everyone shall have the right to live in a healthy environment" *Id.* at art. 11.

48. *Cf. supra*, note 47.

49. See *International Non-Governmental Coalition Against Tobacco* (visited June 14, 1999) <<http://www.uicc.ch/ingcat/english/info/position.declar01.htm>>; see also *Action on Smoking and Health Thailand* (visited June 14, 1999) <<http://www.ash.org.or.th/>>; *Campaign for Tobacco Free Kids* (visited June 14, 1999) <<http://www.tobaccofreekids.org/>>; *Counsel for a Tobacco-Free Ontario* (visited June 14, 1999) <<http://www.opc.on.ca/ctfo/>>; *Smoke Free OK* (visited June 14, 1999) <<http://www.smokefree.org.ok/>>.

50. *Tobacco or Health*, *supra* note 39 ("For most tobacco related illnesses, effective treatment is rarely possible. Only prevention of tobacco-related illness will be effective in slowing the progress of the pandemic of tobacco-caused death and illness."); E. Loren Buhle, Jr., *Smoking is Causing a Global Epidemic of Death* (visited Feb. 27, 1998) <http://cancer.med.upenn.edu/cancer_news/1994/smoke_epidemic.html>.

51. WORLD HEALTH ORGANIZATION CONSTITUTION, July 22, 1946, 14 U.N.T.S. 185 (1946) [hereinafter WHO CONSTITUTION]. "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being . . ." *Id.* at preamble. "The objective of the [WHO Constitution] . . . shall be the attainment by all peoples of the highest possible level of health." *Id.* at art. 1.

search and present statistical projections as credible, then a question arises. What, if anything, should be done about tobacco consumption and global public health? This article examines the possibilities from a global perspective viewed within the context of NGOs, while trying to find a balance between personal choice, public health, and a legal commodity.

III. PUBLIC EDUCATION AND AWARENESS

Cultural acceptance of tobacco is generally widespread and longstanding.⁵² Tobacco has been a legal product since its introduction from the New World in 1492. Thereafter, it gained popularity despite King James' 1604 admonition that "[s]moking is a custome lothesome to the Eye, hateful to the Nose, harmefull to the Braine, [and] dangerous to the Lungs . . ."⁵³ Popular culture normalized and glamorized smoking for most of this century,⁵⁴ and thereby reinforced the desirability of tobacco consumption. Often, tobacco consumption is presented as part of desirable lifestyle.⁵⁵ A cultural example that contrasts with American norms is the acceptance of *betel quid* chewing within Bangladeshi families while viewing smoking as a socially unacceptable habit.⁵⁶ Whatever the culture, a significant portion of the population views some form of tobacco consumption as acceptable. Despite cultural norms, people are commonly misinformed about risks associated with tobacco.⁵⁷

52. For an extensive overview, see Gene Borio, *Tobacco Timeline*, (visited Mar. 26, 1998) <<http://www.worldchat.com/public/geaston/history.html>>.

53. ROBERT K. HEIMANN, *TOBACCO AND AMERICANS* 250 (1960) (citing KING JAMES I, *A COUNTERBLASTE TO TOBACCO* (1604)).

54. For example, tobacco use is glamorized in movies (e.g., Humphry Bogart in *CASABLANCA* (Metro-Goldwyn-Mayer 1942)), television (e.g., Cigarette-Smoking Man in *The X-Files* (Twentieth Century Fox Film Corp.)), advertising (e.g., Joe Camel and the Marlboro man), and sports and arts sponsorships (see *infra* notes 201-03 and accompanying texts). See generally Sherryl Connelly, *Health Activists Fume About Movie Smoking*, *THE OREGONIAN*, July 26, 1998, at E4; Mark Henderson, *Rise of "New Lad" Boosts Smoking and Drinking*, *TIMES* (London), Mar. 26, 1998, at 14; Petersen, *supra* note 5 (noting cigar smoking morphed to become glamorous); Am. Lung Ass'n (ALA), *Thumbs Up! Thumbs Down!* (visited Mar. 2, 1998) <<http://www.lungusa.org/tutd/lastyear.html>> (panning and praising 1996 movies for their portrayals of tobacco).

55. In China, smoking is a social institution for many people. *Morning Edition: International Conference on Smoking* (Nat'l Pub. Radio broadcast, Aug. 27, 1997), Mark Henderson, *Rise of "New Lad" Boosts Smoking and Drinking*, *TIMES* (London), Mar. 26, 1998, at 14; Petersen, *supra* note 5 (noting cigar smoking morphed to become glamorous). Aug. 27, 1997). The Chinese public usually saw Mao Zedong and Deng Xiaoping with cigarettes. Ron Scherer, *Worldwide Trend: Tobacco Use Grows*, *CHRISTIAN SCI. MONITOR*, July 17, 1996, at 1.

56. See WHO, *Betel Quid Chewing Habit Amongst a Group of Bangladeshi Adolescents in East London, in Tobacco Alert July 1996* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/jul96/E/10.htm>>. "This habit is accepted as a traditional cultural feature of this community." *Id.*

57. See Anwar Fazal, *Foreword* to CHAPMAN & LENG, *supra* note 30, at i; Allyn L.

To alter a culture's perceptions, significant efforts must be made to educate and persuade the society to accept a "cultural redefinition of smoking."⁵⁸ Public education is the first step in this process.⁵⁹ The American government attempts to alter public opinion regarding tobacco consumption with various forms of public education⁶⁰ and, ultimately, laws.⁶¹ The United States, like most countries, tends to respond to its politic. Therefore, the social and political processes usually pull the government and its statutory framework rather than government pushing society. NGOs usually are the force that initially moves society in a different direction (e.g., mobilizing initial anti-tobacco efforts in the 1960s). Similar efforts occurred internationally, but NGOs lead the anti-tobacco crusade much more than various governments.⁶²

Public education efforts are helpful, but information alone rarely changes a smoker's actions. Often, when a smoker knows that the habit is detrimental, he or she continues anyway. Information by itself usually is insufficient to alter a smoker's behavior. Common reasons as to why the smoker began smoking in the first place are peer pressure and social acceptance of the act.⁶³ Equally important is the addictive nature

Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257, 266-67, n.49 (1996); *Butting Out*, in Int'l Dev. Res. Ctr. (IDRC), *IDRC: 25 Years of Science in Action - Media Review 1995-96* (visited Mar. 7, 1998) <<http://www.irdc.caa/media/erevue.html>> (describing widespread misconceptions regarding tobacco). "An amateur [Gambian] wrestler . . . urgently puffed on a cigarette just before his championship match. When asked why, he answered that 'cigarettes make me strong.'" *Id.*

58. See generally Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 69 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Several online sites offer extensive documentation on health and industry matters. See The Lib. & Ctr. for Knowledge Mgmt., Univ. Cal. San Francisco, *Tobacco Control Archives Collections* (visited Feb. 14, 1998) <<http://www.library.ucsf.edu/tobacco/tacoll.html>>; *The Tobacco Resolution* (visited May 25, 1998) <<http://www.tobaccoresolution.com>>; Univ. Ariz., *ETS Sites* (visited Feb. 14, 1998) <<http://www.ahsc.arizona.edu/aztepp/ets.html>> (cataloging environmental tobacco smoke information).

59. See, e.g., *N.J. Family Physicians Fight Youth Smoking Through 'Tar Wars'*, PR NEWSWIRE, Oct. 21, 1997, available in LEXIS, News Library, Curnws File (describing Tar Wars, "a pro-health tobacco education program . . . target[ing] fifth graders"). Philip Morris Inc. recently announced plans to air television ads to encourage children aged 10 to 14 years old not to smoke. *Philip Morris Plans Ads to Warn Youth on Smoking*, WASH. POST, Dec. 4, 1998, at A4.

60. For example, documenting medical research. See *supra* notes 1, 3 and accompanying text. Publishing information for public consumption on the internet. See, e.g. the CDC at <http://www.cdc.gov>, Federal Trade Comm'n (FTC) at <http://www.ftc.gov>, and HHS at <http://www.hhs.gov>.

61. See *supra* notes 7-12 and accompanying texts.

62. For example, events such as the 10th World Conference on Tobacco or Health (Aug. 24-28, 1997 in Beijing, China), publishing information on the internet (e.g., the WHO at <<http://www.who.org>>) and in books (SMOKING AND HEALTH IN THE AMERICAS, *supra* note 29).

63. A 1981 Phillip Morris document states: "There is no question but peer pressure is

of nicotine, a drug present in all tobacco.⁶⁴ The Australian "Will Frank win" campaign illustrates how addictive smoking can be and how a hard-hitting campaign can succeed.⁶⁵

Anti-tobacco programs utilizing peer pressure, social acceptance, and group support can be productive.⁶⁶ NGOs take a leading and vital role in sponsoring annual events to reinforce a tobacco-free lifestyle (e.g., the World No-Tobacco Day⁶⁷ and the Great American Smokeout⁶⁸). The events typically educate the public, explain medical effects of tobacco, encourage abstinence or cessation, and support both the user and nonuser.

The World No-Tobacco Day is an example of implementing the WHO's duty "to assist in developing an informed public opinion among

important in influencing the young not to begin smoking. A decade or more ago it was a major reason why teen-agers began to smoke. Now, it is a major reason for their not beginning to smoke." *Youth Smoking: Prevalence, Trends, Implications and Related Demographic Trends* (1981) (quoted in *Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary*, 105th Cong. (1998) (statement of Sen. Hatch)). See CHOLLAT-TRAQUET, *supra* note 31, at 57-70 (explaining reasons why females consume tobacco). Cf. *American Heart Association and Tobacco-Free Ohio Clear the Air About Women and Smoking; Ohio Research Scientist Knows Why Women Won't Quit and How to Help*, PR NEWSWIRE, Feb. 6, 1998, available in LEXIS, News Library, Curnws File (noting attitudinal differences between the sexes).

64. See *supra* note 34 and accompanying text; PREVENTING TOBACCO 1994, *supra* note 4, at 30-31 (noting nicotine is as addictive as cocaine or heroin); *infra* notes 129-43 and accompanying text.

65. See *Media Can be Important Allies in Tobacco Control*, in WHO, *Tobacco Control is Everybody's Business* (visited Aug. 4, 1997) <<http://www.who.org/programmes/psa/toh/Alert/4-96/E/ta6.htm>>. An Australian tobacco company staged a major promotional contest in 1981 to find a cowboy for a model in their cigarette ads. Tobacco control activists found a willing contestant in Frank who continued to smoke through a tracheostoma. Activists distributed posters with Frank's picture and the caption, "Will Frank win?" Despite extensive media coverage, Frank lost and the tobacco company suffered significant embarrassment. This helped lead to a later comprehensive Australian tobacco control legislation and a ban on promotional contests. *Id.* Innovative behavior modification promotions have a substantially better chance of success. See, e.g., Theresa Kirsch, *What A Shot*, THE OREGONIAN, Mar. 22, 1998, at T10 (quoting a Bahamian sign: "Please Do Not Drop Your Cigarette Butts On The Ground. The Fish Crawl Out At Night To Smoke Them And We Are Trying To Get Them To Quit", and noting the complete success).

66. E.g., Jacksonville Jaguars, *Foundation Program List and Description* (visited Mar. 3, 1998) <http://www.jaguarsnfl.com/jag_web/found/programs.htm> (listing aspects of the Nat'l Football League team's program to educate youth about the health risks of tobacco use); National Spit Tobacco Education Program's Major League Baseball Initiative, in Robert Wood Johnson Found., *Media Resource Guide on Tobacco* (visited Feb. 14, 1998) <<http://www.rwjf.org/media/tbcgde5.htm>>.

67. See WHO, *World No-Tobacco Day 1997* (visited Feb. 14, 1998) <<http://www.who.cha/psa/psa3.htm>> (introducing World No-Tobacco Day, May 31, 1997).

68. See ACS, *Great American Smokeout* (visited Mar. 22, 1999) <<http://www.cancer.org/gasp/main.html>>.

all peoples on matters of health.⁶⁹ Its manner of presentation is notably adult and addressed to a reasonable, intelligent person with a tone that is educational, strategic, and somewhat evangelical. This is the public front in the WHO's war against tobacco.⁷⁰ The WHO's web site offers anti-tobacco strategies; persuasive explanations on the extent of the "public health disaster"; a reasoned explanation detailing the comprehensive necessity and responsibility for tobacco control; collaboration tips to be used on local, national, and international levels; warnings to targeted demographic groups (e.g., women); and contacts for further action and guidance.⁷¹ The internet is an ideal medium for worldwide dissemination on an inexpensive and timely basis and as a supplement to traditional printed materials. WHO coordination with local and national NGOs creates synergy in the anti-tobacco struggle.

Over the last two decades, the Great American Smokeout evolved into a professional, positive, and engaging event. Although targeted at all smokers (most of whom are adults), the 1997 Smokeout focused on teens who compose 90% of all new smokers in the United States.⁷² Closely associated with the Smokeout is the Great American Smoke-Scream, a week-long precursor to the Smokeout, with radio, television, and newspaper affiliations.⁷³ The Smokeout's web page is slick, interactive, and geared to teens and preteens, potentially the most likely individuals to start smoking.⁷⁴ Plentiful graphics, questions and answers, and role models make the site entertaining and educational. The medium itself, a web page, is naturally familiar with today's youth. Closely allied with the Smokeout is the Campaign For Tobacco-Free Kids.⁷⁵

When properly promoted, annual events benefit from public recognition and acceptance. For example, most Americans (including smokers) positively associate the Smokeout with anti-tobacco efforts. Suc-

69. WHO CONSTITUTION, *supra* note 51, at art. 2(r).

70. The theme, "United for a Tobacco-Free World," indicates the struggle's extent. WHO, *Message from the Director-General of the World Health Organization for the World No-Tobacco Day 1997* (visited March 22, 1999) <<http://www.who.int/ntday/ntday97/tale.htm>>.

71. WHO, *Tobacco Control is Everybody's Business*, *supra* note 65.

72. Tristanne L. Walliser, *The Great American Smokeout: No Ifs, Ands or Butts* (visited Dec. 24, 1997) <<http://www.more.abcnews.go.com/sections/living/smokeout1120/index.html>>.

73. ACS, *Great American Smokeout: SmokeScream* (visited Mar. 22, 1999) <<http://www.cancer.org/smokeout/scream.html>>.

74. *Id.*

75. "The Campaign For Tobacco-Free Kids is the largest private initiative ever undertaken to decrease youth tobacco use in the United States." *The Dirt*, *supra* note 6. Notable Campaign members include the American Academy of Pediatrics, American Cancer Society, American Heart Association, American Lung Association, American Medical Association, National Association Elementary School Principals, National Association Secondary Principals, and National Parent Teacher Association. *Id.*

cessful events like the Smokeout tend to further the event and the sponsoring NGOs goals with the NGO prospering as a result. Such events serve as bully pulpits for the promoters while presenting targeted messages. The anti-tobacco messages probably are received best when differing messages target specific groups, such as smoking cessation messages to smokers and both educational and how to organize messages for nonsmokers. Typically, such anti-tobacco advertising must be unique to capture a potential or actual smoker's attention and get the message absorbed.⁷⁶ Anti-tobacco organizations posit that it is easier to keep a potential smoker from smoking than to get a smoker to quit.⁷⁷

IV. TOBACCO'S EFFECT UPON CHILDREN

A. Influences Upon the Child

Nearly all tobacco consumers began as children.⁷⁸ Children are particularly susceptible to tobacco, both physiologically and psychologically.⁷⁹ One strategy to counter youth smoking is to promote smoking cessation programs for the benefit of both smokers and nonsmokers. Parents who smoke have a profound influence upon their children.⁸⁰ Their behavior normalizes smoking and is the dominant reason that those children are likely to also smoke.⁸¹ Although it is critical to encourage underage potential smokers to avoid the addictive habit, it is just as important to assist the present tobacco consumer, youth or adult.⁸² Tobacco consumers who begin at a younger age generally con-

76. *Morning Edition: Anti-Smoking Ads* (Nat'l Pub. Radio radio broadcast, Aug. 27, 1997) (describing a Florida ad campaign after the state settled its suit with the tobacco industry). An example was the "Cow Fart" television ad for the preteen and young teen audience. "[W]e [took] a very unparental attitude in our advertising. In other words, the last thing you want to do is lecture this particular group. So, the idea was to make smoking as gross and unhip as possible." *Id.* The ad ran on MTV and emphasized the commonality between smoking and cows' poisonous methane gas. *Id.*

77. *Id.* See generally C. Everett Koop, *Don't Forget the Smokers*, WASH. POST, Mar. 8, 1998, at C7 (arguing for a holistic approach against tobacco that prevents adolescents from beginning the habit and assists current users to quit).

78. "Almost 90 percent of adult smokers report beginning their use at or before age 18, and more than half became daily smokers before that age." Roper, *supra* note 40. "Nicotine addiction begins when most tobacco users are teenagers, so let's call [smoking] what it really is: a pediatric disease." 141 CONG. REC. S5915 (daily ed. May 1, 1995) (statement of Sen. Simon) (quoting FDA Commissioner David A. Kessler).

79. Glenda Cooper, *Teenage Girl Smokers Risk Eating Disorders*, THE INDEP., Aug. 4, 1998, at 5 (noting the connection between smoking as a diet tool and the likelihood of eating disorders such as bulimia).

80. See Roper, *supra* note 40.

81. *Youth Smoking Prevention: Hearings on S.1530 Before the Senate Comm. on Judiciary, 105th Cong. (1998)* (statement of Michael C. Fiore).

82. Koop, *supra* note 77.

sume larger quantities, have an increased risk of death from a tobacco-related illnesses, and suffer the onset of such illnesses at a younger age.⁸³ Tobacco has life-long detrimental effects: in neonatal conditions, passively, and as a growing child.⁸⁴ Cognizant of this, the international community offers support.⁸⁵

Youths are particularly susceptible to the slick advertising⁸⁶ of the tobacco companies.⁸⁷ The pervasiveness and magnitude of tobacco ad-

83. PREVENTING TOBACCO 1994, *supra* note 4, at 29-30; WHO, *Smoking Prevalence*, *supra* note 30. See UNICEF, *Finland's 15 year-olds Smoke Most* (visited Mar. 22, 1999) <<http://www.unicef.org/pon96/inSmoke.htm>> (noting about 12% of 15-year-olds smoke daily).

84. TIERNY JR. ET AL., *supra* note 1; American Lung Association, *Tobacco Control General Smoking Information: Secondhand Smoke and Your Family* (visited Mar. 22, 1999) <<http://www.lungusa.org>>. See Roper, *supra* note 40; *Tobacco Issues: Hearings on S.1415 Before the Senate Comm. on Commerce, Sci. & Transp.*, 105th Cong. (1998) (statement of Sen. Chafee).

85. See U.N. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, art 24, at 1465-66 (urging cooperation with U.N. efforts to minimize children's adverse health effects).

86. A report prepared for the Brown & Williamson tobacco company described an advertising approach to employ:

Thus, an attempt to reach young smokers, starters, should be based . . . on the following major parameters: [1] Present the cigarette as one of a few initiations into the adult world. [2] Present the cigarette as part of the illicit pleasure category of products and activities. [3] In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process. [4] To the best of your ability (considering some legal constraints), relate the cigarette to "pot", wine, beer, sex, etc.. [5] DON'T communicate health or health-related points.

Ted Bates & Co., Inc., *What Have We Learned From People? A Conceptual Summarization of 18 Focus Group Interviews on the Subject of Smoking* (May 26, 1975) (quoted in FTC, *Staff Report on the Cigarette Advertising Investigation*, reprinted in *Comprehensive Smoking Education Act: Appendix to Hearings Before the Subcomm. on Health and the Env't of the Comm. on Energy and Commerce House of Representatives*, 97th Cong., 2d Sess. 261-64 (1982)) (citing a Brown & Williamson document describing an advertising strategy for Viceroy cigarettes). Cf. John Schwartz, *Documents Indicate Strategy of Targeting Teen Smokers Brown & Williamson Papers Date to 1972, Offer Detailed Descriptions of Marketing Efforts*, WASH. POST, Feb. 5, 1998, at A3.

87. See *In re R.J. Reynolds Tobacco Co.*, No. 9285, 1997 FTC LEXIS 118 (FTC May 28, 1997) (alleging that Reynolds knew, or should have known, its efforts to reposition the Camel brand would heighten the brand's attractiveness to underage smokers and thereby result in unfair trade practices). "In fact, after the initiation of the Joe Camel campaign, the percentage of smokers under the age of 18 who smoked Camel cigarettes became larger than the percentage of all adult smokers aged 18 and older who smoked Camel cigarettes." *Id.* at *2; Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538 (1995) (concluding that tobacco marketing is a stronger influence in nonsmoking adolescents beginning to smoke than exposure to peer or family smokers or sociodemographic variables); Marlene Cemons, *Study Finds Sharp Rise in Teenage Tobacco Use Health: One-Third Increase Overall Since 1991 Was Even Worse Among African Americans, Federal Report Says*, L.A. TIMES, Apr. 3, 1998, at A1; Barry Meier, *Files of Reynolds Tobacco Show Effort*

vertising is apparent when one learns that cigarette companies spend \$16 million per day or \$6 billion per year.⁸⁸ Anti-tobacco forces (typically NGOs) have nothing near the financial resources that the large transnational tobacco corporations (TTCs)⁸⁹ do. However the 1968-69, free counter-advertising under the American fairness doctrine⁹⁰ proved effective against tobacco ads.⁹¹ The concept of counter-advertising is utilized today, albeit on a significantly smaller scale.⁹² Counter-advertising clearly lessens tobacco consumption and, therefore, should be implemented on a global, national, and local basis.

Some commentators present a moral argument for tobacco regulation upon the tobacco consumer's status as a minor when first beginning to smoke or otherwise use tobacco.⁹³ President Bill Clinton presents such an example.⁹⁴ Even the tobacco industry tries to avoid an

on the Young, N.Y. TIMES, Jan. 15, 1998 at A12; *U.S. Cigar Makers Urged Not to "Glamorize" Smoking*, AAP NEWSFEED, Mar. 4, 1998, available in LEXIS, News Library, Curnws File (request by House Commerce Health & Env't Subcomm. chairman for cigar companies pledge not to engage in product placements in film or television); Henry Weinstein, *R.J. Reynolds Targeted Kids, Records Show*, L.A. TIMES, Jan. 15, 1998, at A1. *But see Philip Morris Plans Ads to Warn Youth on Smoking*, *supra* note 59.

88. ACS, *Great American Smokeout: FAQ* (visited Mar. 16, 1999) <<http://www.cancer.org/smokeout/faq.html>>. Cf. Anna Dolgov, *Western Tobacco Firms Packing Russia Market Heavy Consumption, Low Taxes Make up for Lost Revenue*, SAN ANTONIO EXPRESS-NEWS, Mar. 1, 1998, at 3J.

89. *E.g.*, TTCs include the American companies (Phillip Morris, R.J. Reynolds, and American Brands) and British companies (British American Tobacco (BAT) parent of American Brands and Rothmans (a British/South American joint venture)).

90. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (upholding the fairness doctrine); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (1989), *cert. denied*, 493 U.S. 1019 (1990) (upholding the abandonment of the fairness doctrine).

91. 132 CONG. REC. S16,862, S16,866-67 (July 17, 1986) (statement of Sen. Kennedy).

92. *See Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary*, 105th Cong. (1998) (statement of Gregory N. Connolly, Dir. of Mass. Tobacco Control Program, Mass. Dep't. of Pub. Health, and statement of Sen. Hatch); Bob Edwards & Debbie Elliot, *Morning Edition, Teen Smoking, Part II* (Nat'l Pub. Radio broadcast, June 16, 1998) (reporting on the Am. Lung Ass'n Campaign "Teens Against Tobacco Use" and Florida's "Truth Campaign"); Dan Morain, *State Unveils TV Ads Against Cigars Health: Campaign Says that the Fad is "the Big New Trend in Cancer" and Says that Smoking One Stogie Has as Much Nicotine as 70 Cigarettes*, L.A. TIMES, Mar. 31, 1998, at A3 (describing California's anti-tobacco ads). *E.g.*, *Grafeeties, Grafeeties, the Original Bumper Stickers for Shoes* (visited Feb. 14, 1998) <<http://www.grafeeties.com/tobacco.htm>> (illustrating commercial products); WHO, *supra* notes 60, 61 (regarding World No-Tobacco Day); American Cancer Society, *supra* note 68 (regarding Great American Smokeout).

93. *See Robert L. Rabin, Some Thoughts on Smoking Regulation*, 43 STAN. L. REV. 475, 481 (1991) (reviewing ROBERT E. GOODIN, *NO SMOKING: THE ETHICAL ISSUES* (1989)) (supporting government regulation since nearly all smokers choose to smoke as teens, the state views minors "as incapable of exercising full autonomy of choice" and, therefore, government regulation is not paternalistic).

94. *See generally* William J. Clinton, *Remarks by President Clinton on Tobacco Legislation and America's Youth, Remarks at the Rose Garden*, FED. NEWS SERV., Apr. 20, 1998, available in LEXIS, Exec. Library, Fednew File; Rick Weiss, *Clinton Pushes for*

image of targeting youths as customers.⁹⁵

There is close to universal agreement that children should not consume tobacco or be targeted as (potential) customers. Conversely, most smokers begin as teens.⁹⁶ Despite industry denials that it targets underage people, its advertising appeals significantly to "future" smokers.⁹⁷ This dichotomy between (a) the consequential, yet allegedly unintentional, acquisition of and alarming statistics concerning replacement smokers and (b) a hands-off attitude towards teens as potential tobacco consumers indicates an unresolved dilemma. A simplistic and one-sided response would be to severely limit or prohibit advertising, yet such a concept is close to a pipe dream under some legal systems. Tobacco is a legal product, the industry is very powerful and capable, and advertising is generally accepted in the world's cultures. Naturally, there are legal issues involved too. The issue of advertising is later examined in more detail in Part VI. For now, the dichotomy between children and "unintended" advertising effects is noted along with the greater susceptibility of adolescents.

B. Support from International Law

International law adds support to state efforts to regulate tobacco and prevent children's access to it.⁹⁸ There is a substantial worldwide

Anti-Smoking Bills in Congress, WASH. POST, Mar. 8, 1998, at A2.

95. David Phelps, *R.J. Reynolds Chief Denies Marketing to Kids*, STAR TRIB., Mar. 6, 1998, at 1B. See generally 61 Fed. Reg. 44,396 (1996) (summarizing pro-tobacco industry arguments). But see Doug Campbell, *Lorillard Documents Revealing Documents Discuss Nicotine Levels and Marketing to Teens*, NEWS & REC. (Greensboro, N.C.), June 28, 1998, at A1; Kathleen J. Lester, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry's Commodification of Childhood Protected by the First Amendment?*, 24 N. KY. L. REV. 615, 628-31 (1997); John Mintz & Sandra Torry, *Internal R.J. Reynolds Documents Detail Cigarette Marketing Aimed at Children*, WASH. POST, Jan. 15, 1998, at A1; Schwartz, *supra* note 34; John Schwartz, *Tobacco Firms Must Reveal Documents*, WASH. POST, Mar. 8, 1998, at A2 (referring to a report describing the smoking habits of children, as young as age five, that allegedly is protected by the confidentiality of the attorney-client relationship).

96. *American Academy of Pediatrics Analysis: First Cigarette in Grade 6 or Below Not Uncommon*, Oct. 1, 1997, POINTCAST (reporting approximately 30% of high-school seniors first smoked in the sixth grade or below).

97. See Center for Disease Control and Prevention (CDCP), *Trends in Smoking Initiation Among Adolescents and Young Adults-United States, 1980-1989*, 274 JAMA 528, 529 (1995) (noting the influence advertising has on adolescents who generally smoke the most heavily advertised brands); Evans et al., *supra* note 87 (noting the increasing prevalence promotional activities rather than just advertising); *43% of Teens Smoke or Chew Tobacco*, CINCINNATI POST, Apr. 2, 1998, at 1A (reporting on a CDCP study noting substantial increases in tobacco consumption over the last two years). E.g., Joe Camel, a cartoon character particularly appealing to adolescents.

98. See U.N. Convention on the Rights of the Child, *supra* note 85, at art. 24(1) ("States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health . . ."); *Protect all Children from Tobacco*, Says UNICEF, UNICEF, at

consensus regarding a child's fundamental rights, as stated in the Convention on the Rights of the Child (the Convention).⁹⁹ The United States, however, is not yet a party to the Convention, although it became a signatory on February 16, 1995.¹⁰⁰

Arguably, the Convention has the force of customary law¹⁰¹ as a result of its rapid and near universal acceptance¹⁰² and worldwide compliance due to of a sense of legal obligation.¹⁰³ The unprecedented acceptance of the Convention in such a short time by nearly all states indicates, at least, the creation of "soft law" by the parties. The Convention is "intended for adherence by states generally and [is] in fact widely accepted."¹⁰⁴ A sampling of the Convention's subjects indicates compliance by states from a legal sense of obligation (e.g., a definition of a child;¹⁰⁵ protection from narcotic drugs,¹⁰⁶ pornography,¹⁰⁷ abduction

1, U.N. Doc. CF/DOC/PR/1977/32 (1998) [hereinafter UNICEF, *Protect All Children*].

99. The Convention has been ratified by 188 parties U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1996 at 203, U.N. Doc. ST/LEG/SER.E/15, U.N. Sales No. E.97.V.5 (1997) [hereinafter MULTILATERAL TREATIES]. "UNICEF's role in advocating curbs on tobacco grows out of the 1989 U.N. Convention on the Rights of the Child, which obligates governments to safeguard the health of infants and children; protect children from drugs and exploitation; and promote health education." UNICEF, *Protect All Children*, *supra* note 98, at 3.

100. See MULTILATERAL TREATIES, *supra* note 99. By becoming a signatory long after the Convention became effective, the United States exhibits a creeping acquiescence that partly indicates a U.S. state practice. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2), cmt. b [hereinafter RESTATEMENT (THIRD)].

101. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD), *supra* note 100, §102(2). See ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

102. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." RESTATEMENT (THIRD), *supra* note 100, §102(3). "[T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law." *Id.* §102 n.2 (quoting the North Sea Continental Shelf, 1969 I.C.J. 3, 44). U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1990 AT 191, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991) (ratified by 62 parties); U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES, *supra* note 99 at 187, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993) (ratified by 127 parties). Although this is not a case of "instant customary law," the Convention was very widely accepted for adherence by states generally.

103. *Opinio juris* may be inferred from states' acts indicating compliance inferring a sense of legal obligation. RESTATEMENT (THIRD), *supra* note 100, §102, cmt. c.

104. A practice can be generally accepted even if it is not universally followed; no precise formula indicates the required breadth of practice, "but it should reflect wide acceptance among the states particularly involved in the relevant activity." *Id.* §102, cmt. b.

105. U.N. Convention on the Rights of the Child, *supra* note 85, at art. 1.

106. *Id.* at art. 33.

107. *Id.* at art. 34.

and trafficking of children;¹⁰⁸ and torture¹⁰⁹). One cannot reasonably argue that "a significant number of important states" did not adopt the majority of practices (herein discussed) detailed in the Convention to prevent the Convention from becoming "general customary law."¹¹⁰ Therefore, the Convention is at least soft law and arguably has the force of customary law (excepting the controversial articles) and, in turn, is binding on states that have not yet ratified the Convention.

The Convention on the Rights of the Child offers a broad scope of protection for the world's children. The Convention states that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."¹¹¹ Although tobacco takes decades to kill, it detrimentally affects a child's growth and development and, in turn, indirectly impacts a child's "inherent right to life."¹¹² States possess a mandatory obligation to "ensure to the maximum extent possible the survival and development of the child."¹¹³ Therefore, being cognizant that tobacco imparts harmful health effects on both children and the unborn, governments have an obligation to neutralize, or at least minimize, tobacco's negative effects upon children. In particular, states possess an affirmative duty to prevent children from consuming tobacco directly or its byproducts indirectly.¹¹⁴ This can be done by a full spectrum of regulatory means.¹¹⁵

Article 13 of the Convention concerns the child's freedom of expression and receiving "information and ideas of all kinds,"¹¹⁶ including commercial speech regarding legal products. The tobacco industry has always claimed a right to advertise its products to the fullest extent possible. If one state prohibits any television ads for tobacco products, the industry complies in only that state, unless similarly required by other states. The difference between states is their legal systems (the process), not the resultant harm that affects the children and popula-

108. *Id.* at art. 35.

109. *Id.* at art. 37.

110. RESTATEMENT (THIRD), *supra* note 100, §102 cmt. b. Notwithstanding some controversial Convention topics (*e.g.*, the minimum age for participation in armed combat or freedom of religion), the topics discussed in Articles 3, 6, 13, and 17 are generally accepted by states. See Cynthia P. Cohen, Introductory Note, in Convention of the Rights of the Child, *supra* note 85, at 1450.

111. U.N. Convention of the Rights of the Child, *supra* note 85, at art. 3(1).

112. *Id.* at art. 6(1).

113. *Id.* at art. 6(2).

114. For example, from the mother in a neonatal condition or through environmental tobacco smoke (ETS).

115. For example, prohibiting sales to minors and limiting advertising.

116. "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." U.N. Convention of the Rights of the Child, *supra* note 85, at art. 13(1).

tion in general.

Some states have touted tobacco's benefits in the past and, arguably, some justification may exist for advertising tobacco.¹¹⁷ However, medical evidence clearly overcomes such perceived benefits. In light of the fact that minors are viewed "as incapable of exercising full autonomy of choice,"¹¹⁸ the concept of open and uninhibited information may be restricted when the child's best interests so require.¹¹⁹

A state may exercise its police powers to protect its interests and, therefore, has the power to regulate tobacco to protect its youth. Possible restrictions are limited by what is necessary (e.g., banning television ads for tobacco products at times children are likely to be viewing), statutory mandates, and protection of the public health or the rights of others, such as environmental tobacco smoke (ETS) exposure.¹²⁰ When states regulate tobacco to protect their children, the reasons proffered are for the children's protection, not compliance with international law or custom.¹²¹ Presently, international law and custom are not significant sources of protection in the struggle to control tobacco consumption. Despite the Convention's legal authority, it has not been, nor is it likely to be, applied as a mechanism to protect children from tobacco.

117. Smokers may rationalize the psychological and sociological benefits of their habit (qualities include relaxation and pleasure). In 1995, the Japanese Ministry of Health (MOH) reported that "tobacco has long been an item of personal preference [shikonhin], and at the present time, there are many smokers. Accordingly, some [committee members] would point out the mental and psychological benefits from smoking." KOSEISHO TABAKO KODO KEIKAKU KENTOKAI [MOH TOBACCO ACTION PLAN WORKING GROUP], KOSEISHO TABAKO KODO KEIKAKU KENTOKAI HOKOKUSHO [REPORT BY THE MOH TOBACCO ACTION PLAN WORKING GROUP] (Mar. 29, 1995), cited in Mark A. Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99, 105 n.132 (1997). Japan is noted for its cooperation with and lack of confrontation towards its tobacco industry, a former state-run monopoly with continuing substantial government ownership. *Id.* at 99-102.

118. Rabin, *supra* note 93. "Children tend to imitate other children and they often lack the ability to foresee and avoid dangers. . . . [M]any children do not comprehend the nature of the risk or seriousness of nicotine addiction or the other dangerous health effects of smoking." FTC Commissioner Roscoe B. Starek, III, *The ABCs at the FTC: Marketing and Advertising to Children*, at *6 (1997), available in 1997 WL 441740 (addressing the Minnesota Institute of Legal Education).

119. U.N. Convention of the Rights of the Child, *supra* note 85, at art. 13(2).

120. *Id.* See Ed Rivera, *Texas in Forefront of Teen Tobacco Battle*, DALLAS MORNING NEWS, Mar. 3, 1998, at 9A (reporting the passage of Senate Bill 55, "one of the strongest and most comprehensive tobacco control packages in the country"). Senate Bill 55 becomes effective in 1998. It prohibits minors from purchasing, consuming, or possessing tobacco products except in the presence of a parent or guardian. Violations can result in fines up to \$250, community service, attendance of a tobacco education class by the minor and his/her parents, or suspension of the minor's drivers license. Senate Bill 55 prohibits outdoor advertising of tobacco products within 1,000 feet of a church or school. Identification is required of purchasers who appear younger than age 27. Self-service sales such as vending machines are generally restricted to locations closed to minors. *Id.*

121. *Id.*

Because states implement diverse laws and consistently uniform standards are necessary for effective global tobacco control, global standards should be determined to implement authorized protections under Article 13. Within the scope of tobacco control, the Convention authorizes and obligates states individually, and supports the idea of a framework convention for tobacco control. A framework convention for tobacco control would be instrumental in implementing global standards. With uniform standards, present generally unaccepted practices that appear in minimally regulated countries could be avoided.¹²² Although the legal authority exists, global implementation has yet to occur. A global will to regulate tobacco is evident; changing public opinion along with regulatory and legal changes indicate tobacco's zenith has passed, despite the industry's recent profitable successes.¹²³ The world is nearly ready to commit to a framework protection, and the WHO is the appropriate NGO to lead the effort for a framework convention because of its expertise and stature in the field of tobacco control.¹²⁴

Anti-tobacco public education, peer support, and advertising can lessen the rate of adolescent tobacco consumption. NGO programs and events are the most common, and probably successful, means of influencing youths.¹²⁵ The success experienced by model NGO programs indicate that all NGOs should join efforts with the media to promote the well-being and health of children as envisioned by the Convention.¹²⁶

Government regulatory measures are vital in an anti-tobacco effort as a means of setting minimum levels of behavior (e.g., sales and advertising restrictions) but are generally incapable of leading the cause.¹²⁷ NGOs are best suited to alter public opinion and spearhead the battle against the tobacco industry on local, national, regional, and global levels. NGOs can, do, and should lead governments and the public to raise the regulatory constraints on the tobacco industry. While NGOs can pull tobacco control, they are incapable of pushing it. The converse is true for governments; they often push the issue by legislative and regulatory means, but seldom are able to pull it.¹²⁸ As leaders in the anti-tobacco cause, NGOs increase awareness, educate, and help to focus public opinion. Examples of NGOs doing this are the American Cancer

122. For example, free samples to and targeted marketing of youths. See Dolgov, *supra* note 88.

123. For example, the U.S. legal and regulatory environment radically changed during the 1990s

124. See *World Health Organization Home Page*, (visited June 15, 1999) <<http://www.who.int>>.

125. See generally *supra* notes 62-97 and accompanying text.

126. Convention of the Rights of the Child, *supra* note 85, at art. 17.

127. See *World Health Organization Home Page* (visited June 15, 1999) <<http://www.who.int>>.

128. A notable exception is the 1964 U.S. Surgeon General's report that changed the smoking paradigm. See 1964 REPORT, *supra* note 3.

Society and the WHO. NGOs are essential partners in combating under-age tobacco consumption. The time is ripe for NGOs to lead a tripartite coalition of NGOs, state governments, and the public, to implement an international framework convention on tobacco control that includes regulative mechanisms to protect children from tobacco.

V. SUBSTANCE CONTROL

A. Medical Basis

Medical research has documented nicotine's effect upon the body and its psychoactive characteristics.¹²⁹ The WHO's Programme on Substance Abuse (PSA) expressly addresses tobacco as a psychoactive substance.¹³⁰ The PSA's mandate is reflected in its mission statement "to promote health for all by preventing and reducing the adverse consequences of . . . tobacco . . . use."¹³¹ The Tobacco or Health (TOH) project, an ongoing PSA program, gained significant visibility with its annual "World No-Tobacco Day."¹³² This event is an exemplary means of promoting an international anti-tobacco effort. With its global recognition and reputation, the WHO (with the PSA) is the proper international NGO to preach the anti-tobacco gospel.

Nicotine's addictiveness¹³³ has been equated to that of cocaine and heroin.¹³⁴ Tobacco is not generally considered a psychotropic¹³⁵ substance by the medical or legal fields.¹³⁶ If one considers recent medical

129. "Nicotine is the most prevalent psychoactive drug [and] . . . is only second to alcohol as the most abused drug." *Community Outreach Health Information System (COHIS)*, Boston University Medical Center, *About Nicotine Addiction* (visited Mar. 19, 1998) <<http://bu.edu/cohis/smoking/upsmoke/aboutnic.htm>>. Psychoactive is defined as "possessing the ability to alter mood, behavior, cognitive process, or medical tension; usually applied to pharmacologic agents." *STEDMAN'S MEDICAL DICTIONARY* 1284 (William R. Hensyl et al. eds., 25th ed. 1990).

130. See WHO, *Programme on Substance Abuse: Factsheets: Trends in Substance Use and Associated Health Problems, Factsheet N.127* (visited Feb. 14, 1998) <<http://www.who.int/inffs/en/fact127.html>>.

131. The PSA mandate is "to: 1. prevent and reduce the negative health and social consequences of psycho-active substance use; 2. reduce the demand for non-medical use of psychoactive substances; and 3. assess psychoactive substances so as to advise the United Nations with regard to their regulatory control." *Id.*

132. See WHO, *supra* note 67.

133. See Susan H. Carchman, *Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?*, 51 *FOOD & DRUG L.J.* 85, 114-20 (1996); Michael L. Pianezza et al., *Nicotine Metabolism Defect Reduces Smoking*, 393 *NATURE* 750 (1998) (describing gene CYP2A6 and its relation to producing enzymes to consume nicotine).

134. See *PREVENTING TOBACCO* 1994, *supra* note 4, at 30-31.

135. Psychotropic is defined as "affecting the mind." *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 129, at 1288.

136. *But see* Arlene Levinson, *Smoker Vows To Pursue Religious Fight Against Cam-*

discoveries concerning nicotine and tobacco, an argument emerges to classify tobacco as a psychotropic substance. Nicotine is a unique drug with multiple characteristics that makes it difficult to classify in a single category.¹³⁷ It "exerts psychoactive (or mood-altering) effects on the brain that motivate repeated and compulsive use of the substance."¹³⁸ Nicotine has both sedating and stimulating effects upon brain activity.¹³⁹ The tobacco industry classified nicotine as "a narcotic, tranquilizer, or sedative"¹⁴⁰ and "a physiologically active . . . substance . . . [that] alters the state of the smoker by becoming a neurotransmitter and a stimulant."¹⁴¹ Medical research revealed that nicotine stimulates the release of both dopamine, a neurotransmitter, which stimulates the brain's pleasure receptors, and norepinephrine which increases alertness and energy.¹⁴² This process directly affects the tobacco consumer's cognitive functions.¹⁴³ Thus, tobacco use materially affects one's mind and body.

bridge Smoking Ban, Feb. 18, 1987, available in 1987 WL 3132747.

137. "At low blood levels nicotine stimulates all nicotinic receptors: in sympathetic and parasympathetic ganglia, in the adrenal medulla, in the CNS [central nervous system], and on skeletal muscle. At higher concentrations it blocks the same receptors." ELAINE N. MARIEB & ELAINE N. MARIEB MARSHAL SCHLAFFER, *THE NURSE, PHARMACOLOGY, AND DRUG THERAPY* 268 (1989).

138. David A. Kessler et al., *The Legal and Scientific Basis for FDA's Assertion of Jurisdiction over Cigarettes and Smokeless Tobacco*, 277 *JAMA* 405 (1997) (citing *SMOKELESS TOBACCO* 1986, *supra* note 4, at 182-83; *NICOTINE ADDICTION* 1988, *supra* note 4, at 7-8, 270, 334-35).

139. Kessler et al., *supra* note 138 (citing R. Norton et al., *Smoking, Nicotine Dose and the Lateralisation of Electrocortical Activity*, 108 *PSYCHOPHARMACOLOGY* 473-79 (1992); W.S. Pritchard, *Electroencephalographic Effects of Cigarette Smoking*, 104 *PSYCHOPHARMACOLOGY* 485-90 (1991)); Robert Langreth, *Kicking the Habit: Why Smokers Don't Quit; New Clues to How Nicotine Affects the Brain; Personality Traits May Predispose Some People to Addiction*, *WALL ST. J.*, May 5, 1997, at B1.

140. Kessler et al., *supra* note 138, at 407 (citing AL UDOW, *WHY PEOPLE START TO SMOKE* (1976), in 141 *CONG. REC.* H7646, H7663 (daily ed. July 25, 1995) (Udow was a Phillip Morris researcher)).

141. Kessler et al., *supra* note 138, at 407 (citing Phillip Morris Inc., Draft Report Regarding a Proposal for a "Safer" Cigarette Code-Named Table). See generally Elyse Tanouye, *Kicking the Habit: Why Smokers Don't Quit; New Clues to How Nicotine Affects the Brain; Antidepressant, Other Drugs Offer New Hope*, *WALL ST. J.*, May 5, 1997, at B1. "Nicotine is the best and most effective over-the-counter antidepressant available in the world." *Id.*

142. Gordon B. Lindsay & Jacquie Rainey, *Psychosocial and Pharmacologic Explanations of Nicotine's "Gateway Drug" Function*, 67 *J. SCH. HEALTH* 123 (1997); David N. Leff, *Why Day's First Cigarette is Best Nicotine Addiction Traced to Neurons Releasing Pleasure-Giving Dopamine*, *BIOWORLD TODAY*, Dec. 9, 1997, available in 1998 WL 14876468; Tanouye, *supra* note 141; *U.S. HHS: One Step Closer to Unraveling Nicotine's Addictive Properties*, *M2 PRESSWIRE*, Jan. 26, 1998, available in 1998 WL 5047105.

143. Langreth, *supra* note 139.

B. Argument for an International Legal Basis

The WHO has a duty to inform the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations if the WHO finds:

(a) that the substance has the capacity to produce

(i) (1) *a state of dependence, and*

(2) *central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor functions or thinking or behavior or perception or mood, or*

(ii) similar abuse and similar ill effects as a substance in Schedule I, II, III or IV,

(b) that there is that *the substance is being or is likely to be abused so as to constitute a public health and social problem* warranting the placing of the substance under international control.¹⁴⁴

Although tobacco is not abused in a manner similar to Schedule I-IV drugs (i.e., hallucinogenics, amphetamines, or barbiturates), it certainly would not be approved for over-the-counter use if it was introduced today. Tobacco consumption by underage and/or uninformed consumers can easily be construed as abuse, particularly when considering the medical effects. It resides in a gray zone between relatively harmless drugs and the inherently dangerous Schedule I-IV drugs. In comparison to Schedule I-IV substances, a tobacco consumer remains lucid while consuming tobacco and the direct medical effects persist for a relatively short time period. Tobacco is a dependence-creating substance that stimulates the central nervous system and one's cognitive functions, thoughts, behavior, perceptions, and/or moods. Therefore, tobacco meets the medical definition of a psychotropic¹⁴⁵ drug and the conditions stated in the Convention on Psychotropic Substances, article 2(4).¹⁴⁶ Hence, the WHO should classify tobacco as a psychotropic substance.

Cognizant of the subtle dangers and social acceptance of tobacco, the WHO would be reasonable in classifying tobacco as a Schedule V psychotropic substance. This would create a new category, Schedule V, to reflect the serious and insidious nature inherent in tobacco while rec-

144. Convention on Psychotropic Substances, Feb. 19, 1971, 1019 U.N.T.S. 175, 178 at art. 2(4) (emphasis added).

145. See STEADMAN'S MEDICAL DICTIONARY, *supra* note 135.

146. See Convention on Psychotropic Substances, *supra* note 144.

ognizing that tobacco poses a smaller risk than Schedule I-IV substances. A Schedule V substance would require less regulatory control than Schedule I-IV substances. Possible regulatory controls include limits on advertising, required labeling, vendor licensing, and mandatory reporting of production and sales.

If tobacco is classified as a psychotropic substance, the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances offers regulatory assistance.¹⁴⁷ Parties possess a duty to: protect minors,¹⁴⁸ monitor the import and export of psychotropic substances,¹⁴⁹ suppress illicit trafficking in free trade zones (e.g., duty-free areas),¹⁵⁰ and furnish the United Nations with text of applicable laws and regulations along with reported domestic cases of illicit trafficking.¹⁵¹ These affirmative obligations increase tobacco awareness and control. Increased attention to unlawful tobacco distribution would naturally help to regulate tobacco within a legal context by increasing containment.

Within the context of tobacco as a legal psychotropic substance, a reasonable compromise would be to license all tobacco vendors and require universal labeling¹⁵² standards for all tobacco products (e.g., using a plain and predominate manner to maximize consumers' awareness of tobacco's health risks).¹⁵³ These universal standards should utilize thresholds that may be raised by parties individually or in concert.¹⁵⁴ The WHO, with its Tobacco or Health program, is the proper NGO to promote this plan of action because of its credibility, leadership, and recognition. Although an international legal basis exists to control tobacco as a psychotropic drug, *arguendo*, it has not been, nor is likely to be in the near future, implemented towards this predictably controversial end. Similarly, the tobacco industry will steadfastly resist efforts to mandate warning and ingredient labeling.

147. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493 [hereinafter Convention Against Illicit Trafficking].

148. *Id.* at art. 3(5)(f).

149. *Id.* at art. 9(2)(c).

150. *Id.* at art. 18(1).

151. *Id.* at art. 20(1).

152. *E.g.*, Convention on Psychotropic Substances, *supra* note 144, at art. 10 (addressing warnings, labeling, and advertising); WHO CONSTITUTION, *supra* note 51, at art. 21(e) (possessing authority to regulate advertising and labeling).

153. ROB CUNNINGHAM, SMOKE & MIRRORS: THE CANADIAN TOBACCO WAR (1996) (describing "generic" warning labels).

154. Convention Against Illicit Trafficking, *supra* note 147, at art. 24.

VI. ECONOMIC ISSUES

A. *Economics*

The tobacco industry is an economic juggernaut. In today's world of global economic competition, it is rare to find an industry with such high profit margins.¹⁵⁵ Investors are naturally attracted to its profitability.¹⁵⁶

The tobacco industry has oligopolistic characteristics.¹⁵⁷ There is only a handful of tobacco product manufacturers while countless growers supply the TTCs. Utilizing their vertical integration, the TTCs earn substantial profits by adding value to the tobacco and marketing it.¹⁵⁸ The farmers do well to earn a modest living, partly because they only supply a commodity. Being oligopolistic allows the TTCs to exert significant influence over the tobacco industry.¹⁵⁹ Past industry behavior reveals how jealously the TTCs protect their interests, even to the public's detriment. In the past, only (some) governments have been able to confront the TTCs.¹⁶⁰

Despite modest earnings, farmers view tobacco favorably because it is one of the best paying cash crops and grows well in most environments, except the northern climates.¹⁶¹ In the past, tobacco has been

155. Tobacco products have one of the highest markups for manufactured goods. Of 36 sectors tracked in the G-7 countries, it has the highest markup in the United States, France, United Kingdom, second highest in Germany, and below average in Canada. Similar results occur in seven other European countries. Joaquim O. Martins et al., *Mark-up Ratios in Manufacturing Industries Estimates for 14 OECD Countries*, OECD Doc. OCDE/GD/(96)61 (1996). See Rekha Balu & Ernest Beck, *Tobacco: Sara Lee Corp. Kicks Tobacco*, WALL ST. J., Apr. 8, 1998, at B1 (reporting that although the Dutch Douwe Egberts Van Nelle Tobacco unit had annual sales of only \$300 million, it contributed 6% of Sara Lee's operating income from aggregate sales of \$19.73 billion).

156. *Tobacco Questions*, *supra* note 24. "A successful American stock market investor, with a strong interest in tobacco stocks, summed it up this way: 'I'll tell you why I like the cigarette business. It costs a penny to make, sell it for a dollar, it's addictive and there's fantastic brand loyalty.'" *Id.* Despite the current U.S. legal climate and their population's greater suffering from tobacco, Native American tribes are building cigarette production facilities as a job creation and investment strategy. Pam Belluck, *Tribe's Unlikely Business: Manufacturing Cigarettes*, THE OREGONIAN, Mar. 22, 1998, at A14.

157. U.N. CONF. ON TRADE & DEV., *MARKETING AND DISTRIBUTION OF TOBACCO*, at 2, U.N. Doc. TD/B/C.1/205, U.N. Sales No. E.78.II.D.14 (1978). While there are countless tobacco farmers, the large TTCs generally control the production of retail tobacco products. See generally *Farm Leader Lobbies for Tobacco Program*, KY. J. COM. & INDUS., Oct. 2, 1997 (visited Mar. 8, 1998) <http://www.aik.org/kj_10297j.html>.

158. See *Convention Against Illicit Trafficking*, *supra* note 147.

159. See CHAPMAN & LENG, *supra* note 33, at 44; Chip Jones, *Brazil's Expansion Worries Va. Growers; Its Leaf Costs Half of American Grown*, RICHMOND TIMES DISPATCH, June 29, 1998, at A1 (describing globalization effects on tobacco producers).

160. See *Convention Against Illicit Trafficking* *supra* note 147.

161. See CHAPMAN & LENG, *supra* note 33, at 27-29 (noting the economic infrastruc-

viewed as a source for economic growth.¹⁶² Today, governments and NGOs generally take a neutral or negative view on tobacco's economic contributions.¹⁶³ There is a dark side to tobacco's economic character, namely its costs to society. The World Bank estimated that the net global cost of tobacco to the world economy is over \$200 billion per year.¹⁶⁴ As a result, World Bank policy now discourages the use of tobacco products and grants no new loans for tobacco production, processing, or marketing.¹⁶⁵ On a more human scale, tobacco is faulted by some because acreage devoted to tobacco propagation is acreage removed from food production.¹⁶⁶

ture that enables tobacco production); Gail Gibson, *Churches Stumble over Morality of Tobacco Guilt and Ambiguity Clash with Profits and Tradition in Tobacco Belt*, ROANOKE TIMES & WORLD NEWS, Mar. 29, 1998, at A3. See e.g., 139 CONG. REC. S446 (1993) (statement of Sen. McConnell) (noting that the average Kentucky farmer raises only three acres and there is no other alternate crop that pays as well as tobacco on such a small scale). But see CHAPMAN & LENG, *supra* note 33, at 30-31 (describing the increasing attractiveness of alternative crops that offer higher returns, are less labor intensive, and require fewer chemicals and fertilizers). Tobacco grows well as far north as southern Canada. CUNNINGHAM, *supra* note 153, at 185

162. The World Bank funded tobacco development in the past. See *infra* note 164 and accompanying text; CUNNINGHAM, *supra* note 153, at 185-86. But see Gumisai Mutume, *Southern Africa-Commodities: Save Tobacco, Save Our Economies*, INTER PRESS SERV., Aug. 3, 1994, available in LEXIS, News Library, Inpres File (reporting that Zimbabwe and Malawi supply 44% and 33%, respectively, of world tobacco production). In Zimbabwe, tobacco in one of the largest employers, provides \$414 million annually (nearly 30% of export earnings), and is the single largest source of foreign exchange. *Id.* Tobacco furnishes 80% of Malawian exports. *Zimbabwe: Tobacco's Struggle for Survival*, AFR. ECON. DIG., Aug. 15, 1994, available in LEXIS, World Library, Txtline File.

163. See CUNNINGHAM, *supra* note 153; Jeanne Cummings & David Wessel, *Treasury Pegs Smoking's Economic Cost*, WALL ST. J., Mar. 25, 1998, at A3 (reporting that U.S. smoking costs are about \$130 billion annually); Lawrence H. Summers, *Tobacco Issues*, FED. DOC. CLEARING HOUSE, Mar. 24, 1998, available in 1998 WL 8993691.

164. *Economic Role of Tobacco Production and Exports in Countries Depending on Tobacco as a Major Source of Income*, at 3, UNTAD/COM/36 (1995) (citing Howard Barnum, in WHO, WORLD NO-TOBACCO DAY 1995 TOBACCO ALERT 6-13 (1994)); *Tobacco Questions*, *supra* note 24.

165. See *Report of the Secretary-General to the United Nations Economic and Social Council on the Multisectoral Collaboration on Tobacco or Health*, U.N. ESCOR, at 7-8, U.N. Doc. E/1955/67 (1995).

166. See Stanley A. Taylor, *Tobacco and Economic Growth in Developing Nations*, BUS. CONTEMP. WORLD, Winter 1989. Raising tobacco reduces the quantity of food produced and therefore increases food prices. *Id.* at 55 (citing acreage data in STAT. DIV. OF THE ECON. & SOC. POL'Y DEPT, FOOD & AGRIC. ORG., 35 1981 FAO PRODUCTION Y.B. (1982)). See also Corporate Watch, *The Global Politics of Tobacco* (visited Mar. 19, 1998) <<http://www.corpwatch.org/feature/tobacco/framework.htm>> (noting that worldwide tobacco production utilizes land that alternatively could feed 20 million people); Pamphil H.M. Kweyah, *Tobacco Expansion in Kenya: The Socio-Ecological Losses*, *id.* at 248, 248-51; Henry Muwanga-Bayego, *Tobacco Growing in Uganda: The Environment and Women Pay the Price*, 3 TOBACCO CONTROL 255, 255-56 (1994), cited in Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 WIS. INT'L L.J. 29, 38 n.32 (1996)).

Previously, a dichotomy existed between government action to increase the trade in tobacco and government action to fight its adverse health effects.¹⁶⁷ A prime example was the U.S. trade policies during late 1970s and 1980s that utilized federal law¹⁶⁸ to open foreign markets for tobacco products.¹⁶⁹ Prominent critics decried the inconsistency in U.S. actions.¹⁷⁰ Fortunately, the U.S. government now precludes this dichotomy by not promoting tobacco products in its trade policies.¹⁷¹

B. Agricultural Subsidies

Agricultural tobacco subsidies are another method of governmental support that presents problems common to subsidies and unique to tobacco. Subsidies are generally intended to support farm income, farm commodity prices, or manage commodity supplies.¹⁷² Overall, subsidies

167. See 144 CONG. REC. S1801-02 (daily ed. Mar. 11, 1998) (statement of Sen. Leahy); Heidi S. Gruner, Note, *The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets*, 28 LAW & POLY INT'L BUS. 217 (1996); Heidi S. Gruner, Note, *The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets*, 28 LAW & POLY INT'L BUS. 217 (1996); Andrea J. Hageman, Note, *U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies*, 1 MINN. J. GLOBAL TRADE 175 (1992); Jonathan Wike, Note, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT'L L. 329, 334-38 (1996). Cf. CUNNINGHAM, *supra* note 153, at 186 (describing Canadian tobacco export promotions).

168. Trade Act of 1974, § 301, 19 U.S.C. 2411 (1994).

169. The U.S. Trade Representative used § 301 and the threat of possible retaliation to remove trade barriers and open foreign markets for U.S. tobacco products. *E.g.*, Japan in 1979 (cigars and pipe tobacco) (46 Fed. Reg. 1388-89 (1981)); CHAPMAN & LENG, *supra* note 33, at 44-45; (Taiwan in 1986) (cigarettes); (Memorandum for the United States Trade Representative, Oct. 27, 1986, 51 Fed. Reg. 39,639 (1986)); South Korea (cigarettes) (53 Fed. Reg. 4,926-27, 20,406 (1988)); Thailand (cigarettes) (54 Fed. Reg. 23,724-25 (1989)); Thailand Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, (1991), *reprinted in* 30 I.L.M. 1122 (1991)). In contrast, Hong Kong banned smokeless tobacco in 1987 but avoided retaliatory actions while claiming the ban was an internal health matter and not a trade issue. CHAPMAN & LENG, *supra* note 33, at 44. Cf. *Health Policy: MEPs Call for Wider Overall Emphasis on Health Considerations*, EUR. REP., Mar. 14, 1998, available in 1998 WL 8801099 [hereinafter *MEPS CALL FOR HEALTH CONSIDERATIONS*]. But see Lloyd Doggett, *Eliminate Taxpayer Support for Big Tobacco*, CONG. PRESS RELEASES, Sept. 26, 1997, available in LEXIS, News Library, Curnws File.

170. Former Surgeon General C. Everett Koop stated that "it is the height of hypocrisy for the United States to export tobacco." See Barbara Rudolph, *Fuming over a Hazardous Export*, TIME, Oct. 2, 1989, at 82. The American Medical Association stated that U.S. trade policy "perpetuates the problem of smoking by trying to develop overseas a market that is drying up at home." *A.M.A. Assails Nation's Export Policy on Tobacco*, N.Y. TIMES, June 27, 1990, at A1, A12. See Weissman, *supra* note 36.

171. See Diana Degette, *Degette Amendment Stops U.S. Promotion of Tobacco Overseas*, CONG. PRESS RELEASES, Sept. 26, 1997, available in LEXIS, News Library, Curnws File; Doggett, *supra* note 169; Samuel Goldreich, *House OK's Ending Tobacco-Export Support*, WASH. TIMES, Sept. 27, 1997, at A11.

172. See Geoffrey S. Becker, *An Introduction to Farm Commodity Programs* (visited Apr. 17, 1998) <<http://www.cnie.org/nle/ag-10.html>>.

are often inefficient; in effect, they are more a political response than an economic solution. As decades pass, many farmers "learn" to view subsidies more like an entitlement than as an economic equalizing mechanism. Indeed, the agricultural and technological contexts have substantially changed since the Great Depression of the 1930s and the original purposes for subsidies are no longer present.¹⁷³ A problem unique to tobacco subsidies is the inherent conflict between government promotion of a legal, but harmful, agricultural product¹⁷⁴ and government actions and policies to encourage the public to avoid or discontinue use of tobacco products.¹⁷⁵

There are no simple solutions to tobacco production subsidies. A recent European Union (EU) proposal¹⁷⁶ is a notable example. The EU produces 4.6% of the world's tobacco, yet it is a low-grade quality, sells at a very low price, and is heavily subsidized.¹⁷⁷ The Mediterranean EU states, who produce the majority of EU tobacco (i.e., Italy at 39%, Greece at 36%, and Spain at 13%) are comfortable with the status quo and wish to avoid any major changes to the EC (European Community) Tobacco Regime. At the same time, the United Kingdom and Sweden argue for a phased reduction of tobacco subsidies and financial incentives to encourage tobacco producers to seek other livelihoods.¹⁷⁸ EU tobacco subsidies are particularly high (80% of the producers' revenue) when compared to other agricultural subsidies (e.g., a 15% U.K. "set-aside").¹⁷⁹ Such substantial tobacco subsidies will probably become a free trade issue. Subsequently, these tobacco subsidies probably will be a source of disputes within the World Trade Organization (WTO) between producing states.¹⁸⁰ In general, agricultural subsidies continue to be a contentious issue in world trade.

Providing tobacco subsidies invokes moral and economic questions. What makes tobacco subsidies a difficult issue is the breadth of areas affected. In the EU, "the problem is really a social one; not a commodity

173. See Edward Lotterman, *Farm Bills and Farmers: The Effects of Subsidies Over Time*, THE REGION, Dec. 1996, at 4.

174. "Tobacco is one of the few subsidised crops which is not eaten and which is uniquely recognised as injurious to health." 581 PARL. DEB., H.L. (5th ser.) 798 (1997) (statement of Lord Grantchester).

175. See EUROPEAN COMMITTEE, THIRTEENTH REPORT 17-18, 39 (1997) (visited Apr. 17, 1998) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldselect/ldcom/073xiii/ec1301.htm>> [hereinafter THIRTEENTH REPORT]; James T. O'Reilly, *A Consistent Ethic of Safety Regulation: The Case for Improving Regulation Of Tobacco Products*, 3 ADMIN. L.J. 215, 240-42 (1989).

176. Report from the Commission to the Council on the Common Organisation of the Market in Raw Tobacco, COM(96)554.

177. THIRTEENTH REPORT, *supra* note 175, at 4, 7.

178. *Id.* at 4, 24-27, 30, 51-54.

179. *Id.* at 1; 581 PARL. DEB., H.L. (5th ser.) 796 (1997) (statement of Lord Brain).

180. See THIRTEENTH REPORT, *supra* note 175, at 11-12.

issue."¹⁸¹ The situation also involves moral issues regarding government support of an addictive substance and a disingenuous argument that if the EU does not produce the tobacco someone else will.¹⁸² How can a government justify tobacco subsidies while it also attempts to minimize tobacco consumption in its population? Is it any more justifiable if the tobacco is raised only for export? Posing these questions invokes examination of the tobacco industry's legislative clout and substantial lobbying influence. Past experience illustrates that the contentious matter of tobacco subsidies is slow to change. Anti-tobacco forces must fight established economic interests and political inertia.¹⁸³ Difficult situations like this exist worldwide and plainly demonstrate the need for comprehensive change. An optimum solution is a international framework convention for tobacco control that is discussed later in Part VIII. Without global cooperation, this type of quandary will persist.

181. 581 PARL. DEB., H.L. (5th ser.) 806 (1997) (statement of Lord Donoughue).

Tobacco tends to be grown in remote rural areas on very small plots with an average size . . . of about three acres. It also involves Napoleonic or Continental land ownership issues. There are great difficulties in changing land use It is an intensive crop and the social problem is that in some areas it is a, or the, major employer and important source of income.

Id. See McConnell, *supra* note 161. *But see* Lord Rea's argument:

It is possible, with a slight stretch of the imagination, to compare [EU] tobacco production with South American cocaine production or Asian opiate or heroin production. The production of crops of all these addictive substances persists despite the strong opposition of their governments because of the high price which the products command in relation to alternative crops. Efforts to persuade Thai hill farmers or Colombian peasants to grow other crops tend to fail because even if they are subsidised they bring in much less income. The price of the dangerous controlled addictive drugs is artificially high largely because of their illegality and their subsequent scarcity. In the case of European tobacco, which of course is a perfectly legal product, the reward to the farmers is artificially high solely because of the regime which is funded by the taxpayer.

581 PARL. DEB., H.L. (5th ser.) 790 (1997) (statement of Lord Rea).

182. Lord Rea posits:

While little of the [EU] tobacco production is consumed in Europe nearly all of it is eventually consumed in the developing world. To say that ending [EC] production would lead to its replacement "from elsewhere" avoids acknowledging the actual situation in which strong, bad quality tobacco from Europe is currently contributing to the rapidly growing epidemic of tobacco related sickness and death in the less developed world. Not only are we supplying them with a dangerous addictive substance; they also have to pay hard currency for it, although admittedly far less than it costs us in subsidising its production.

581 PARL. DEB., H.L. (5th ser.) 790 (1997) (statement of Lord Rea).

183. *E.g.*, MEPS CALL FOR HEALTH CONSIDERATIONS, *supra* note 169 and accompanying text.

C. Advertising

Tobacco advertising is quite effective and tobacco is a legal product nearly everywhere. Some countries, like the United States, protect commercial speech and, thus, tobacco advertising.¹⁸⁴ What, if any, limitations or prohibitions can be applied to a legal product? At one end of the spectrum is a complete ban on tobacco advertising by some states.¹⁸⁵ Other states have implemented less extreme measures.¹⁸⁶ Because of the inherent differences between states, regional anti-tobacco regulations are predictably elusive. However, the EU is on the verge of implementing a regional agreement to significantly limit tobacco advertising and sponsorship.¹⁸⁷ To a lesser extent, the United States and the EU limited tobacco advertising on television and required warning labels.¹⁸⁸

Although the TTCs suffered setbacks over the last decade, the anti-tobacco forces are far from gaining dominance over the TTCs. Examples abound of failed efforts to limit tobacco advertising. During the 1980s and 1990s, events in Eastern Europe and Asia illustrate big tobacco's influence and its ability to increase sales despite regulatory efforts.¹⁸⁹

184. See *infra*, notes 210-212.

185. E.g., Afghanistan, Algeria, Australia, Bulgaria, China, Hungary, Iceland, Italy, Iraq, Jordan, Mozambique, New Zealand, Norway, Papua New Guinea, Portugal, Romania, Singapore, and Sudan. RUTH ROEMER, WHO, LEGISLATIVE ACTION TO COMBAT THE WORLD TOBACCO EPIDEMIC 182, 205, 211, 237 (2d ed., 1993). See also CHAPMAN & LENG, *supra* note 33, at 65; Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 SUFFOLK TRANSNAT'L L. Rev. 309, 342 (1994); Neil Buckley, *Belgians Back Tobacco Advertising Ban*, FIN. TIMES, Jan. 10, 1997, at 2 (banning all forms of advertising and sponsorship beginning in 1999); Scherer, *supra* note 55.

186. E.g., Russia banned tobacco advertising on television, front and back pages of print media, and daytime radio on Jan. 1, 1996. Scherer, *supra* note 55. On April 1, 1998, Hong Kong banned tobacco advertising on the internet. See Jane Moir, *Anti-Smoking Moves Seen as Small First Step*, S. CHINA MORNING POST, Feb. 21, 1998, at 4, available in LEXIS, News Library, Txtnews File.

187. See Melissa N. Kurnit, *The Uncertain Future of Tobacco Advertising in the European Community*, 17 B.C. INT'L & COMP. L. REV. 177 (1994); Charles Bremner, *EU Vote Spells End to Tobacco Ads in Four Years*, TIMES (London) (reporting the European Parliament's endorsement of draft passed by the EU ministers); *Tobacco Advertising Ban Reaches Final Hurdle*, THE HERALD (Glasgow), Feb. 12, 1998, at 7 (agreeing to phase out tobacco advertising and sponsorships).

188. 15 U.S.C. §§ 1331, 1333 (1994); Council Directive 89/552/EEC, art. 13, 1989 O.J. (L 298) 28; Council Directive 92/41/EEC, art. 4, 1992 O.J. (L 158) 30.

189. See Susan Meyer, Comment, *New Players for the Old Tobacco Game: The Czech Republic and Romania; It's Time to Change the Rules*, 17 NW. J. INT'L L. & BUS. 1057 (1996-97). See generally Johnson, *supra* note 15; Levin, *supra* note 117. But see *World Tobacco, ESTONIA Advertising Ban* (July 1997) (visited Feb. 26, 1998) <<http://www.marketfile.co.uk/tobademo/news/WTNEWS/ESTONIA.1.html>>; *World Tobacco, HUNGARY Tobacco Advertising Given Limited Run* (July 1997) (visited Feb. 26, 1998) <<http://www.marketfile.co.uk/tobademo/news/WTNEWS/HUNGARY.1.html>> (re-

The following example illustrates the power of TTCs to influence the law and advertising in a national market. Czechoslovakia banned tobacco advertising¹⁹⁰ before its communist government fell in 1989, but rescinded the law after President Vaclav Havel's governments came into power.¹⁹¹ Shortly thereafter, the Czechs began a "privatize or die" campaign to convert their economy into a market driven economy.¹⁹² Phillip Morris, a TTC, purchased approximately 77% of the Czech tobacco company Tabak and now dominates the Czech market.¹⁹³ Parliament banned all tobacco advertising in the 1992 Law on Consumer Protection.¹⁹⁴ Tobacco advertisers flouted the law in Prague and forced a modification of the law in their favor.¹⁹⁵ In November 1993, the Czech Parliament again banned tobacco advertising but allowed it to continue for advertising contracts in force before 1994.¹⁹⁶ Despite a proposed legislative timetable to ban the grandfathered contracts in 1994, the timetable slid back during 1994 and in May 1995, President Havel, a smoker, rejected the law for economic reasons.¹⁹⁷ In June 1995, the country again regulated tobacco but the new law is equivocal and less stringent than the Czech Voluntary Advertising Code.¹⁹⁸ The Czech Re-

placing a 1978 law that totally banned all tobacco advertising with a lenient act) [hereinafter *HUNGARY Tobacco Advertising*].

190. The Czechs banned cigarette advertising in March 1989. ROEMER, *supra* note 185, at 211-12.

191. *Id.* at 212. The Czechs adopted a 1991 law regulating radio and television broadcasting and it permitted tobacco ads in the press, on billboards, and between 10:00 p.m. and 6:00 a.m. on television. MS, *Legal and Ethical Regulation of Tobacco Advertising*, CTK Nat'l News Wire, Aug. 13, 1995, available in LEXIS, World Library, Allnws File [hereinafter *Czech Legal & Ethical Law*].

192. Neil King, *World Business (A Special Report): How It Works; Faster, Faster: The Czech Voucher System had One Overriding Aim: Get the Job Done Quickly*, WALL ST. J. EUR., Oct. 23, 1995, at R11.

193. *Tobacco Producer Disagrees with Consumer Protection Law*, CTK NAT'L NEWS WIRE, Mar. 4, 1993, available in LEXIS, World Library, Allnws File [hereinafter *Czech Tobacco Producer Disagrees*]; *Gaspings, Tobacco in Eastern Europe*, THE ECONOMIST, Aug. 21, 1993, at 52.

194. *Czech Tobacco Producer Disagrees*, *supra* note 193; *Debate Continues on Role of Advertising in Business*, CTK NAT'L NEWS WIRE, Sept. 9, 1993, available in LEXIS, World Library, Allnws File (citing the Consumer Protection Law 634/92) [hereinafter *Debate Continues*].

195. The television ban on tobacco ads continued, see *Gaspings, Tobacco in Eastern Europe*, *supra* note 193; *Debate Continues*, *supra* note 194.

196. See *Czech Republic: Czech Republic Bans Tobacco Advertising*, EUROMARKETING, Dec. 7, 1993, available in LEXIS, World Library, USA: A Roundup of Activity, ADVER. AGE, Nov. 21, 1994, available in LEXIS, World Library, Allnws File.

197. *Czech Tobacco Ban Delay*, EUROMARKETING, Mar. 1, 1994, available in LEXIS, World Library, Allnws File; Thomas Kellner, *Havel Vetoes Tobacco Legislation on Economic Grounds*, PRAGUE POST, May 31, 1995, available in LEXIS, World Library, Allnws File; Will Tizard, *Tobacco-Government Alliance 'Fruitful'*, PRAGUE POST, Aug. 10, 1994, available in LEXIS, World Library, Allnws File.

198. *Czech Legal & Ethical Law*, *supra* note 191; *Confusion Prevents Enforcement of Tobacco Advertisement Law*, CTK BUS. NEWS, Apr. 13, 1995, available in LEXIS, World

public is a prime example of big tobacco's economic muscle, the industry's ability to persuasively sell its allegedly positive economic contribution to a national economy (without internalizing the negative externalities), and its will to manipulate market influences.

Arts and sports sponsorship can be considered indirect advertising. By sponsoring an event, a TTC can get corporate and/or brand logos displayed in the background (e.g., on a stadium wall, on an athlete's uniform or equipment, in a program, and/or on a television screen). Sponsorship can thus circumvent television advertising bans and gain high visibility for tobacco products. This has the effect of legitimizing and normalizing the product to viewers and tends to increase social acceptance and awareness.

Individual countries¹⁹⁹ and regional organizations²⁰⁰ have regulated tobacco sponsorship. Legislative efforts generally cannot provide a complete answer to indirect advertising. Experience proves a patchwork result occurs at best. A comprehensive mechanism is required to effectively deal with the tobacco industry.

Tobacco sponsorship has insidiously "addicted" many event organizers (e.g., automobile racing²⁰¹ and sports tournaments²⁰²). Occasion-

Library, Allnws File; *Czech Republic: Czech Self Regulation Win*, EUOMARKETING, Mar. 21, 1995, available in LEXIS, World Library, Allnws File.

199. Tobacco Products Control Act, ch. 20, 11 C. Gaz. 393 (1988) (repealed 1997) (Can.) (banning sponsorship in the name of tobacco brands); *Lebensmittel und Bedarfsgegenstandsgesetz* [Foodstuffs & Goods in Daily Use Act] § 22, 1974 BGBI.I 1945, amended by 1986 BGBI.I 2610, 1987 BGBI.III 2610 (F.R.G.) (restricted display of cigarette logos in televised sports) (cited in Randall H. Stoner, Note, *200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship*, 15 HASTINGS INT'L & COMP. L. REV. 639, 641, nn. 11, 12 (1992)); *Voluntary Agreement between the Government and the Tobacco Industry on Sports Sponsorship to Stand at Least Until 31/10/1989*, available in DEP'T HEALTH & SOCIAL SEC., FIRST REPORT OF THE COMMITTEE FOR MONITORING AGREEMENTS ON TOBACCO ADVERTISING AND SPONSORSHIP annex (1988) (restricted display of cigarette logos in televised sports) (cited in Stoner, *supra* note 199, at 641, n.13). See *S. African Cabinet Okays Tobacco Control Bill*, XINHUA NEWS AGENCY, July 29, 1998, available in LEXIS, News Library, Txtnws File (reporting on draft legislation that would permit the health minister to prohibit all tobacco advertising, including sponsorships).

200. An EU-wide ban of tobacco product advertising is close to final approval. See Council Directive 97/36/ED, 1197 O.J. (L 202) 1 (amending Council Directive 89/552/EEC); *Council Adopts Common Position on Tobacco Advertising*, SPICERS CTR. FOR EUROPE, Feb. 14, 1998, available in LEXIS, Eurcom Library, Spicer File; *Health Ministers Pave the Way for EU-Wide Tobacco Adverts Ban*, Spicers Ctr. for Europe, Dec. 6, 1998, available in LEXIS, Eurcom Library, Spicer File.

201. *E.g.*, National Association for Stock Car Auto Racing's (NASACR) Winston Cup; International Motor Sports Association's (IMSA) Camel GT; and Marlboro sponsored Indianapolis 500 cars. See *Letter from Lord Tordoff, Chairman of the [Select] Committee [on European Communities Eleventh Report], to Tessa Jowell MP, Minister of State for Public Health, Department of Health*, PARL. DEB. H.L. (5th ser.) (Dec. 17, 1997), (visited Apr. 18, 1998) <<http://parliament.the-stationery-office.co.uk/pa/ld199798/ldselect/ldeucom/060xi/ec1141.htm>> ("[I]t still seems to us illogical, in terms of health policy, that the [U.K.] government should be so insistent on special treatment for this particular sport when

ally, a conscious effort is made to avoid or remove the tobacco industry's influence.²⁰³ When tobacco-free events occur, it is often in partnership with an NGO rather than the event organizer unilaterally acquiring replacement sponsorship. In effect, NGOs serve as catalysts and thus are usually a significant factor in altering the event's dependence on TTC financial support.

The TTCs are forces not to be taken lightly. Their past behavior plainly reveals that advertising and market share are the means to the end—namely profit.²⁰⁴ They are ruthlessly efficient capitalists. Advertising plays a crucial role in the TTC's success.²⁰⁵ Counter-advertising can operate as a substantial deterrent.²⁰⁶ While governments and NGOs sometimes utilize counter-advertising, results often depend on how the message is presented. Past experience underscores the general ineffectiveness of voluntary advertising self-regulation.²⁰⁷

A new approach to limiting tobacco promotion is to proscribe the deductibility of certain advertising expenses as tax deductions.²⁰⁸ One U.S. proposal would deny tax deductions for advertising and promotional expenses when the ads target children.²⁰⁹ Although this approach

other glamorous, male-dominated sports such as Premier League football have no difficulty in attracting significant sponsorship from commercial interests outside the tobacco industry.”). *Id.* *But see* Douglas P. Shuit, *Anti-Smoking Forces Ready to Invade Tobacco Road*, L.A. TIMES, Apr. 3, 1998, at B1 (describing anti-tobacco sponsorship of race cars).

202. *E.g.*, Virginia Slims Women's Tennis Tour.

203. For example, the International Olympic Committee and WHO coordinated to make the 1994 Winter Olympics in Lillehammer, Norway, smoke-free. WORLD HEALTH REPORT 1995, *supra* note 1, at 61. *But see Commission Welcomes FIA Move for Ban on Tobacco Sponsorship*, SPICERS CTR. FOR EUROPE, Mar. 7, 1998, available in LEXIS, Eur-com Library, Spicer File (skeptically noting that the Federation Internationale de l'Automobile conditions its compliance on clear data proving the link between advertising and smoking habits).

204. In Minnesota's suit against the tobacco industry, Phillip Morris' chief executive, Geoffrey Bible, testified that profitability was as important as public health. *See Myron Levin, Tobacco Executive Endures 4 Hours of Tough Questioning*, L.A. TIMES, Mar. 3, 1998, at A1; *Profit as Important as Public's Health, Tobacco Exec Testifies*, CHI. TRIB., Mar. 3, 1998, at 7.

205. *E.g.*, advertising is critical to entice and retain “replacement” smokers. “Eighty-six percent of underage smokers prefer one of the three most heavily advertised brands - Marlboro, Newport or Camel.” Children's Health Preservation and Tobacco Advertising Compliance Act, S. 1902, 105th Cong. (1998). *See* 144 CONG. REC. S. 1902-01 (daily ed. Mar. 12, 1998) (statement of Sen. Reed).

206. *See supra* notes 13, 14, 90-92, and accompanying text.

207. *See generally* Meyer, *supra* note 189, at 1078-82; Levin, *supra* note 117, at 100-01, 103, 106;. *But see* Jennifer A. Lesny, Note, *Tobacco Proves Addictive: The European Community's Stalled Proposal to Ban Tobacco Advertising*, 26 VAND. J. TRANSNAT'L L. 149, 167-68 (1993).

208. 144 CONG. REC. S. 1902-01 (daily ed. Mar. 12, 1998) (statement of Sen. Reed).

209. “Key components of [S. 1638's] restrictions include: a prohibition on point of sale advertising except in adult only stores and tobacco outlets; a ban on outdoor advertising within 1000 feet of schools and publicly-owned playgrounds, and outdoor advertising be-

is certain to be controversial, in the United States there are few, if any, constitutional questions posed by this tax code mechanism. There are substantially more constitutional questions posed by outright bans or substantial regulation of commercial speech.²¹⁰

Labeling tobacco products with health warnings is a common regulatory tactic that varies extensively between states. Some are relatively lax²¹¹ while other states are substantially more demanding²¹² in their re-

yond those areas restricted to black-and-white text only; and, a prohibition on brand-name sponsorship of sporting or entertainment events." *Id.*

210. See Jeff I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U.L. REV. 1147 (1996); Stoner, *supra* note 199, at 650-58

211. Japan requires the warning to state: "As smoking might injure your health, let's be careful not to smoke too much." Levin, *supra* note 117, at 100 (citing KITSUEN TO KENKO, SMOKING AND HEALTH 7 (Ministry of Health & Welfare Ed., 2d ed. 1993)). Hungary requires the warning to state "[s]moking seriously damages your health and that of those around you." HUNGARY *Tobacco Advertising*, *supra* note 189.

212. The United States requires four rotating warnings on cigarette packages and advertising: "smoking causes lung cancer, heart disease and may complicate pregnancy," "quitting smoking now greatly reduces serious risks to your health," "smoking by pregnant women may result in fetal injury, premature birth, and low birth weight" and "cigarette smoke contains carbon monoxide." 15 U.S.C. § 1333 (1994). For smokeless tobacco, the United States requires three rotating warnings: "this product may cause mouth cancer," "this product may cause gum disease and tooth loss" and "this product is not a safe alternative to cigarettes." 15 U.S.C. § 4402 (1994). Canada requires warnings at the top of the package's front and back. CUNNINGHAM, *supra* note 153, at 105-07. Cigarette and roll-your-own packages must carry the following rotating statements: "cigarettes are addictive," "tobacco smoke can harm your children," "cigarettes cause fatal lung disease," "cigarettes cause cancer," "cigarettes cause strokes and heart disease," "smoking during pregnancy can harm your baby," "smoking can kill you," and "tobacco smoke causes fatal disease in non-smokers." *Id.* The warnings appear in white on black or black on white, not in the package colors. *Id.* Australia requires six rotating warnings that cover 25% of the package front: "smoking is addictive," "smoking kills," "smoking causes heart disease," "smoking when pregnant harms your baby," "your smoking can harm others" and "smoking causes lung cancer." CDC, *Tobacco Control Measures, in Australia* (visited Mar. 19, 1998) <<http://www.cdc.gov/nccdphp/osh/who/australi.htm>>. Cf The EU's Tobacco Labeling Directive requires a general warning on each tobacco product, "tobacco seriously damages health," and a second, specific alternating warning. Council Directive 89/662/EEC, art. 4, 1989 O.J. (L 359) 1, amended by Council Directive 92/41/EEC, *supra* note 175, art. 1. Specific warnings on each cigarette or rolling tobacco packet have two mandatory warnings, "smoking causes cancer" and "smoking causes heart disease," and a choice from 14 optional warnings: "smoking causes fatal diseases," "smoking kills," "smoking can kill," "smoking when pregnant harms your baby," "protect children: don't make them breathe your smoke," "smoking damages the health of those around you," "stopping smoking reduces the risk of serious disease," "smoking causes cancer," "smoking causes chronic bronchitis and other chest diseases," "more than (. . .) people die each year in (name of country) from lung cancer," "every year, (. . .) people are killed in road accidents in (name of country) times more die from their addiction to smoking," "every year, addiction to smoking claims more victims than road accidents," "smokers die younger," "don't smoke if you want to stay healthy," "save money: stop smoking," and "smoking causes addiction." *Id.* A specific warning, "causes cancer," is on each smokeless tobacco product. *Id.* Each unit packet of cigar, cigarillo, pipe tobacco, or other smoking tobacco product carries a rotating specific warning: "smoking causes cancer," "smoking causes fatal diseases," "smoking

quired warnings. When a state does not require warning labels, TTCs often avoid labeling the tobacco product.²¹³ As a result, many consumers in underdeveloped countries are unaware of the dangers associated with tobacco consumption and the breath of ingredients.²¹⁴ Therefore, labels should include both ingredients and health warnings. To enable the public to make an informed choice when consuming a product with dangerous characteristics, labeling should be standardized globally and implemented where it does not exist. Standardized labeling would mandate disclosures by the TTCs for the public benefit. Although a large part of the global public would learn some of tobacco's dangers, most probably, that would not alter their consumption habits. Overall, such labeling probably would not harm the TTC's profitability much, if at all. History shows that without international labeling standards, only a patchwork of national regulations (and matching success) results, if at all. Universally effective labeling requires an international standard. Therefore, the WHO is the appropriate NGO to press for and oversee labeling implementation within the context of an international framework convention.

Considering the gravity of tobacco's health implications, past experience with voluntary regulation, and the inherent profit oriented nature of the industry, uniform regulations on advertising should be established. Such regulations should involve time, place, and manner restrictions. The regulations should include uniform minimum global standards; the right to avoid preemption of stricter regional, national, or local law; television advertising bans; a phased elimination of sports and arts sponsorships; prohibition of free samples; and mandatory labeling including health warnings and ingredients. The economic justification for these restrictions is based upon the current high expense for health care with explosive increases certain to appear within three to four decades if current trends remain unaltered. A moral justification exists based upon the fundamental right of all people to achieve "the

damages the health of those around you," and "smoking causes heart disease." *Id.*

213. See Johnson, *supra* note 15, at 38, n.194 (interviewing a R.J. Reynolds spokesperson in 1989 who revealed that RJR did not include the labels unless the law required it). *But see Health: Ingredients of Tobacco to be Revealed: Producers, Importers Issued Stern Warning*, BANGKOK POST, Apr. 26, 1998, at 3 (reporting on a new Thai regulation that requires tobacco importers and manufacturers to reveal the ingredients of tobacco products); Mark Moran, "Cough Up" Ingredients, *Health Officials Tell Tobacco Industry*, AM. MED. NEWS, Nov. 23, 1998, available in 1998 WL 20199081 (reporting the industry's unsuccessful trade secret argument to avoid disclosing cigarette ingredients in Massachusetts Superior Court).

214. See Fazal, *supra* note 57. Typically, chemicals are part of processed tobacco. See Campbell, *supra* note 95 (utilizing ammonia to increase nicotine's pH and speed of absorption); *Marlboro Secret Said to be Ammonia*, BOSTON GLOBE, Feb. 9, 1998, at A4; Karen Mills, *Witness: R.J. Reynolds Used Freon in Cigarettes from 1970-73*, Apr. 1, 1998, ASSOCIATED PRESS, available in 1998 WL 6648870 (using freon to puff up tobacco volume).

highest attainable standard of health."²¹⁵ An optimum means to accomplish this goal today is through the WHO and an international framework convention on tobacco control.²¹⁶ The phrase, "think globally, act locally" is indicative of and critical to success.

D. Taxes

Excise taxes are an excellent governmental tool for modifying behavior and as a revenue source in an inelastic demand/elastic supply situation.²¹⁷ Taxes are a particularly effective means of lowering teen tobacco consumption²¹⁸ because adolescent discretionary income is limited.²¹⁹ Despite decreased sales, revenue increases because consumption falls proportionately less than the price increases. The public generally favors a sin tax over other types of taxes, such as income or sales taxes. Significant excise tax increases have proven themselves as an effective tool for decreasing tobacco consumption.²²⁰ Some states utilize higher taxes as a tobacco consumption control mechanism, but the majority can and should substantially increase tobacco excise taxes for the public benefit.²²¹ An international framework convention on tobacco control should include a platform for significantly increased uniform excise taxes.²²²

An inherent concern associated with substantially increased taxes is smuggling. The larger the relative difference in the tax rate (and hence retail price) between political entities, the greater the probability of smuggling.²²³ Although smuggling tobacco is low on the scale of pub-

215. WHO CONSTITUTION, *supra* note 51.

216. *See infra* Part VII.

217. *See* CUNNINGHAM, *supra* note 153, at 119.

218. WHO, *Tobacco Taxation: Turning the Economic Tables in Favour of Health, in Costs of Tobacco Use*, *supra* note 40 [hereinafter *Tobacco Taxation*].

219. Research indicates that a 10% price increase for tobacco products results in a 3-9% decrease in consumption. For adolescents who are more price sensitive, the consumption decrease jumps to 14%.

220. CUNNINGHAM, *supra* note 153; *Tobacco Taxation*, *supra* note 205.

221. *E.g.*, the current U.S. legislative process continues debating the extent to increase taxes.

222. *See* CUNNINGHAM, *supra* note 153, at 249.

223. *See Statement by Senator Edward M. Kennedy at the Senate Democratic Tobacco Task Force Hearing on Cigarette Smuggling*, FED. DOC. CLEARING HOUSE, May 4, 1998, available in 1998 WL 7323398 (criticizing big tobacco's "smoke-screen" of smuggling); Mark Suzman, *Summers Dismisses Fears on Tobacco Deal*, FIN. TIMES, May 1, 1998, at 6 (affirming the U.S. Treasury's ability to regulate tobacco and avoid smuggling). *See generally* CUNNINGHAM, *supra* note 153, at 125-30; Alissa J. Rubin & Henry Weinstein, *Tobacco Company Affiliate Pleads Guilty in Smuggling Trade: Firm with Ties to RJR Nabisco Admits Avoiding Taxes and Aiding the Illegal Export of Cigarettes to Canada. It Agrees to \$15-Million Fine.*, L.A. TIMES, Dec. 23, 1998, at A10. *But see* Mark Johnson, *Cigarette Tax Hike a Smuggler's Boon?*, RICHMOND TIMES-DISPATCH, Oct. 19, 1997, at A1 (quoting Alcohol, Tobacco & Firearms Agent Joseph P. Dougherty; "(Smuggling) will in-

lic concern and prosecution, it tends to involve violence, debases public lawfulness, and can quickly acquire a large market share, thereby depriving governments of valuable revenue.²²⁴ A standard international excise tax on tobacco would tend to equalize tobacco's consumer prices between states and thus decrease smuggling by removing the black market incentive.

To smuggle, a cigarette wholesaler commonly buys from the factory and sells to an exporter. The exporter ships the cigarettes to a specially licensed warehouse just across the border and smugglers then ship the cigarettes back into the country of origin, thereby avoiding the substantial excise tax. The exporter, wholesaler, and manufacturer typically do not pay the tax.²²⁵ One method to counter tax avoidance is to directly tax all parties who distribute tobacco products from the manufacturer through the retailer, rather than only the retailer. Similarly, all tobacco distributors should be licensed by governmental authorities and all tobacco product packages should require labeling that identifies the product for domestic use or export. These tobacco regulation methods would substantially limit smuggling opportunities.²²⁶ Globally, tobacco smuggling is significant.²²⁷

Duty-free sales also offer incentives for tax avoidance by purchasing duty-free or smuggling.²²⁸ Considering the uniqueness of tobacco and the serious health implications, duty-free sales should be renegotiated to prohibit tobacco products.²²⁹ In a similar manner, tobacco sales over the internet also are a means to avoid taxes.²³⁰ Unlike duty-free sales that occur in a definite location, internet sales present a unique set of problems because of the internet's pervasive presence combined with an extraterritorial situs.²³¹ Because of the internet's nature, a regional or global situation should address taxing tobacco products to ensure equivalent taxes on tobacco despite the means of acquisition. An international convention framework for tobacco control is an ideal

crease exponentially").

224. See CUNNINGHAM, *supra* note 153, at 130; Samer Iskander, *EU Defrauded of Ecu 1.4bn*, FIN. TIMES, May 7, 1998, at 2; Rubin & Weinstein, *supra* note 223.

225. See Johnson, *supra* note 15.

226. *Senate Judiciary Committee Hearing Re: Tobacco Control Legislation and the Black Market*, FED. NEWS SERV., Apr. 30, 1998, available in LEXIS, News Library, Curnws File (statement of Lawrence Summers, Deputy Treasury Secretary) [hereinafter *Tobacco Control Hearing*].

227. Approximately 6% of world cigarette production, valued at \$16 billion, is smuggled. L. Joossens & M. Raw, *Smuggling and Cross Border Shopping of Tobacco in Europe*, 310 BRIT. MED. J. 1393-97 (1995); Rubin & Weinstein, *supra* note 223.

228. *Tobacco Control Hearing*, *supra* note 226 (statement of Sen. Feinstein).

229. See CUNNINGHAM, *supra* note 153, at 250.

230. See Quantum Research, *Discount Cigarettes & Tobacco* (visited Mar. 19, 1998) <<http://www.pricepro.com>>. "Are you a smoker feeling discriminated against, >grossly overtaxed', and, searching for the best discount cigarette and tobacco prices" *Id.*

231. See generally *Quill Corp. v. South Dakota*, 504 U.S. 298 (1992).

method to implement this strategy.²³²

Taxation is a proven method of modifying behavior. States should increase excise taxes to a uniform global rate thereby significantly decreasing tobacco consumption. A uniform global excise tax would be an effective tool to combat smuggling. Although regional agreements can help, the better solution has a global nature. An international framework convention for tobacco control is the best mechanism to control tax related problems stemming from nonuniform tobacco taxation. Despite the certainty that the tobacco industry will fight substantial excise tax increases, the time has never been better to implement a global solution.

E. Workplace Conditions

Smoking gives rise to issues involving workplace health conditions caused by environmental tobacco smoke (ETS).²³³ In enclosed areas, ETS becomes significantly more hazardous. Although the extent of harm resulting from ETS is debated, the World Health Assembly (WHA) "[r]ecogniz[ed] that there is no safe level of exposure to tobacco smoke"²³⁴ To lead by example, the WHA urged a workplace tobacco ban at U.N. facilities.²³⁵ The WHA urged states to ban smoking on public transportation to protect people from ETS.²³⁶ Consumer groups also

232. See CUNNINGHAM, *supra* note 153, at 249-50.

233. ETS is also referred to as secondhand smoke and side-stream smoke. See generally PASSIVE SMOKING 1993, *supra* note 4; Henderson, *supra* note 12; Cal. Env'tl. Protection Agency, *Health Effects of Exposure to Environmental Tobacco Smoke* (visited Apr. 1, 1998) <<http://www.calepa.ca.gov/oehha/docs/finalets.htm>>. Debate continues regarding health risks of ETS. See Nigel Hawkes, *Smoking Out the Risk*, TIMES (London), Mar. 30, 1998, at 15; *Major Environmental Tobacco Smoke Study Finds No Risk*, PR NEWSWIRE, Mar. 10, 1998, available in LEXIS, News Library, Curnws File. But see Simon Chapman, *The Hot Air on Passive Smoking; Medicine and the Media*, 316 BRIT. MED. J. 945 (1998) (reporting on the alleged statistical disinformation released by tobacco industry scientists to the media; "The truth is rarely pure, and never simple. . ."); *Cancer Study Criticism Tied to Tobacco Money*, WASH. POST, Aug. 5, 1998, at A2 (reporting "massive evidence of a propaganda machine"); David Concar & Michael Day, *Undercover Operation*, NEW SCIENTIST, May 16, 1998, at 4, available in LEXIS, News Library, Curnws File.

234. World Health Association Res. 44.26, 44th W.H.A., (1991) [hereinafter WHA 44.26], compiled in WHO, III HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD (1985-1992) 53 (3d ed. 1993). See WHA 39.14, *infra* notes 245-46 and accompanying text.

235. World Health Association Res. 46.8, 46th W.H.A., (1993) (urging the UN Secretary-General "to take the necessary steps to ban the sale and use of all kinds of tobacco").

236. "Aware of the technical problems of ensuring a smoke-free environment in many public conveyances, especially trains and aircraft . . ." WHA 44.26, *supra* note 234. See *China is to Ban Smoking on All Public Transport*, FIN. TIMES, Mar. 5, 1997, at 1 (effective May 1, 1997); *Smoking Banned Outdoors*, FIN. TIMES, Jan. 27, 1997, at 44 (reporting on smoking ban in busses, trains, schools, government offices, cinemas, and outdoors in New Delhi, India).

noted the detrimental effects of ETS in aircraft and recommended measures to restrict or ban in-flight smoking.²³⁷ ETS becomes an international issue whenever people travel between states.

Some states have regulated smoking on aircrafts,²³⁸ but many more have yet to do so. Market forces led legislative efforts to provide consumers more smoke-free flights.²³⁹ Following the WHA's lead, the International Civil Aviation Organization (ICAO) adopted Assembly Resolution A29-15, which advocated that states completely ban smoking on all international flights in Assembly Resolution A29-15.²⁴⁰ Although the ICAO Assembly cannot enforce a worldwide in-flight smoking ban, its position of global leadership carries substantial influence. Working together, ICAO and market forces made the "majority of flights . . . smoke-free today, especially in North America."²⁴¹ This noteworthy success is not due to the force of law but rather public desire.²⁴² For exam-

237. *Breathing on a Jet Plane, How Fresh is the Air?*, CONSUMER REP., Aug. 1994, at 501, 502.

238. For example, the United States banned nearly all smoking on domestic flights. *Smoking Aboard Aircraft*, 14 C.F.R. § 252 (1997). See also *U.S., Australia, Canada Sign Pact to End In-flight Smoking*, WORLD AIRLINE NEWS, Nov. 11, 1994, available in 1994 WL 8731642; *Summary of Replies to Questionnaire Attached to State Letter AN 5/13-97/8*, App. A, ICAO Doc. A32-WP (1997) [hereinafter *ICAO Summary of Replies*].

239. *ICAO Summary of Replies*, supra note 238. Legislation in the following states enacted a complete or partial smoking ban on international and/or domestic passenger flights: Armenia, Australia, Benin, Canada, Chile, Cuba, Ecuador, Egypt, Finland, France, Hungary, Iceland, Jordan, Moldova, Nepal, New Zealand, Norway, Oman, Pakistan, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, Sweden, Thailand, Turkey, Ukraine, United States, and Zambia. *Id.* Airline policies in the following states supplement legislation to provide fewer opportunities for in-flight smoking: Argentina, Austria, Bahrain, Belarus, Belize, Brazil, Burkina Faso, Cuba, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iran, Italy, Korea, Lithuania, Mauritius, Mexico, Monaco, Nepal, Netherlands, New Zealand, Norway, Panama, Qatar, Romania, Slovak Republic, South Africa, Sweden, Switzerland, Thailand, Tunisia, United Kingdom, United States, and Vietnam. *Id.* See *Senate OKs Transportation Bill with Airline Smoking Ban*, CHI. TRIB., July 25, 1998, at N15 (describing an amendment that bans smoking on international flights arriving and departing from U.S. airports); Cath Urquhart, *Travel: Ban That Flies in the Face of Smokers Worldwide*, DAILY TEL., Sept. 3, 1994, at 25 (reporting that American Airlines, Delta Airlines, British Airways, and Singapore Airlines instituted smoke-free transatlantic flights). See generally *Pena Grants Anti-Trust Immunity for Carriers to Discuss Smoking Ban*, WORLD AIRLINE NEWS, Jan. 30, 1995, available in 1995 WL 6154837.

240. *Smoking Restrictions on International Passenger Flights*, ASS. RES. A29-15, at I-37, ICAO Doc. 9600 (1996) [hereinafter *ICAO A29-15*]. The resolution urged states to "take measures as soon as possible to restrict smoking progressively on all international passenger flights with objective of implementing complete smoking bans by 1 July 1996." *Id.*

241. Letter from Dr. Claus Curdt-Christiansen, Chief of Aviation Medicine, ICAO, to the author (Apr. 7, 1998) (on file with author). See *ICAO Summary of Replies*, supra note 238.

242. See *Canadian Airlines Bans Smoking on Daily Flights to Japan*, AIRLINE MKTG. NEWS, July 6, 1994, available in 1994 WL 8734555; *Delta Snuffs Out Cigarette Smoking in the Sky*, AIRLINE MKTG. NEWS, Nov. 23, 1994, available in 1994 WL 8731657; *Iceland-*

ple, A29-15 lacks mandatory means to enforce its goal of smoke-free flights. A29-15 "requests" intensified studies, "requests" the ICAO and WHO to promote smoke-free travel, and "[u]rges all Contracting States . . . to restrict smoking progressively on all international passenger flights with the objective of implementing complete smoking bans."²⁴³ This is a prime example of an NGO pulling a tobacco control issue and legislation along. Despite the contentious nature of ETS regulation, legislatures continue working to protect the public in the workplace.²⁴⁴

Leadership by NGOs like ICAO and WHO are essential when workplace issues involve tobacco and transcend national boundaries. Although a compulsory international legal mechanism to protect people from ETS is lacking, ICAO and WHO leadership significantly influenced market forces and, in turn, governmental actions. Despite substantial advancements in ETS protection, much remains to be done. The international status and recognition of NGOs such as WHO and ICAO serve as a vital lens to focus regional and professional associations, and local grass roots organizations. Whereas change is slow to come for the benefit of anti-tobacco forces, the pendulum now swings in their favor.

dair Bolsters Image as First Smoke-Free European Carrier, AIRLINE MKTG. NEWS, Feb. 15, 1995, available in 1995 WL 8157552; *International Airlines Hasten Move Toward Non-Smoking Markets*, AIRLINE MKTG. NEWS, Aug. 31, 1994, available in 1994 WL 8734432; *Martinair Imposes Smoking on All International Flights*, AIRLINE MKTG. NEWS, Aug. 2, 1995, available in 1995 WL 8157865; *Northwest, KLM Snuff out Smoking on More International Flights*, AIRLINE MKTG. NEWS, July 19, 1995, available in 1995 WL 8157816; *Three More Carriers Cut Smoking as Congress Mulls International Air Ban*, AIRLINE MKTG. NEWS, Mar. 1, 1995, available in 1995 WL 8157567.

243. See ICAO A29-15, *supra* note 240.

244. See CAL. LABOR CODE, *supra* note 12; N.Y. CITY ADMIN. CODE, *supra* note 12; ARIZ. REV. STAT. ANN., *supra* note 12. Local regulations that prohibit indoor smoking are based upon health concerns rather than purely economic matters. Despite the controversy, once such statutes are enacted the public generally supports them despite a vocal, opposing minority. See *Bar Patrons in L.A. County Overwhelmingly Support Smoke-Free Bars*, BUS. WIRE, Mar. 4, 1998, available in LEXIS, News Library, Curnws File; Dr. David R. Nielsen, *Debating a Point Pro-Tobacco Arguments, Fears Fall Flat*, ARIZ. REPUBLIC, Mar. 1, 1998, at EV4; *HK New Anti-Smoking Measures Effective on July*, XINHUA NEWS AGENCY, June 25, 1998, available in LEXIS, News Library, Txtnews File (reporting on a Hong Kong ordinance that bans smoking at indoor shopping malls, department stores, supermarkets, and banks, except for restaurants within those facilities); *S. African Cabinet Okays Tobacco Control Bill*, *supra* note 199 (reporting on draft legislation that would allow broad smoking bans in the workplace).

VII. AN INTERNATIONAL FRAMEWORK CONVENTION FOR TOBACCO CONTROL

A. *The Need for an International Legal Instrument*

Since the 1980s, the WHO and the World Health Assembly (WHA) took a more active leadership role in the fight against tobacco. In the later 1980s, the WHA affirmed the causal link that tobacco consumption leads to death and disease.²⁴⁵ The WHA also affirmed that ETS is a “noxious form of environmental pollution” that violates nonsmokers’ right to health.²⁴⁶ A later WHA resolution urged states to protect the public from ETS in public transport.²⁴⁷

Several countries regulate tobacco consumption and marketing.²⁴⁸ However, legislative efforts have a patchwork effect due to the industry’s lobbying and influence.²⁴⁹ Without a global approach to tobacco control, further inconsistent and highly variable regulations will result.

The WHO, through the WHA, recognized the need for a comprehensive approach to the situation.²⁵⁰ After determining the feasibility of a framework convention,²⁵¹ the WHA adopted a resolution²⁵² calling on the WHO Director-General to begin developing an international framework convention for tobacco control in accordance with Article 19 of the WHO Constitution.²⁵³ The stated goals of the framework convention include the “adoption of comprehensive tobacco control policies” and methods to cope “with aspects of tobacco control that transcend national boundaries.”²⁵⁴

245. World Health Association Res. 39.14, 39th W.H.A. (1986), compiled in WHO, III HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD (1985-1992) 53 (3d ed. 1993).

246. *Id.*

247. WHA 44.26, *supra* note 234.

248. *See supra* notes 7, 8, 10 and accompanying text.

249. *E.g.*, *supra* notes 172-74 and accompanying text. *See, e.g.*, John Bacon, *Big tobacco Set to Sign \$206 Billion Settlement*, USA TODAY, Nov. 23, 1998, at 3A; Debbie Elliot & Robert Siegel, *All Things Considered: Whether Tobacco* (Nat’l Pub. Radio broadcast, Nov. 23, 1998);

250. *An International Strategy for Tobacco Control*, World Health Association Res. 48.11, W.H.O., 48th W.H.A., 12th plen. mtg., Annex 1, Agenda Item 19, W.H.O. Doc. WHA48/1995/REC/1 (1995).

251. *International Framework Convention for Tobacco Control*, W.H.A. Res. 49.17, W.H.O., 49th World Health Ass., W.H.O. Doc. WHA49/1996/REC/1 (1996).

252. *Id.*

253. WHO CONSTITUTION, *supra* note 51, at art. 19.

254. *Id.*

B. Progress Through an International Framework Convention

Tobacco's controversial nature makes it better suited for a framework convention rather than a detailed treaty. If the world attempted to implement a traditional treaty comprised of detailed terms, similar to the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it may never happen because parties probably would fail to agree on the explicit terms that compose such a treaty. The controversies surrounding tobacco would doom a traditional treaty from the start. A framework convention is much better suited for an initial global means of controlling tobacco. The framework treaty could list the tobacco control objectives,²⁵⁵ set forth the principles to guide the parties in implementing the objectives,²⁵⁶ and establish commitments to ensure an objective means of compliance to measure the parties' progress.²⁵⁷

Elements of "comprehensive tobacco control policies" should address the overall policy of tobacco control and further develop a program of shared information for all interested parties. States should report tobacco production, sales, exports, and imports to aid in comprehending, and eventually, comprehensive monitoring of the tobacco industry and critical areas inherent to tobacco control. Tobacco policies should deliberately address advertising, sponsorship, taxes, smuggling, and duty-free sales. Institutions and states should increase testing and reporting of toxic constituents. Both the tobacco consumer and tobacco-free population should have full information supplied on exactly how tobacco affects people.

Standardized, detailed reporting on tobacco production and marketing are required to fully understand the variable factors relating to the industry and consumer. Market research is a vital tool for the industry's success and forces for tobacco control should possess equal knowledge as a means of ensuring their success. The WHO and its Tobacco or Health (TOH) program acquired and shared substantial knowledge regarding the industry and health matters but much remains to be learned. The WHO's leadership position and reputation make it the logical choice to continue in this capacity. The WHO and TOH program could serve as an informational clearing house for local and regional NGOs along with many governments. This is a critical role for the WHO since one organization cannot fight the anti-tobacco battle single-

255. *E.g.*, raising tobacco excise taxes; eliminating duty-free tobacco sales; controlling smuggling; regulating advertising and warning labels; reporting production, imports, exports, and sales of tobacco products; and testing and reporting of toxic ingredients.

256. *E.g.*, ensuring the world's population has full knowledge of tobacco's effects upon personal health and national economies; encouraging states to remove supports of the tobacco industry and regulate its actions; and implementing uniform standards for tobacco control on a global basis.

257. *E.g.*, implementing standardized reporting concerning all aspects of tobacco control, regulation, production, and consumption.

handedly; success requires an extensive network.²⁵⁸

Advertising objectives should address advertising bans on television and billboards and also the material role that advertising plays in underage tobacco consumption. Although the framework probably will be unable to go as far as advocating minimized advertising, such goals within the framework's scope serve as an incentive for progressive states. The framework should include labeling guidelines that include explicit health warnings and a detailed ingredients listing. By setting global baselines for advertising practices, health warnings, and ingredient labeling the field can be leveled so that consumers are informed and can make knowledgeable choices regarding the tobacco habit. The framework could add a measure of protection for underage persons. Encouraging counter-advertising could rebut the glamorization of tobacco consumption for the benefit of susceptible youths.²⁵⁹

The international framework convention for tobacco control presently possesses the highest probability of success because of (1) the certainty that a traditional, detailed treaty would never be agreed upon and (2) the public's swelling anti-tobacco sentiment and its corresponding desire for a means of tobacco control. A framework convention would certainly advance anti-tobacco efforts to a higher level. Due to the deadly serious nature of the issue, the WHA, WHO, and United Nations should implement the framework convention before the new millennium begins.

VIII. CONCLUSION

The global majority acknowledges the causal relationship between tobacco consumption and ill health. Since the 1980s, the TTCs have aggressively marketed their wares in the developing world with notable success. Despite decreasing consumption in developed states, the gains in developing states more than offset any losses the TTCs may suffer. Although some argue that a tobacco pandemic is presently amongst us, the explosive increase in tobacco consumers predicates a certain pandemic in thirty to forty years.²⁶⁰ The economic and social costs will increase proportionately with the inevitable health costs.

Around the world, many people are ignorant of tobacco's ill effects, yet are quite cognizant of the image sold to them by TTCs. Children are particularly susceptible to tobacco and its marketing. Approximately 90% of all smokers began before age eighteen.²⁶¹ The international

258. See, e.g., *The International Nongovernmental Coalition Against Tobacco*, in *WHO, International Collaboration* (visited Mar. 26, 1998) <<http://www.who.org/psa/toh/Alert/4-96/E/ta10.htm>>.

259. See *supra* notes 90-92 and accompanying text.

260. See *supra*, notes 37-39 and accompanying text.

261. See *supra*, note 78.

community, through the Convention, has an obligation to ensure the fundamental right of children to maximize their health and development. Arguably, this Convention also possesses the authority of customary law due to its near-universal acceptance and basic premises that tend to be followed because of a sense of legal obligation. Alternatively, the Convention is soft law. The Convention offers a legal basis and a moral argument for regulating tobacco advertising that affects impressionable youths.²⁶² Although international legal authority exists, it is not utilized to control tobacco presently and the likelihood that the Convention will be employed to regulate tobacco is quite slim. Therefore, an alternative means of international tobacco advertising regulation is essential.

Nicotine's presence in all tobacco and ongoing medical research present a reasonable basis for regulating tobacco as a drug.²⁶³ Nicotine is arguably a psychotropic drug when one considers its physiological effects. It clearly affects the central nervous system and the brain, produces dependence, and is abusable. Although it does not present the severity of danger that hallucinogenic, barbiturate, or amphetamine drugs do, it falls in a gray zone and should be regulated. Despite an arguable international legal basis for regulating tobacco as a psychotropic drug, it is highly improbable that the international community will attempt to control tobacco in such a manner. Tobacco is too controversial a subject and the industry is too powerful for the world's interested parties to regulate tobacco as a psychotropic drug. Conversely, it may be sufficient to regulate the packaging, advertising, and sale of tobacco in the form of time, place, and manner restrictions without the contentious status of being regulated as a dangerous drug. After all, tobacco generally is legal and culturally acceptable worldwide, similar to alcohol. Issues like this that transcend national borders are best handled by an international framework convention.

Advertising is the engine that propels the tobacco industry's success. The industry is a formidable economic and social force that cannot be effectively regulated by voluntary measures because penalties do not exist to ensure compliance. The TTCs are often powerful enough to in-

262. See generally U.N. Convention on the Rights of the Child, *supra* note 85 and accompanying text.

263. *E.g.*, the U.S. Food and Drug Administration currently lobbies for authority to regulate tobacco as a nicotine delivery substance but suffered legal setbacks. See Alissa J. Rubin, *Court Rules FDA Cannot Regulate Tobacco as Drug; Law: Appeals Panel's Decision Deals Key Blow to Clinton Administration's Fight to Curb Youth Smoking. Judges Say Congress Never Gave the Agency Jurisdiction*, L.A. TIMES, Aug. 15, 1998, at A1 (reporting on *Brown & Williamson Tobacco Corp. v. FDA*, No. 97-1604 (4th Cir. Aug. 14, 1998)). See generally Susan H. Carchman, *Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?*, 51 FOOD & DRUG L.J. (1996); Barbara Noah & Lars Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1 (1996).

fluence governmental actions for their benefit. The current patchwork of national regulations regarding advertising illustrates this and portends a predictable failure if the world attempted to introduce a traditional treaty to regulate tobacco. Traditional treaties would probably fail for a lack of agreement on the details. The industry's influence necessitates a global standard; a possibility with an international framework convention. An international framework convention should address advertising, ingredient listing, and warning label issues.

Taxes are an effective tool for modifying consumer behavior and as a revenue source. Significantly raising excise taxes directly impacts underage and lower income consumers who possess less disposable income. It diminishes the number of people beginning the habit and gives incentive to current consumers to decrease consumption or quit all together. A problem with substantial tax increases is the inevitable smuggling where prices vary significantly between political entities. Within a global solution, tobacco taxes and anti-smuggling efforts must be examined concurrently. Because of the health dangers associated with tobacco, duty-free sales should also be reexamined. The framework convention should encourage uniform and substantial taxation of all tobacco products. A framework convention could begin a continuing process that incrementally leads states to implement controls toward the eventual goal of standardized global tobacco control.

The international issue of ETS as a workplace health risk is gaining credence along with the concept of a nonsmoker's right to be smoke-free. Businesses, individual political entities, and the United Nations have led by example and banned or limited smoking in enclosed places. In turn, workers gain significant health benefits from limiting their ETS exposure. A noteworthy example is the push by the ICAO and market forces to ban in-flight smoking. The health of passengers and particularly flight crews benefit from in-flight smoking bans while the airline industry enjoys secondary financial and safety benefits. Although ICAO lacks legal authority to enforce an in-flight smoking ban, it is in a position to lead the industry and states. Banning in-flight smoking facilitates a growing anti-tobacco public perception with commercial self-regulation and governmental regulation often following public opinion. Further strong leadership is needed to protect all workers. NGOs lead the struggle from grassroots to international levels. Without NGOs, any advances in ETS protection would be slow to come, if at all, particularly in the international context.

Without international tobacco controls, we can expect no significant progress in the anti-tobacco fight. An international framework convention for tobacco control is arguably the best method for examining all issues related to, and implementing measures for, tobacco control. The issues must be dealt with on an international basis to effectively regu-

late the tobacco industry, manage adverse consequences, and avoid patchwork regulations.²⁶⁴ The gravity of tobacco control requires a unified approach. The traditional treaty form would fail because meaningful consensus could not be obtained within a reasonable time. It is better to make a looser framework to build upon than stall and make no progress at all.

The WHO, through its constitution, possesses the authority to call a convention for matters within its domain. The issue of tobacco or health is clearly inside the WHO's purview. The WHO has the opportunity to lead the United Nations and improve the lives of the world's citizens. It is questionable that any other organization could accomplish the task. The WHO must take the lead and move beyond its conservative, technocratic past to prevent a tobacco pandemic.

The framework convention should contain guiding objectives and principles for implementing the objectives, as well as commitments for objectively measuring compliance. It should standardize reporting and information dissemination to better understand the issues associated with tobacco control. The time is ripe for an international framework convention for tobacco control—it is achievable and essential. The substantial likelihood of an unsuccessful traditional treaty for tobacco control contributes to the need for a framework convention. The international community has an obligation to alter the status quo and not turn away from the difficult issue of tobacco control.

Some assert that the present concerns about tobacco are much ado about nothing and tobacco is a reasonably safe and legal product, like alcohol. However, if current trends do not change, the world will assuredly experience a pandemic of monumental proportions, if it is not already. NGOs are a catalyst, in a leadership role, to implement positive change in how the world views and regulates tobacco. Without NGOs, meaningful global tobacco control will not materialize. Although international legal mechanisms exist to regulate tobacco globally, they have not been used in that capacity. Current public attitudes toward tobacco control, expansive medical and scientific evidence, and influential NGOs present the world with a unique opportunity for tobacco control through an international framework convention. The role of NGOs and the international framework convention for tobacco control will play a pivotal role in the next century's public health. Difficult choices and hard work remain for the world to gain effective tobacco control, yet it is possible within an international legal context, but only with support from NGO leadership and coordinated state commitments.

264. Cf. Torry, *supra* note 17 (describing internationally unique lawsuits by Guatemala, Nicaragua, and Panama against the tobacco industry).

RADIOACTIVE WASTE AND RUSSIA'S NORTHERN FLEET: SINKING THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

JUSTIN MELLOR^{*}

Communication with the Russian military on the Kola Peninsula is poor. We can understand their situation, but the problems of nuclear waste there are so great that they have to be solved. A catastrophe in the North would affect the whole of Europe.

Jorgen Kosmo, Norwegian Defense Minister¹

I. INTRODUCTION

In 1959 the first Soviet nuclear submarine, the Leninski Komsomol (K-3), entered into service and since that time the former Soviet Union (FSU) has launched a total of 248 nuclear powered submarines.² The majority of these vessels have served with Russia's Northern Fleet, based in Murmansk in the Barents Sea region.³ At the height of the Cold War the Barents region was home to the highest concentration of nuclear weapons and nuclear powered submarines in the world, due, in part, to the fact that the region contained the only ice free ports on the Russian Arctic.⁴

The Soviets, like their NATO counterparts, began their nuclear

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1. Michael Bond, *Arctic Standoff*, NEW SCIENTIST, Oct. 4, 1997, at 22.

2. Joshua Handler, *The Lasting Legacy: Nuclear Submarine Disposal*, JANE'S NAVY INT'L 11, Jan. 1, 1998, at 15 (in NATO nomenclature the K-3 was referred to as November class).

3. In the early 1990s, 84 of the former Soviet Union's submarines were serving with the Northern Fleet. See A. BAKLANOV ET AL., INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS, RADIOACTIVE SOURCES IN THE KOLA REGION: ACTUAL AND POTENTIAL RADIOLOGICAL CONSEQUENCES FOR MAN 36 (1996).

4. Gennady P. Luzin et al., *The Kola Peninsula: Geography, History and Resources*, ARCTIC, Mar., 1994, at 1.

building program with little thought to how the nuclear vessels would be decommissioned without creating serious environmental damage.⁵ As these submarines have reached the end of their natural service lives, they have become environmental hazards.⁶ The spent fuel from the submarines, and the reactor compartments themselves, pose serious health and environmental risks.⁷ Since the end of the cold war, a combination of factors, including financial restraint, maintenance problems and arms control, have accelerated the rate of decommissioning, thereby aggravating the problem.⁸ At present, the Northern Fleet's interim storage facilities are exhausted and much of the waste is being stored in an unsafe manner.⁹ Though immediate damage from Russian activities may not be obvious, exposure to even low levels of radiation may have grave consequences for the health and well being of people in neighboring states.¹⁰

International, regional and bilateral initiatives have been created in response to the nuclear waste problems generated by the Russian Navy.¹¹ Many of these have provided funds for studies and initial aid towards solving the problems of waste disposal.¹² The Rovanniemi Dec-

5. Alexi Yablokov the head of the Center for Russian Environmental Policy in Moscow indicated that despite the centralized economy of the Soviet Union, "when they produced nuclear submarines, . . . nobody thought about how to decommission them." See David Hoffman, *Russia Suffering Fallout Over Nuclear Submarines: Disposal Problems Causing Worries Worldwide*, DALLAS MORNING STAR, Nov. 27, 1998, at 55A.

6. Handler, *supra* note 2, at 17-18. Environmental hazards include: leakage of fuel, inappropriate storage of fuel when decommissioning the submarines, reactor accidents, and sinkings of submarines.

7. Geoffrey York, *Russia's "Floating Chernobyls" Part of Deadly Nuclear Mix: Disaster in the Making*, GLOBE AND MAIL, Jan. 2, 1996, at A1.

8. Handler, *supra* note 2, at 16-18.

9. H.-J. ENGELMANN, ET AL., INVENTORY OF RADIOACTIVE WASTE AND SPENT FUEL AT THE KOLA PENINSULA REGION OF NORTH-WEST RUSSIA 115 (1996) [hereinafter INVENTORY].

10. Apart from long latency periods for certain kinds of cancer, it has also been suggested that exposure to radiation may produce cumulative genetic damage with mutated genes being passed on from one generation to the next. See Herman Muller, *Radiation and Heredity*, 54 AM. J. PUB. HEALTH 42, 44 (1964). Russia's neighbors should be concerned given the example of the Isle of Man where low level exposure from the UK's Sellafield nuclear reprocessing plant has been linked to increases in childhood cancer in Ireland and the Isle of Man. See Terry Hall, ". . . Carried by the Wind Out to Sea" *Ireland and the Isle of Man v. Sellafield: Anatomy of a Transboundary Pollution Dispute*, 6 GEO. INT'L ENVTL. L. REV. 639, 649-53 (1994).

11. See *Declaration on the Protection of the Arctic Environment*, in ORAN YOUNG, CREATING REGIMES: ARCTIC ACCORDS AND INTERNATIONAL GOVERNANCE 200 (1998) [hereinafter Kirkenes Declaration]; *Declaration on Cooperation in the Barents Euro-Arctic Region*, in *id.* at 217.

12. The problem has been studied extensively. For example: IAEA funded International Arctic Seas Assessment Project (1993), Arctic Monitoring and Assessment Program, International Science and Technology Centre established by Japan, EU, U.S., Arctic Nuclear Waste Program (ANWAP), Euro-Arctic Barents-Region, and NATO. For a more detailed description of studies and initiatives, see BAKLANOV ET AL., *supra* note 3,

laration on the Protection of the Environment¹³, signed by the eight Arctic nations,¹⁴ cited the importance of international co-operation and financial support in the "rehabilitation of areas that have been polluted as a result of the operation of nuclear facilities."¹⁵ Similarly, the Barents Euro-Arctic Council in the Kirkenes Declaration recognized it as a serious problem that requires international co-operation.¹⁶ Despite this push towards international co-operation and aid for dealing with its spent fuel problem, the Russian Navy has continued to operate nuclear powered submarines and is presently engaged in building and launching new vessels that rely on nuclear propulsion.¹⁷

This paper argues that the international community is undermining principles of international environmental law, such as state responsibility and co-operation. Russia has not been admonished for its violation of existing treaty law, such as the London Convention,¹⁸ and has instead become the beneficiary of international aid.¹⁹ By reconstructing the problem as regional, Russia has avoided the issue of state responsibility. It has further ignored the precautionary approach and has launched new submarines as well as proposing the creation of floating nuclear plants for the Arctic communities based on naval reactor designs.²⁰ Regional co-operation has become nothing more than a military subsidy in that it allows the Russian Navy to avoid diverting portions of its operational budget into nuclear waste disposal and treatment.

Before analyzing this problem from the principles of state responsibility and co-operation, it is first necessary to outline the scope and magnitude of the nuclear waste problem.

at 15-21.

13. Kirkenes Declaration, *supra* note 11, at 200.

14. The eight Arctic nations are Denmark, Finland, Sweden, Norway, Iceland, the Union of Soviet Socialist Republics, Canada, and the United States of America. See Kirkenes Declaration, *supra* note 11, at 200.

15. *Id.*

16. *Declaration on Cooperation in the Barents Region*, reprinted in YOUNG, *supra* note 11, at 217.

17. The SSBM Yuri Dolgoruky, the lead boat of the new Borey class, is under construction at Severodvinsk. See Alison Clayton & Ian Kemp, *Russian Navy Readiness Remains Despite Cuts*, JANE'S DEFENCE WKLY, Sept. 9, 1998, at 8.

18. *Intergovernmental Conference on the Convention on the Dumping of Wastes at Sea: Final Documents*, Nov. 13, 1972, 11 I.L.M. 1291 (as amended in 1996, the chief international convention for the control of deliberate disposal of substances at sea). The 1996 Protocol takes an even greater precautionary approach to dumping by creating a reverse listing. Article 4(1)(c) "prohibits the dumping of any wastes" other than those listed in annex 1. *Id.* at art. 4(1)(c).

19. *Id.* at art. VIII, X.

20. *Russia Nuclear Power Plant in Works*, GLOBE AND MAIL, Sept. 11, 1997, at A17.

II. DEFINING THE NORTHERN FLEET'S WASTE PROBLEM

Throughout the 1970s and 1980s, the Former Soviet Union (FSU) engaged in an extensive submarine building program, culminating in the construction of 248 submarines.²¹ Over the years, the FSU has suffered fifty-two known accidents involving nuclear submarines or vessels.²² Before 1992, the navy often dumped spent fuel and reactor compartments, along with low level waste, into the Barents Sea.²³ In the area surrounding Novaya Zemlia, the navy has dumped two submarines, one with two loaded reactors, the other with a reactor containing spent fuel.²⁴ In total, thirteen submarine reactors were disposed of in the area;²⁵ six of them containing varying amounts of spent fuel.²⁶ Dumping was typically carried out when a submarine was damaged or when its fuel could not be extracted safely and put into interim storage to await reprocessing.²⁷ This occurred despite domestic and international prohibitions against dumping.²⁸

Due to a combination of fiscal restraint and the START agreements, the rate of decommissioning has rapidly accelerated.²⁹ By 1998 the FSU had retired approximately 167 submarines and was averaging about twenty submarines per year.³⁰ In the Northern Fleet alone, there are presently 132 inoperative reactors in decommissioned vessels,³¹ many of which have fuel assemblies remaining in the reactors because of the critical shortage of storage space.³²

The FSU procedure for dealing with spent fuel involves off loading the fuel onto service ships, which then transport it to fuel depots for temporary storage. After cooling, the spent fuel is transported by rail to the Mayak reprocessing plant in the Urals.³³ The contaminated reactor

21. Handler, *supra* note 2, at 15.

22. BAKLANOV ET AL., *supra* note 3, at 44.

23. *Id.*

24. Jason H. Eaton, *Kicking the Habit: Russia's Addiction to Nuclear Waste Dumping at Sea*, 23 DEN. J. INT'L L. & POL'Y 287, 293 (1995).

25. Handler, *supra* note 2, at 16.

26. *Id.*

27. *Id.*

28. International concern provoked numerous reports of radioactive waste dumping. *Id.*

29. *Id.* at 16. The two START agreements are: Treaty on the Reduction and Limitation of Strategic Offensive Arms, July 31, 1991, U.S.-U.S.S.R., reprinted in JOZEF GOLDBLAT, *ARMS CONTROL: A GUIDE TO NEGOTIATIONS AND AGREEMENTS* 591 (1994) [hereinafter START I]; Treaty on Further Reduction and Limitation of Strategic Offensive Arms, Jan. 3, 1993, U.S.-U.S.S.R., reprinted in *id.* at 697 [hereinafter START II].

30. Handler, *supra* note 2, at 15.

31. *Id.* at 16.

32. INVENTORY, *supra* note 9, at 90.

33. Handler, *supra* note 2, at 16.

compartments are then sealed up and stored afloat.³⁴ Due largely to fiscal problems, the FSU has not been able to afford the cost of transportation and reprocessing.³⁵ Consequently, approximately 49,000 spent fuel assemblies are now sitting in interim storage,³⁶ some being stored improperly at outdoor sites.³⁷

It is difficult to assess the extent of the environmental damage from the FSU submarine program. It is generally believed that there is wide spread "low level contamination" throughout the entire fleet support facility.³⁸ Some recent reports have found an eight-fold increase in radioactivity in the sediment found around the Kola bases in the last three years.³⁹ The amount of Cobalt 60 found in the vicinity of the naval base at Poljarny has increased from 10(bq/kg) to 80 (bq/kg).⁴⁰ Scientists from the Russian Academy of Science's Marine Biology Institute discovered that levels of Caesium 137 in Andreeva Bay near Norway had also increased.⁴¹ These increases are likely due to deteriorating storage facilities.⁴² A recent European Commission report concluded, "the storage situation constitutes a major hazard to the population of the area and the environment."⁴³

However, a 1996 review of studies carried out on radioactive nuclides in the region concluded that most of the marine pollution was composed of Caesium 137 and Strontium 90, both of which could be traced directly to the Chernobyl accident and nuclear atmospheric tests carried out in the Soviet north.⁴⁴ This finding lends support to an early International Atomic Energy Agency (IAEA) study that found fine grain ocean sediment actually traps radioactivity and limits environmental damage.⁴⁵ This has led some to suggest that the dumping option may be

34. *Id.* at 16. It is important to differentiate between the high level waste (the spent fuel) and the low level radioactive waste (reactor compartments). For a description of what is involved in decommissioning a nuclear submarine. See *Committee on Merchant Marine and Fisheries House of Representatives on Oversight of the Ocean Dumping Act and National Ocean Pollution Planning Act and the Disposal of Defueled, Decommissioned Nuclear Submarines*, 97th Cong. 16-17 (1982) (statement of Carl Schmidt, U.S. Naval Nuclear Propulsion Program Director).

35. Handler, *supra* note 2, at 16.

36. INVENTORY, *supra* note 9, at 92.

37. York, *supra* note 7, at A1.

38. Handler, *supra* note 2, at 18. The storing of waste outside creates the risk that the containers will develop cracks as a result of thawing and freezing. See Thomas Nilssen, *Nuclear Waste Storage in Andreeva Bay* (visited Oct. 9, 1999) <<http://www.Belona.no/efakta/fakta87.htm>>.

39. Rob Edwards, *Hot Waters*, NEW SCIENTIST, May 9, 1998, at 11.

40. *Id.* (According to Bellona these high levels of Cobalt are indications that storage of submarine reactors holding liquid waste in the vicinity are corroding.)

41. *Id.*

42. *Id.*

43. INVENTORY, *supra* note 9, at 119.

44. BAKLANOV ET AL., *supra* note 3, at 100.

45. David Schneider, *Not In My Backyard: Could Ocean Mud Trap Nuclear Waste*

a safe environmental solution to Russia's problem.⁴⁶

The immediate absence of extensive radioactive marine contamination does not mean that a problem does not exist. Almost all of the dumped naval reactors were filled with a special hardening solution to prevent salt-water deterioration, which means it may be some time before the effects of the contamination begin to appear in the environment.⁴⁷ The potential for an accident also increases as more submarines await decommissioning or are scrapped.⁴⁸ The shortage of interim storage facilities poses grave hazards and there have already been reports of leakages and accidents.⁴⁹ Russian Deputy Atomic Energy Minister Nikolay Yegorov has stated that "matters worsen every year . . . and could turn into a catastrophe worse than Chernobyl."⁵⁰ Government statements such as this are of obvious concern to Russia's northern neighbors.

The lack of Russian government funding resulted in only two submarines being scrapped in 1997 for both the Pacific and Northern Fleets.⁵¹ In addition, at the current rate of fuel shipment, it will take thirty to forty years to reprocess all of the spent fuel.⁵² In spite of these facts, the Russian Navy has continued operations and a nuclear building program. In 1996 the Navy launched the much delayed nuclear powered cruiser, Peter the Great, with an estimated operating cost of U.S. \$50-100 million per year,⁵³ as well as laying the keel of the nuclear submarine Yuri Dolgoruki.⁵⁴ The Russian Navy announced in 1998 that it hoped to launch two nuclear submarines in 1999⁵⁵ and Admiral Oleg Yerofeyev indicated that Russia's building program will now focus on higher technology boats because it makes "sense to have fewer vessels but of a higher quality."⁵⁶ The Russian Navy demonstrated its opera-

from Old Russian Subs, SCIENTIFIC AMERICAN, Mar. 1997 at 20, 21.

46. The IAEA has studied plutonium that was dispersed by a downed B-52 bomber of the coast of Greenland. Charles D. Hollister of the Woods Hole Oceanographic Institute has been vocal in supporting a study of the dumping option for subs. *Id.* at 22.

47. Eaton notes that witness accounts indicate that the navy often fired at nuclear waste containers to quicken their sinking. Eaton, *supra* note 24, at 293.

48. In December 1995 the Northern Fleet failed to pay its electricity bill and had its power cut resulting in a failure of the cooling system and overheating of one reactor. See York, *supra* note 7, at A12.

49. BAKLANOV ET AL., *supra* note 3, at 188. One defueled reactor compartment was lost at sea in 1995 whilst being towed from Severodvinsk to Murmansk for storage. Handler, *supra* note 2, at 17.

50. Al Venter, *Russian Nuclear Neglect May Cause Next Chernobyl*, JANE'S DEFENCE WKLY., Apr. 7, 1999, at 8.

51. Handler, *supra* note 2, at 19.

52. *Id.*

53. *Russia Arms for Oblivion*, ECONOMIST, Nov. 30, 1996, at 47.

54. *Id.*

55. Clayton & Kemp, *supra* note 17, at 8.

56. *Id.*

tional capability in December 1997 when the Russians tested ballistic missiles from submarines in the Barents Sea.⁵⁷ All of this information supports the conclusion that severely limited Russian Navy funds have been directed towards operations and building as opposed to dealing with the waste problem.

Though construction of new boats has fallen behind schedule⁵⁸ and operations for the Northern Fleet have declined as a result of recent troubles in the Russian economy,⁵⁹ analysts still believe that submarine and anti-submarine warfare will continue to have the "highest priority" in terms of Russia's defense expenditures.⁶⁰ Recent government documents indicate that Russia is still planning to allocate three and-a-half percent GDP for defense appropriations in the 1998-2025 period.⁶¹ Russia has sought extensive foreign co-operation in dealing with its nuclear problems.⁶² As early as 1992, it began seeking aid from the United States; but despite its pleas for assistance in dealing with nuclear waste, Russia has still commissioned several nuclear vessels in ensuing years.⁶³ Much of the Russian interest in Arctic co-operation has been in attempt to obtain environmental aid to deal with self-inflicted problems.⁶⁴ As part of a recent Russian-Norwegian bilateral agreement, the Norwegian government has agreed to provide assistance to clean up the Andreeva Bay sight, build rail cars for shipping waste and begin a pilot project to deal with a contaminated submarine tender named the *Lepse*.⁶⁵ The Norwegian parliament has been adamant that it will not provide financial assistance if the money can be used to support the operations of the Russian Navy.⁶⁶ However, simply by paying for a portion of the clean up, the Norwegians are relieving the Russians of the need to divert resources from their naval operations budget into waste management. In that sense, co-operation and aid serve as indirect military subsidies.

The increase in international co-operation has not changed Russian

57. *Cold Wars in Cold Waters*, U.S. NEWS & WORLD REP., Mar. 23 1998, at 19.

58. Clayton & Kemp, *supra* note 17, at 8.

59. *Id.*

60. Norman Polmar, *The Soviet Navy*, PROCEEDINGS, Feb. 1998, at 88.

61. See Richard F. Staar, *Russia's New Blueprint For National Security*, 26 STRATEGIC REV., 31, 34 (1998).

62. *Japan Asks U.S., Russia, IAEA for Help in Nuke Accident*, MALAY. GEN. NEWS, Oct. 1, 1999, at A1; *Democracy and Investment New Focus of EU Assistance to Russia, Ukraine and Other Newly Independent States*, RAPID, Dec. 22, 1998, at 1.

63. Gabriel Schonfeld, *Underwatergate*, NEW REPUBLIC, Apr. 27, 1992, at 20.

64. YOUNG, *supra* note 11, at 66.

65. Igor Kudrick, *Russian-Norwegian Commission on Radwaste Holds First Meeting in Moscow*, (July 31, 1998) (visited Nov. 8, 1998) <<http://www.bellona.no/e/russia/nfl/news/98073>>.

66. Thomas Nilsen, *Nuclear Waste Cleanup to Start in Russian Arctic*, (Jun. 2, 1998) (visited Nov. 3, 1998) <<http://www.bellona.no/e/russia/nfl/news/980731>>.

behavior or policy on contamination in the Barents.⁶⁷ The Northern Fleet continues to generate 5000 tons of solid radioactive waste each year despite the absence of a comprehensive plan to deal with it.⁶⁸ In October 1997, the Russian government announced that it planned to build a series of floating nuclear power plants, based on naval reactor designs, to supply Siberian towns with electricity.⁶⁹ This plan would require the barges to be towed to Murmansk for servicing and refuelling.⁷⁰ The Norwegian Defense Minister, Jorgen Kosmo, condemned the initiative, stating, "[t]his is not the kind of progress I am hoping for from Russia. . . . They should use their first class engineers to make existing power plants more secure, rather than try to realise a vision of floating plants."⁷¹

As well as creating problems in the Barents region with nuclear waste, Russia has also been complicit in the proliferation of the problem in the developing world. In the late 1980s, Russia leased a nuclear attack submarine (SSN) to India, as well as providing technicians and assistance, which served as basis for the development of an indigenous Indian SSN project.⁷² This occurred in spite of Russia's own problems with the disposal of waste from the Northern Fleet⁷³ and is indicative of the blind nature of Russian policy on the costs and impacts of nuclear technology.⁷⁴

Despite Russia's willingness to accept financial aid to deal with the Barents problem, it has been less than forthcoming with information about the situation. It has refused Norwegian experts access to the fuel depot at Andreeva Bay, fifty kilometers from Norway.⁷⁵ As one senior official stated, "[n]o nation would want this kind of storage facility so close to its border. We would like to see it for ourselves, and it concerns us that we cannot."⁷⁶ The cloak of secrecy extends not only to foreign, but also to domestic authorities. In 1996, inspectors from Gosatomnadzor, the civil radiation protection agency, were barred from inspecting the site.⁷⁷

67. Ethirajan Anbarasan, *Nuclear Watch in the Far North; Scandinavian Countries Concerned Over the Concentration of Russian Nuclear Material on the Kola Peninsula*, UNESCO COURIER, Nov. 1, 1998, at 10.

68. INVENTORY, *supra* note 9, at 92.

69. *Norway goes Critical over Floating Reactors*, NEW SCIENTIST, Oct. 4, 1997, at 22.

70. *Id.*

71. *Id.*

72. Rahul Bedi, *India Presses Ahead with SSN to Boost Navy's Nuclear Profile*, JANE'S DEFENCE WKLY., July 22, 1998, at 26.

73. INVENTORY, *supra* note 9.

74. *Id.*

75. Bond, *supra* note 1, at 22.

76. *Id.*

77. Deborah MacKenzie, *Russian Secrecy Could Sink Nuclear Aid*, NEW SCIENTIST, Apr. 20, 1996, at 4.

The Russians have effectively ignored the principle of state responsibility and twisted the concept of co-operation. The Northern Fleet situation demonstrates the contradictory nature of state responsibility and co-operation and shows how a country may become the beneficiary of co-operation without having to accept liability or even modify its hazardous behavior.⁷⁸ As the following sections will demonstrate, international environmental law is inadequate to deal with this type of situation.

III. ISSUES OF STATE RESPONSIBILITY

In order to examine the effect of Russian policy regarding nuclear waste, it is necessary to look at both treaty law and customary international law in the area of state responsibility.

A. *Treaty Law*

Part of the difficulty with imposing any liability on the FSU for contamination in the Barents Sea is that the pollution source is military based, not civilian. Many treaties specifically exclude military pollution sources.⁷⁹ The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter⁸⁰ prohibits marine dumping in Article 4,⁸¹ but Article 7 specifically excludes vessels that are entitled to sovereign immunity under international law.⁸² Article 10(4) of the 1996 Protocol to the London Convention⁸³ also exempts those vessels with sovereign immunity.⁸⁴ Because military vessels are subject to such immunity, these articles effectively remove the Barents

78. *Id.*

79. See Third United Nations Conference on the Law of the Sea: Final Act, Nov. 1982, 21 ILM 1245 [hereinafter Third United Nations]; Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (London Convention), 1972: Final Act, 1996 Protocol and Resolutions, 36 ILM 1 [hereinafter London Convention].

80. London Convention, *supra* note 79.

81. *Id.* at 9.

82. *Id.* at 10.

83. Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972 and Resolutions Adopted by the Special Meeting (as adopted by the Special Meeting of the Contracting Parties to the London Convention 1972 on Nov. 7, 1996) LC/SM 1/6, Nov. 14, 1996.

84. Article 10 (4) states:

Application and Enforcement: This protocol shall not apply to those vessels and aircraft entitled to sovereign immunity under international law. However, each Contracting Party shall ensure by the adoption of appropriate measures that such vessels and aircraft owned or operated by it act in a manner consistent with the object and purpose of this Protocol and shall inform the Organization accordingly.

Id.

problem from the reach of the conventions, since most of the threat stems from submarines awaiting de-fuelling.

Some commentators have suggested that once a submarine is decommissioned it loses its sovereign immunity and that a de-fuelled submarine dumped at sea would be subject to London Convention regulation.⁸⁵ This argument is based on the definition of "warship" contained under Article 29 of the United Nations Law of the Sea Convention,⁸⁶ which requires the ship to be under the command of an officer.⁸⁷ But this argument leads one to make fine distinctions in order to identify the point at which decommissioning takes place; something that is very difficult to do in the Russian case, where much of the submarine scuttling occurred in an emergency context.⁸⁸

Even if the London Convention was applicable to waste that was dumped into the Barents Sea; the convention would still be of little use in attempting to impose state responsibility. First, the Convention did not come into effect until 1976 for the Soviet Union, by which point considerable amounts of dumping had already occurred.⁸⁹ Second, even under the 1996 Protocol, there are no specifics on responsibility and liability for dumping.⁹⁰ Article 15 simply states that "the Contracting Parties undertake to develop procedures regarding liability arising from the dumping or incineration at sea of wastes."⁹¹ This means that countries in the Barents Region have no recourse against the FSU should the contamination problem increase, as previously dumped waste begins to work its way into the environment and existing storage sites deteriorate.

The one convention that could have effectively imposed state responsibility on the FSU for contamination in the Barents Sea was the Brussels Convention on the Liability of Operators of Nuclear Ships.⁹² It applied to both civil and naval vessels⁹³ and, under Article 2(1), held that "[t]he operator of a nuclear ship be absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste

85. See W. Jackson Davis and Jon M. Van Dyke, *Dumping of Decommissioned Nuclear Submarines at Sea*, 14 MARINE POL'Y 467, 475 (1990).

86. See Third United Nations, *supra* note 78, at 1275.

87. *Id.*

88. For example, in April 1970 the Soviets scuttled a November Class SSN off the coast of Spain following a loss of stability in pitch caused by a fire on board. See BAKLANOV ET AL., *supra* note 3, at 44.

89. See generally London Convention, *supra* note 79.

90. See *id.*

91. *Id.* at art. 15.

92. Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, 57 AM. J. INT'L L. 268 (1963), reprinted in PHILLIPPE SANDS, CHERNOBYL: LAW AND COMMUNICATION 82 (1988).

93. *Id.* at art. 1(1).

produced in such a ship."⁹⁴ However, the convention was never signed by either the U.S. or the U.S.S.R. and did not enter into force.⁹⁵ The fact that none of the countries with naval programs relying on nuclear propulsion signed the treaty indicates the ultra-hazardous nature of the activity.⁹⁶

Similarly, Russia is not a party to the recently concluded Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.⁹⁷ Even if it were a party, the agreement would be of little use in imposing responsibility and liability on the FSU's government. In the preamble, the Convention reaffirms "the ultimate responsibility for ensuring the safety of spent fuel and radioactive waste management rests with the States."⁹⁸ However, Article 3(3) of the Convention explicitly exempts "radioactive waste within military or defence programmes" unless the Contracting Party decides to bring it within the Convention.⁹⁹ In the Russian case, it would be difficult to evaluate the applicability of the Convention since the decommissioning of nuclear submarines is in the process of being transferred from the Ministry of Defense to the civil Ministry of Atomic Energy.¹⁰⁰

Even presuming the applicability of the Convention, the agreement is lacking in substance. There are no provisions within the Convention to impose liability on a state or civil operator for transboundary pollution caused by the mishandling of spent fuel.¹⁰¹ The Convention does not even specify exact standards of storage for spent fuel. Rather, it simply requires that the contracting parties take appropriate steps to "ensure that . . . individuals, society, and environment are adequately protected against radiological hazards."¹⁰² It then provides some very

94. *Id.* at art. 2(1).

95. *Id.* at 83.

96. *Id.*

97. *Signing of Conventions: Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (visited Oct. 9, 1999) <<http://www.iaea.org/worldatom/updates/jointa.html>>.

98. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 5, 1997, 36 I.L.M. 1436, 1437, preamble (vi) [hereinafter Spent Fuel Convention].

99. *Id.* at 1440, art. 3(3). Article 3(3) states:

This Convention shall not apply to the safety of management of spent fuel or radioactive waste within military or defence programmes, unless declared as spent fuel or radioactive waste for the purposes of this Convention by the Contracting Party. However, this Convention shall apply to the safety of management of spent fuel and radioactive waste from military or defence programmes if and when such materials are transferred permanently to and managed within exclusively civilian programmes.

Id.

100. It appears that reallocation of responsibility was made in May 1998. See Clayton & Kemp, *supra* note 17, at 8.

101. See generally Spent Fuel Convention, *supra* note 98.

102. *Id.* at art. 4.

general recommendations on storage.¹⁰³ The absence of precise rules and a provision for liability in the case of an accident results in hard law becoming soft law due to the absence of content.¹⁰⁴ Further, under Article 36(3),¹⁰⁵ the Convention allows a contracting party to impose a veil of secrecy around information dealing with military waste that the party chooses to bring under the auspices of the Convention.¹⁰⁶ This makes proving the negligence of a contracting party extremely difficult.

Conventions like the Spent Fuel Convention that rely largely on the domestic law of contracting states to enforce standards of safety and responsibility are of limited worth. The Russian Navy dumped spent fuel despite its own regulations and those of other domestic agencies against it.¹⁰⁷ The present Russian Constitution contains provisions under Article 42 that hold the state liable for domestic ecological damage.¹⁰⁸ It states that "[e]veryone has the right to a favourable environment, to reliable information about its conditions, and to compensation for any loss caused by ecological damage to his health or property."¹⁰⁹ The constitution also indicates that the general principles and norms of international law are an integral part of Russian law if the Russian Federation is party to an agreement.¹¹⁰ However, this is of little use in attempting to enforce state responsibility since the Russians have vigorously avoided conventions that impose liability and most nuclear law is now based on the concept of "incentives" as opposed to punitive sanctions.¹¹¹

Western states, in providing assistance to deal with Russia's military waste problem, need to tie the aid to specific hard law provisions concerning state responsibility. One particular model might be the

103. *Id.*

104. Katia Boustany, *The Development of Nuclear Law or the Art of Legal Evasion*, 51 NUCLEAR L. BULL. 39, 44 (1998).

105. Spent Fuel Convention, *supra* note 98, at 1450, art. 36(3). Article 36(3) states:

With respect to information relating to spent fuel or radioactive waste falling within the scope of this Convention by virtue of paragraph 3 of Article 3, the provisions of this Convention shall not affect the exclusive discretion of the Contracting Party to decide: (i) whether such information is classified or otherwise controlled to preclude release (ii) whether to provide information referred to in sub-paragraph (i) above in the context of the Convention; and (iii) what conditions of confidentiality are attached to such information if it is provided in the context of this Convention.

Id.

106. *Id.*

107. Eaton, *supra* note 24, at 297.

108. KONST. RF. art. 42, reprinted in S. E. FINER ET. AL., *COMPARING CONSTITUTIONS* 257 (1995).

109. *Id.*

110. *Id.* at art. 15.4.

111. See, e.g., *Convention on Nuclear Safety*, 1994, 33 I.L.M. 1514 reprinted in INTERNATIONAL ATOMIC ENERGY AGENCY, *CONVENTION ON NUCLEAR SAFETY: LEGAL SERIES NO. 16*, 1 (1994) (This Convention lacks "hard" standards or any liability for radiological transboundary pollution).

Nordic Convention on the Protection of the Environment.¹¹² Article 3 gives citizens of contracting parties the right to bring cases before each other's courts in order to obtain compensation or to question the permissibility of an activity.¹¹³ This would allow individuals in other Bar-ents countries the right to seek redress within the Russian legal system for damage done by the nuclear activities of the Northern Fleet.

It may be argued, however, that some treaty law on nuclear matters works in direct opposition to the concept of state responsibility. For example, the Russians are party to the Vienna Convention on Early Notification of a Nuclear Accident,¹¹⁴ which requires that notification be given to those states that are affected by a nuclear accident at any "radioactive waste management facility."¹¹⁵ The state must also furnish information on the characteristics of the accident to the International Atomic Energy Agency (IAEA)¹¹⁶ and to those "States which are physically affected."¹¹⁷ Whilst, on the surface, the early notification appears to be a positive step, it may be argued that by providing notification of a nuclear accident involving the Northern Fleet, the Russians may claim that they have fulfilled their procedural obligations and that their liability is limited. In that case, the Convention shifts the onus and may result in a victim being accused of not acting to prevent damage and

112. Nordic Convention on the Protection of the Environment, Feb. 19, 1974, 1092 U.N.T.S. 279, reprinted in SANDS, *supra* note 92, at 144.

113. *Id.* at 145. Article 3 states:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out. The provisions of the first paragraph of this Article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favorable to the injured party than the rules of compensation of the State in which the activities are being carried out.

Id.

114. Vienna Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, 1439 U.N.T.S. 276, 25 I.L.M. 1370 (1986).

115. *Id.* at art. 1.

116. *Id.* at art. 2(a). The International Atomic Energy Agency is a specialized agency within the United Nations system, comprised of 129 Member States. The IAEA serves as the world's central intergovernmental forum for scientific and technical cooperation in the nuclear field, and as the international inspectorate for the application of nuclear safeguards and verification measures covering civilian nuclear programs. *Profile of the IAEA* (visited Oct. 9, 1999) <http://www.iaea.org/worldatom/About/profile.shtml>.

117. Vienna Convention on Early Notification of a Nuclear Accident, *supra* note 114, at art. 2(a).

therefore being contributorily negligent.¹¹⁸

The recent Norwegian-Russian agreement on waste clean up specifically insulates the parties involved from any form of liability in case of an accident during the clean up.¹¹⁹ This means that there is absolutely no recourse for liability either against the state, using treaty law, or on a civil basis against the companies participating in the project.

Treaty law in the areas of spent fuel management and liability for nuclear accidents are either non-applicable, in the case of the Russian Navy, or are based on incentive conventions and impose no requirements for state responsibility.¹²⁰ Therefore, the Northern Fleet and its environmental problems are beyond the reach of international treaty law.¹²¹ This leaves only customary international law as a means of imposing liability should an accident occur.¹²²

B. Customary Law

There are many sources of customary international law that could impose a duty of state responsibility on the Russians for any trans-boundary pollution that might result from their nuclear activity in the Barents Sea.¹²³ In 1961, the United Nations passed Resolution 1629, which dealt with the issue of nuclear pollution.¹²⁴ It stated that "the fundamental principles of international law impose a responsibility on all States concerning actions which might have harmful biological consequences for the existing and future generations of peoples of other states."¹²⁵ The most frequently cited source of customary state responsibility is Principle 21 of the Stockholm Declaration,¹²⁶ which holds that states have a "responsibility to ensure that activities within their juris-

118. This idea of notification limiting liability may also be applied to Ukraine and the existing situation with Chernobyl. See Justin Mellor, *The Negative Effects of Chernobyl on International Environmental Law: The Creation of The Polluter Gets Paid Principle*, 17 WIS. INT'L L. J. 65, 73-74 (1999).

119. Igor Kudrick, *Russian-Norwegian Commission on Radwaste holds first meeting in Moscow*, (visited Nov. 8, 1998) <<http://www.bellona.no/e/russia/nfl/news/98073>>.

120. Spent Fuel Convention, *supra* note 98, at art. 3.

121. *Id.*

122. Customary international law, in contrast to treaty law, is a consequence largely of uniformities in state behavior rather than formal writings resulting from extensive deliberation and negotiation. BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 107 (3rd ed. 1997).

123. See G.A. Res. 1629, Nov. 28, 1961, *reprinted in* UNITED NATIONS RESOLUTIONS, Series I, Vol. VIII 241 (Dusan J. Djonovich ed., 1974)

124. *Id.*

125. *Id.*

126. See Stockholm Declaration of the United Nations Conference on the Human Environment, The United Nations Conference on the Human Environment, June 5-16, 1972, U.N. Doc. A/Conf.48/14 and Corr. 1, *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

diction or control do not cause damage to the environment of other States or of areas beyond their national jurisdiction.¹²⁷ The Rio Declaration,¹²⁸ in Principle 2, reaffirms the issue of state responsibility.¹²⁹ It also recognizes, under Principle 16, that "the polluter in principle should bear the cost of pollution."¹³⁰

Besides the Rio Declaration and Stockholm Declaration, there are also legal precedents such as the *Trail Smelter* arbitration¹³¹ and the *Corfu Channel* case,¹³² which imply a custom of state responsibility. The *Trail Smelter* arbitration established the principle that "no state has the right to permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons there in."¹³³ The *Corfu Channel* case held that every state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."¹³⁴

However, the weight of these precedents has been undermined in recent years by the Sandoz chemical fire¹³⁵ and the Chernobyl accident,¹³⁶ in which liability for damage was not imposed on the polluter states.¹³⁷ In fact, it can be argued that Chernobyl has resulted in a "polluter gets paid principle," in which the polluter becomes the recipient of aid rather than compensating those states that are harmed.¹³⁸ By 1995,

127. *Id.* at princ. 21.

128. The Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Agenda Item 9, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in STANLEY P. JOHNSON, *THE EARTH SUMMIT: THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED)*, 117-121 (1992) [hereinafter Rio Declaration].

129. *Id.* at 118.

130. *Id.*

131. See *Trail Smelter Arbitration (U.S. v. Can.) 1931-1941*, 3 R.I.A.A. 1905, reprinted in *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 1209 (Hugh K. Kindred et al., eds, 4th ed., 1987).

132. See *Corfu Channel (U.K. v. Alb.) 1949 I.C.J. Rep. 4*, reprinted in *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA*, *supra* note 131, at 1229.

133. *Trail Smelter Arbitration*, 3 R.I.A.A. 1905, at 1212.

134. *Corfu Channel*, 1949 I.C.J. 4, at 1231.

135. See generally Devereaux F. McClatchey, *Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996*, 25 GA. J. INT'L & COMP. L. 659, at 661 (1996). On November 1, 1986, a fire broke out in a chemical warehouse owned and operated by the Sandoz Corporation in Schweizerhale, near Basel, Switzerland. *Id.* The fire spread quickly and because of all the water used water used by the fire departments to combat the fire, between 10,000 to 15,000 cubic meters of chemically-infested water seeped into the Rhine River through the Sandoz sewer system. *Id.*

136. *Id.* On April 26, 1986, a reactor exploded at a nuclear power plant located in Chernobyl, U.S.S.R. *Id.* As a result of the explosion, a devastating amount of radioactive emissions were released into the atmosphere, spreading quickly throughout the Soviet Republic and eventually across the entire face of Europe. *Id.*

137. See Mellor, *supra* note 118, 65-66 (1999).

138. *Id.*

the Ukraine had secured U.S. \$2.3 billion from western nations to close the Chernobyl plant and begin a full cleanup.¹³⁹ The recent Norwegian-Russian agreement on dealing with pollution from the Northern Fleet provides U.S. \$60 million for clean up purposes, but fails to attach any meaningful provisions surrounding state responsibility.¹⁴⁰ This serves only to reinforce the polluter gets paid principle, rather than one of state responsibility. It can be argued that the indulgences shown by the West in the Chernobyl affair have been counterproductive in trying to get the FSU to accept responsibility for its own nuclear contamination.¹⁴¹ As one commentator has suggested, one must wonder "given the Russian Federation's persistent delay in adopting legislation on nuclear third party liability and on safety, whether such indulgence has not in fact been counterproductive."¹⁴² At the very least, there is no incentive to change or modify their current behavior. This reluctance to change was confirmed at the recent conclusion of the Russian-Norwegian agreement, when the Russian Foreign Minister, Yevgeny Primakov, clearly indicated that the agreement in no way applies to "those submarines that are patrolling the region, that are on active duty."¹⁴³

A further source of customary law for imposing state responsibility is found in the ILC's *Report of the Working Group of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*.¹⁴⁴ Article 1(a) indicates that draft articles apply to activities that are not prohibited by international law but involve the risk of transboundary harm.¹⁴⁵ This would clearly bring Russia's fuel storage at Andreeva Bay, fifty kilometers from Norway, within its scope. Article 3 acknowledges that states do not have unlimited freedom to carry on activities within their jurisdiction and that they have "a general obligation to prevent or minimize the risk of causing transboundary harm."¹⁴⁶ The draft articles also make states liable to pay compensation for activities that create harm.¹⁴⁷ However, Article 16 specifically allows data and information on national security to be withheld by the state.¹⁴⁸ This exemption for national security purposes

139. See Jeff Sallot, *G-7 Nations to Finance Chernobyl Closing*, GLOBE AND MAIL, June 19, 1995, at A13.

140. *Id.*

141. Boustany, *supra* note 104, at 53.

142. *Id.*

143. Richard Paddock, *Russia Signs Accord With Norway to Dismantle Aging Nuclear Subs*, L.A. TIMES, May 27, 1998, at A4.

144. Report of the Working Group of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law and Draft Articles from Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No.10, at 235-244, U.N. Doc. A/51/10 (1996).

145. *Id.* at art. 1(a).

146. *Id.* at art. 3.

147. *Id.* at art. 5.

148. *Id.* at art. 16.

would allow the FSU to put the Northern Fleet beyond the reach of the articles.¹⁴⁹ Absent information on the matter, legal causation would be very difficult to prove.

Even if causation could be proved and state liability imposed by means of customary law, the present economic state of Russia would prevent the payment of any form of compensation to states suffering transboundary harm. Recent studies indicate that Russia has a "virtual economy," with its economy appearing larger than it actually is.¹⁵⁰ Businesses frequently operate without paying taxes to the central government, which acts as a type of subsidy to unproductive sectors of the economy, further worsening the crisis.¹⁵¹ The Red Cross has gone as far as warning that starvation is possible if the economy does not improve in the near future.¹⁵² In Russia's case, the impecuniosity of the polluter may serve to make liability for its actions meaningless.

Russia's obligations of customary state responsibility come into direct conflict with its existing treaty obligations. Under the Treaty Between the USA and the USSR on the Reduction and Limitation of Strategic Offensive Arms (START I),¹⁵³ there are restrictions on the total number of submarine launched ballistic missiles (SLBM) and launchers that Russia may possess in conjunction with other parts of its strategic deterrent.¹⁵⁴ Under Article 1(3) of the Treaty Between the USA and Russia on Further Reduction and Limitation of Strategic Offensive Arms (START II),¹⁵⁵ the Russians are required, by 2003, to reduce the number of deployed warheads on SLBMs to 1750.¹⁵⁶ Compliance with the provisions of START I & II has aggravated the Russian Navy's problems with radioactive waste by requiring the decommissioning of nuclear powered submarines.¹⁵⁷ A European Commission report found that future projections on the quantity of solid nuclear waste produced

149. The Barents Region has always held great strategic importance for the Russians and would clearly qualify as a matter within national security. This was recognized by the Russian minister for foreign affairs, Vyacheslav Molotov, in his dealings with his Norwegian counterpart in 1944 and it remained critical during the cold war. See GEOFFREY TILL, *NORTHERN WATERS* 69 (Clive Archer & David Scrivener eds., 1986).

150. Clifford G. Gaddy & Barry W. Ickes, *Russia's Virtual Economy*, 77 *FOREIGN AFF.* 53, 54 (1998).

151. *Id.* at 56-57.

152. Geoffrey York, *Red Cross Warns of Starvation in Russia*, *GLOBE AND MAIL*, Oct. 1, 1998, at A1.

153. START I, *supra* note 29, at 591.

154. The total number of deployed ICBMs, ICBM launchers, SLBMs and launchers cannot exceed 1600. See *id.* at art. II(1)(a).

155. START II, *supra* note 29, at 697.

156. The aggregate numbers for each Party shall not exceed a number between 1700 and 1750, for warheads attributed to deployed SLBMs or such lower number as each Party shall decide for itself, but in no case shall such number exceed 1750. See *id.* at art. I(3), I(4)(a).

157. *INVENTORY*, *supra* note 9, at 98.

would depend on the extent of Russian compliance with the START agreements before 2003.¹⁵⁸

The START agreements put Russia in a legal double bind: the state can comply with the agreements despite inadequate storage facilities for waste and thereby violate the principle of state responsibility by creating potential transboundary pollution,¹⁵⁹ or it can comply with the customary principle of international environmental law and suffer the ramifications of violating the arms control agreements. Russia is essentially caught between two different forms of state responsibility.

The effects of disarmament on the normative values of international environmental law are largely ignored. There is little recognition of Russia's legal double bind. Also, U.S. assistance under the Cooperative Threat Reduction Program has been limited to providing tools for scrapping the submarines and the program has focused more on the safeguarding and storing of fissionable material from Russian nuclear weapons.¹⁶⁰

State responsibility can not be achieved by means of treaty law, nor is it realistic to impose state responsibility by way of customary law. As the next section demonstrates, the weak concept of state responsibility for transboundary harm has been further diluted by the principle of cooperation.

IV. CO-OPERATION

Mikhail Gorbachev, in a 1987 speech in Murmansk, spoke of the need for co-operation amongst Arctic nations and the urgent need to draw up an "integrated comprehensive plan for protecting the natural environment of the North."¹⁶¹ This proposal echoes the customary principle of co-operation as stated in the preamble to the Stockholm Declaration, which holds that "[a] growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation. . . by international organizations in the common interest."¹⁶² The concept was further recognized in Principle 7 of the Rio Declaration, which affirmed that "States shall cooperate in a spirit of global partnership to conserve,

158. *Id.*

159. *Id.*

160. Handler, *supra* note 2, at 19. The program of threat reduction (Nunn-Lugar program) has focused on the fear of proliferation of FSU warheads. See *Military Implications of START I and START II: Hearings Before the Committee on Armed Services*, 102nd Cong., Sess. 2, 89 at 90 (1992).

161. Mikhail Gorbachev, Speech in Murmansk at the Ceremonial Meeting on the Occasion of the Presentation of the Order of Lenin and the Gold Star to the City of Murmansk, Oct. 1, 1987 (visited Oct. 28, 1998) <<http://www.sipri.se/projects/SAC/871001.html>>.

162. Stockholm Declaration, *supra* note 126, at pmb1.

protect and restore the health and integrity of the Earth's ecosystem."¹⁶³

These principles are given meaning by the Arctic Environmental Protection Strategy (AEPS) and the initiatives of the Barents Euro-Arctic Region (BEAR). AEPS was established in 1991 by the eight Arctic nations and focuses on co-operation in the areas of indigenous people, sustainable development, environmental protection and the role of science in the Arctic.¹⁶⁴ BEAR was established in Kirkenes, Norway in 1993, and involves co-operation among Denmark, Finland, Iceland, Norway, Sweden and Russia.¹⁶⁵ It has a two-tier structure involving a regional council comprised of county and indigenous representatives and a national council of government representatives.¹⁶⁶

Both of these regimes recognize the importance of nuclear contamination in the Arctic and are involved in initiatives to assist with clean up. However, AEPS and BEAR are programmatic in nature, and focus on the co-ordination of activities as opposed to the "promulgation of regulatory measures intended to guide the behaviour of various classes of subject."¹⁶⁷ The hope with BEAR is that this approach will eventually lead to a dense web of co-operation in the region.

BEAR's Kirkenes Declaration specifically mentions that the participants recognize the importance of international co-operation in the areas of monitoring radioactivity, enhancing safety at nuclear facilities and rehabilitating areas polluted as a result of nuclear facilities.¹⁶⁸ It further emphasizes the need to create "international financial arrangements," as well as encouraging "national financial contributions."¹⁶⁹ Such provisions seem to indicate that increased regional and Arctic co-operation is in accord with the customary international legal principle of co-operation.

It can be argued, however, that the initiatives, rather than giving life to the customary principle of co-operation, simply redefine a Russian national problem as a regional problem and in doing so undermine the principle of state responsibility. Co-operation has come to be defined strictly as western funding. As the Barents Euro-Arctic Council environmental task force indicated, "[t]he funding requirement is great and the projects planned are under-funded."¹⁷⁰ Much of the funding for initial pilot projects has come through the Nordic Environment Finance

163. Rio Declaration, *supra* note 128, at princ. 7.

164. Davor Vidas, *Polar Marine Environment in Regional Cooperation*, in *PROTECTING THE POLAR MARINE ENVIRONMENT* 110 (Davor Vidas ed. forthcoming).

165. Kirkenes Declaration, *supra* note 11, at 217.

166. *Id.* at 218.

167. *Id.* at 123.

168. *Id.* at 220.

169. *Id.*

170. *The Barents Euro-Arctic Council, The Environment Task Force, Report to the Third Ministerial Conference*, St. Petersburg, Oct, 9, 1997, at 9.

Corporation, which is supported by the governments of Nordic countries.¹⁷¹ Oran Young has pointed out that the major attraction of AEPS for the Russians is the "prospect of western assistance" with environmental concerns.¹⁷² When viewed in this light, regional co-operation becomes a means to create a conduit of funds and to reduce potential liability. Clearly subregional programmatic initiatives such as the Kola Smelter Works and the Nuclear Waste Management Program have resulted in the victim paying considerable amounts of the abatement costs.¹⁷³ Some have suggested that this is the "normal procedure" for environmental projects dealing with transboundary pollution and that the benefit to countries such as Norway is that it puts the issue on the agenda.¹⁷⁴ However, heightened political awareness of a problem is a high price to pay for the undermining of an essential principle of international environmental law.

Co-operation in dealing with the problem of naval waste has been largely one sided. Though willing to accept aid, the Russians have been extremely secretive about the problem. Jorgen Kosmo, the Norwegian defense minister, has repeatedly criticized the lack of Russian co-operation and the veil of secrecy surrounding the issue.¹⁷⁵ Russia has denied Norwegian and U.S. officials information regarding the situation in the Lista fjord and has refused to let Norwegian scientists take samples in the area.¹⁷⁶ Naval officials have also denied access to Russian civil inspectors, thereby violating Principle 10 of the Rio Declaration. Principle 10 requires, at a national level, that "each individual shall have appropriate access to information concerning the environment that is held by public officials."¹⁷⁷

The need to maintain a cloak of secrecy has also resulted in the abuse of human rights. The Russian state security apparatus arrested a retired naval captain named Alexandr Nikitin for treason, due to his involvement in a report detailing the environmental problems of the Northern Fleet.¹⁷⁸ This occurred despite the fact that the report is based on public sources.¹⁷⁹ The issue of the arrest was raised by Norwegian Prime Minister Jagland at the Second Council of Europe Summit, but this failed to produce any change in Russian policy.¹⁸⁰ It has been ar-

171. BAKLANOV ET AL., *supra* note 3, at 198.

172. Kirkenes Declaration, *supra* note 11, at 66.

173. Olav Schram Stokke, *Subregional Cooperation and Protection of the Arctic Marine Environment: The Barents Sea*, in PROTECTING THE POLAR MARINE ENVIRONMENT *supra* note 164, at 176.

174. *Id.* at 152.

175. Bond, *supra* note 1, at 22.

176. Nilsen, *supra* note 38.

177. Rio Declaration, *supra* note 128, at princ. 10.

178. *Russia's Dangerous Game*, NEW SCIENTIST, Apr. 20, 1996, at 3.

179. MacKenzie, *supra* note 77, at 4.

180. *Russian Secret and Retroactive Decrees Violate Human Rights* (visited Nov. 8,

gued that this type of action by the Russian government deters Western industrial firms who may wish to become involved in the clean-up process.¹⁸¹

Co-operation is hampered further by Russia's diffusion of responsibility for the handling of nuclear waste within its own domestic government bureaucracy. The Russian Ministry for Atomic Energy is gradually taking over the management of naval radioactive waste.¹⁸² However, involved at a subordinate level are the Ministry of Defense, the Committee of Defense Branches of Industry, the Ministry of Transport and the Ministry of Construction.¹⁸³ The large number of subordinate agencies does not enhance the ease at which bilateral and regional co-operation may occur.

Russia becoming a party to the Spent Fuel Convention would not solve the contradictory nature of the principles of responsibility and co-operation surrounding nuclear waste. Section (vi) of the preamble reaffirms that the state is ultimately responsible for spent fuel, yet in section (ix) it affirms the importance of international co-operation in the matter.¹⁸⁴ The Convention merely serves as a legal articulation of these two contradictory principles.

As this section has demonstrated, responsibility can ultimately be undermined by regional and bilateral co-operation. The initiatives of countries like Norway and organizations such as BEAR do have the positive effect of cleaning up the problem, but they do so at the expense of watering down state responsibility.

V. CONCLUSION AND FUTURE DIRECTIONS

The problem of nuclear waste from Russian naval sources is a pressing problem that requires immediate attention. It is not possible for other countries to impose state responsibility on the Russians for their nuclear waste habit through the use of treaty law. The Russians have vigorously avoided conventions that impose any form of liability and those conventions that do apply, such as the London Convention, either exempt ships or are not applicable to the military.¹⁸⁵ Any future

1998) <<http://www.bellona.no/e/press/9710.htm>>. Nikitin was acquitted of all charges by a St. Petersburg City Court on December 29, 1999. However, prosecutors have appealed the case to the Supreme Court of the Russian Federation and the Russian Security Police have blocked his attempts to obtain a travel passport. See Igor Kudrik, *Nikitin Denied Travelling Abroad* (visited Feb. 22, 2000) <<http://www.bellona.no/fmaker?id+15508&sub=1>>.

181. *Russia's Dangerous Game*, *supra* note 178, at 3.

182. Igor Kudrik, *Minatom Takes Over Naval Radwaste* (visited Nov. 8, 1998) <<http://www.bellona.no/e/russia/nfl/news80930.htm>>.

183. INVENTORY, *supra* note 9, at 10.

184. Spent Fuel Convention, *supra* note 98, at pmb1.

185. See generally Protocol to the Convention on the Prevention of Marine Pollution

treaty law will have to confront the problem of imposing state responsibility for military based pollution and not simply avoid the matter, as AEPS has tended to do.¹⁸⁶ There should be no differentiation between civil and military sources of pollution in terms of the issue of state responsibility.

Reliance on customary principles to produce a duty of state responsibility has become more difficult in light of the Sandoz and Chernobyl precedents.¹⁸⁷ Though much academic discussion is dedicated to this supposedly expanding concept, the practical realities of imposing responsibility by customary means are very difficult. In fact, it can be argued that the international assistance provided to deal with the Northern Fleet's waste problem serves as another counter precedent to the principle of state responsibility.

There is a definite need for regional and international cooperation in dealing with Russia's problem, but this should not come at the cost of ignoring the normative values of international environmental law. The focus of organizations such as BEAR on producing cooperation rather than a corresponding regulatory scheme has allowed Russia to continue to produce nuclear waste and further exacerbate the problem. Future cooperation should bear in mind the complementary principle of state responsibility. Though it may be unrealistic to expect Russia to make a substantial contribution to the cost of the clean up, it should at least be required to cease its harmful behavior. A failure to do so results in other states providing a military subsidy under the guise of environmental cooperation. States must be forced to confront the environmental consequences of their own militarization.

Future arms control agreements must also take into account the principles of international environmental law. In the case of the START agreements, no thought was given to the environmental consequences of disarmament. These concerns were secondary to the issues surrounding safeguarding and the proliferation of weapons as a result of arms reduction. Any future treaty law should specifically recognize the values of the Stockholm Declaration and the Rio Declaration, and frame the agreement within the values of these two conventions. States should not be forced to choose between the conflicting responsibilities of arms reduction agreements and international environmental law.

by Dumping Waste and Other Matter, *supra* note 83.

186. Vidas, *supra* note 164, at 111. Vidas notes, "[s]trict separation from military security issues has pervaded this approach [AEPS], and may be seen by some as an important precondition for success thus far. On the other hand, it might also be a valid reason for others to fear a stalemate in particular segments of current Arctic cooperation." *Id.*

187. McClatchey, *supra* note 135, at 670.

THE DUTY OF “REASONABLE CARE” UNDER THE CUSTOMS MODERNIZATION ACT OF 1993

WILLIAM J. KOVATCH, JR.*

In 1993, major developments occurred in the field of United States international trade law. That year saw the conclusion of the North American Free Trade Agreement (NAFTA), and the passage by Congress of the NAFTA implementing legislation.¹ This legislation accomplished more than just a free trade zone among Canada, Mexico, and the United States. The NAFTA implementation legislation radically altered the distribution of responsibilities between the United States Customs Service (Customs) and the importing community.

Included in the NAFTA implementation legislation is Chapter VI, the Customs Modernization Act (Modernization Act).² This Act impacts all transactions involving the importation of merchandise into the United States, not just importations from Canada and Mexico.

The Modernization Act stemmed from the perception that Customs procedures were inefficient, and unable to manage the expected increase in the flow of international trade. Specifically, Customs' reliance on paper documentation was viewed as cumbersome. The Modernization Act was intended to create a statutory framework to allow electronic filing of documents.

While the Modernization Act was intended to create a more convenient system for both Customs and importers, the act effectively placed greater responsibility on importers. Specifically, the Modernization Act imposed the duty of “reasonable care” on importers in declaring the proper classification and value of goods imported.³ Further, the Modernization Act granted Customs a greater ability to ensure compliance with this duty.

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1. North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3301, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

2. *Id.* § 631.

3. *Id.* § 637.

The concept of reasonable care, as applied to an importer when making a declaration upon entry of merchandise, is in its infant stages as the United States Court of International Trade has yet to address the issue. Nonetheless, guidance on how to interpret reasonable care can be found from other areas of the law that impose a duty of reasonableness. Indeed, the legislative history of the Modernization Act, as well as subsequent Customs publications, indicate that reasonable care should be interpreted consistently with the duty of reasonableness as applied, generally, in other legal fields.

This article analyzes the duty of reasonable care as created by the Customs Modernization Act. Part I explains the legislative history of the Act by examining the importation process prior to the Modernization Act, and the perceived need for change. Part II discusses the provisions of the Modernization Act. Part III examines how Congress and Customs have interpreted the duty of reasonable care. Part IV analyzes the duty of reasonableness in other areas of the law, and concludes that reasonable care under the Modernization Act appears to be following a consistent path.

The Modernization Act changed the way that importers and Customs operate. It has imposed greater responsibilities on the importing community. Like all changes, it has been met with some resistance. By following Customs' published guidelines and becoming familiar with the general duty of reasonableness, importers can discern what is required under this new system, and take steps to ensure compliance with the duty of reasonable care.

I. LEGISLATIVE HISTORY

Prior to the Modernization Act, the process of importing merchandise could be very cumbersome and paper intensive.⁴ An importer had to submit a form to Customs summarizing information relevant to the determination of the classification, value, and origin of the goods.⁵ In addition, the importer would have to submit various supporting documents.⁶ Customs had the responsibility of determining the proper classification, value, and origin.⁷ Customs would not release the goods without proper documentation.⁸ Further, the entry forms and documentation had to be filed at the port where the goods entered the United

4. See 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

5. See UNITED STATES CUSTOMS SERVICE, IMPORTING INTO THE UNITED STATES 6-7 (1994) [hereinafter IMPORTING].

6. See Arthur W. Bodek & Steven S. Weiser, *Many Responsibilities, Too Little Time for Importers Doing Customs' Work*, J. COMMERCE, Feb. 1, 1999, at 7A.

7. See *id.*

8. See IMPORTING, *supra* note 6, at 6.

States.⁹

This process strained the resources of Customs. To relieve the problem, Customs implemented various automation programs during the 1980s and 1990s that provided for electronic transmission of the required information.¹⁰ However, Customs had no statutory authority to establish these programs. Rather, the statutes continued to require the submission of paper documents.¹¹

A concern arose due to the expectation that international trade would increase dramatically. During the late 1980s and early 1990s, the United States was involved in the negotiation of two major international trade agreements: the Uruguay Round of the General Agreement on Tariffs and Trade, and NAFTA. Senator Orin Hatch observed that trade was growing “at an unprecedented rate, one that will accelerate still faster with the adoption of the North American Free-Trade Agreement.”¹² Government officials strove to ensure Customs had “the adequate capacity to process the expected increase in import and export activity,”¹³ and to “greatly enhance the efficient operation of our import and export system.”¹⁴

On June 7, 1991, Representative Philip Crane introduced a bill to the House of Representatives in the 102nd Congress titled the “Customs Modernization Act of 1991.”¹⁵ This bill aimed, in part, to eliminate much of the paperwork involved in importing goods by providing for electronic processing of customs transactions.¹⁶ The Customs Modernization Act of 1991, along with a bill titled the “Customs Informed Compliance and Automation Act of 1991,”¹⁷ was submitted to the House Ways and Means Committee. No further official action was taken on either bill.

The push to modernize the Customs Service was renewed in November 1991, when Representative Sam Gibbons¹⁸ introduced a bill ti-

9. *See id.*

10. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane); Paul L. Green, *New Entry Processing System Remains Controversial Issue Customs Brokers Express Concern*, J. COMMERCE, Mar. 15, 1991, at 4A.

11. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

12. 138 CONG. REC. S14123 (daily ed. Sept. 18, 1992) (statement of Sen. Hatch).

13. 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

14. 138 CONG. REC. S14123 (daily ed. Sept. 18, 1992) (statement of Sen. Hatch).

15. H.R. 2589, 102d Cong. (1991).

16. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

17. H.R. 2512, 102d Cong. (1991).

18. *See* Tim Shorrocks, *Compromise Bill to Reform Customs Introduced*, J. COMMERCE, Dec. 2, 1991, at 5A.

tled the "Customs Modernization and Informed Compliance Act."¹⁹ After being submitted to the Ways and Means Committee, the bill was incorporated into another bill, titled the "Trade Expansion Act of 1992,"²⁰ introduced by Representative Dan Rostenkowski.²¹ Like the Customs Modernization Act of 1991, this bill was meant to provide for full electronic processing of all customs transactions.²² Representative Rostenkowski stated that the bill "improves and clarifies Customs enforcement authority with respect to submission of documentation, recordkeeping and examination procedures and penalty and seizure provisions."²³ The House of Representatives voted to approve the Trade Expansion Act of 1992 on July 8, 1992.²⁴ The bill was then introduced to the Senate.²⁵ However, no further official action was taken on the bill.

The Customs Modernization and Informed Compliance Act did not completely die at that point in the 102nd Congress. Rather, it was incorporated into another bill, entitled the "Revenue Act of 1992."²⁶ The Revenue Act of 1992 mainly sought to provide tax incentives for the establishment of enterprise zones.²⁷ This bill passed in both houses of Congress²⁸ but President George Bush vetoed the legislation.²⁹

In 1993, both houses renewed their push to pass legislation to reform Customs. Representative Gibbons³⁰ and Senator Hatch³¹ introduced identical legislation in their respective houses. However, the legislation met with opposition from portions of the customs brokers community. The National Customs Brokers and Forwarders Association of America, which had supported Customs modernization legislation in 1992, announced its opposition to the Customs Modernization Act of 1993.³² Specifically, the organization opposed the enactment of remote filing, fearing that this change would be harmful to the small customs brokerage firms.³³ This organization believed that the cost of

19. H.R. 3935, 102d Cong. (1991).

20. H.R. 5100, 102d Cong. (1992).

21. See 138 CONG. REC. H3071 (daily ed. May 7, 1992) (statements of Rep. Rostenkowski).

22. See *id.*

23. *Id.*

24. See 138 CONG. REC. 6038 (daily ed. July 8, 1992) (statements of Sen. Hatch).

25. See S. 3249, 102d Cong. (1992).

26. H.R. 11, 102d Cong. (1992).

27. See H.R. REP. NO. 102-1034 (1992).

28. See Richard Lawrence, *Setting the 1993 Trade Agenda*, J. COMMERCE, Jan. 7, 1993, at 6A.

29. See *id.*

30. See generally H.R. 700, 103d Cong. (1993).

31. See generally S. 106, 103d Cong. (1993).

32. See Tim Shorrock & Peter Tirschwell, *Brokers Group Now Opposes Customs Reform*, J. COMMERCE, Jan. 20, 1993, at 1A.

33. See *id.*

modernizing would be prohibitive to small brokerage firms, giving the advantage to larger firms.³⁴ These fears were echoed by the San Francisco Customs Brokers and Freight Forwarders Association, who also opposed the legislation.³⁵ Thus, the support for Customs modernization began to erode in 1993.

In 1993, however, the Clinton Administration finished negotiating NAFTA with Canada and Mexico. The President still possessed Fast-Track authority for trade agreements,³⁶ therefore, the President could submit legislation to implement NAFTA to Congress, and Congress could only vote to accept or reject the legislation as submitted.³⁷ Congress could not amend the implementing legislation.³⁸

With this authority, the President included the Customs Modernization Act of 1993 in NAFTA implementation legislation. Congress approved the NAFTA legislation, thereby passing Customs reform.

II. PROVISIONS OF THE CUSTOMS MODERNIZATION ACT

The Customs Modernization Act of 1993 significantly altered the process of merchandise entering the United States.³⁹ In essence, the Modernization Act reduced the amount of documents an importer had to file. In return, however, the importing community assumed greater responsibilities in the process. This exchange of duties between Customs and the importer has been called a "shared responsibility."⁴⁰

The Modernization Act established a program of automation by allowing electronic processing of customs related transactions.⁴¹ This feature of the Modernization Act is known as the National Customs Automation Program,⁴² and allows importers to file their entry of merchandise electronically.⁴³ In addition, importers may make their payments of duties, fees and taxes electronically.⁴⁴

The Modernization Act further eliminated the requirement that all

34. See Peter M. Tirschwell, *Brokers and Forwarders Meet Amid Upheaval*, J. COMMERCE, Mar. 8, 1993, at 5A.

35. See Brian Johns, *SF Brokers Oppose Couriers' Remote Entry Plans*, J. COMMERCE, Apr. 20, 1993, at 2B.

36. See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903(b) (1998).

37. See Trade Act of 1974, 19 U.S.C. § 2191(d) (1998).

38. *Id.*

39. Customs Modernization Act of 1993, 19 U.S.C. § 1411(a) (1998).

40. H.R. REP. NO. 103-361, pt. 1 (1993); U.S. See also CONGRESS, HOUSE WAYS AND MEANS COMMITTEE, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 52 (1997) [hereinafter U.S. TRADE STATUTES].

41. See 19 U.S.C. § 1411(a); U.S. TRADE STATUTES, *supra* note 39, at 54.

42. See 19 U.S.C. § 1411.

43. See *id.* § 1411 (a)(1)(A).

44. See *id.* § 1411 (a)(1)(E).

entry documentation be filed in the port of entry. Rather, an importer may utilize "remote location filing."⁴⁵ Under this program, a participating importer "may file electronically an entry of merchandise with the Customs Service from a location other than the [port] designated in the entry of examination."⁴⁶ This program provides importers with greater convenience.

While the Modernization Act made it easier for an importer to file entry documentation, Customs required some assurance of the reliability of the information provided. To this end, the Modernization Act imposed the duty of "reasonable care" on importers in providing certain information to Customs.⁴⁷ Upon entry, an importer must use reasonable care in supplying an accurate classification, declared valuation and rate of duty of the merchandise.⁴⁸

By imposing this duty, Congress intended to allow Customs to rely more on the accuracy of information provided by the importers.⁴⁹ To this end, the importer must furnish "information sufficient to permit Customs to fix the final classification and appraisal of the merchandise."⁵⁰ If an importer fails to engage in reasonable care in providing this information, Customs is authorized to impose penalties.⁵¹

The Modernization Act also established procedures allowing Customs to verify the precision of the information the importers provide. The person making a declaration of entry "shall make, keep and render for examination and inspection records" concerning the import transaction.⁵² The importer is required to maintain these records for five years.⁵³

In addition, the Modernization Act strengthened the ability of Customs to verify the importer's compliance. Prior to the passage of the Modernization Act, the Secretary of the Treasury could engage in investigation and inquiry in order to ascertain the correctness of the entry, and determine the importer's liability for duties, fees, and taxes.⁵⁴ The Modernization Act amended the law to allow the Secretary to "examine or cause to be examined, upon reasonable notice, any record . . . which may be relevant to such investigation or inquiry."⁵⁵ Any importer who

45. *See id.* § 1414 (a)(1).

46. *Id.* Since the passage of the Customs Modernization Act, districts and regions have been eliminated from Customs' organization. Restructuring resulted in a greater emphasis on ports. 29 Cust. B. & Dec. 25 (1995).

47. 19 U.S.C. § 1484(a)(1).

48. *See id.* § 1484(a)(1)(B).

49. *See* U.S. TRADE STATUTES, *supra* note 41, at 52.

50. H.R. REP. 103-361, pt. I, at 136 (1993).

51. 19 U.S.C. § 1592.

52. *Id.* § 1508 (a)(3).

53. *Id.* § 1508 (c); 19 C.F.R. § 143.37 (1998).

54. *See id.* § 1509 (a).

55. *Id.* § 1509 (a)(1).

fails to comply with this request is subject to penalties.⁵⁶ In addition, Customs has the power to conduct an audit of the importer.⁵⁷

The Customs Modernization Act of 1993 established a new relationship between Customs and the importer. The Modernization Act made it more convenient for the importer to file entry documents. However, in return, the importing community assumed greater responsibility. Further, the Modernization Act provided Customs with more tools to ensure that the importers observe their responsibilities.

III. REASONABLE CARE IN CUSTOMS TRANSACTIONS

Customs admits "that a 'black and white' definition of reasonable care is impossible, inasmuch as the concept of acting with reasonable care depends on individual circumstances."⁵⁸ To assist importers, Customs published a "Reasonable Care Checklist" in 1997.⁵⁹ The checklist is actually a series of questions organized into such subjects as Classification, Valuation, Origin, Intellectual Property, and Textiles and Apparel.⁶⁰ These questions reveal several themes that run throughout Customs laws, including: providing for adequate internal procedures to ensure accurate information is provided to Customs, the use of experts, and obtaining advance rulings.⁶¹ Additionally, the legislative history of the Customs Modernization Act, Customs' publications, and Customs' rulings serve as a guide in defining the standard of reasonable care.

A. *Informed Compliance*

As an initial matter, reasonable care involves adequate knowledge and familiarity with Customs laws and regulations. Customs refers to this concept as "informed compliance."⁶² Customs emphasized what this concept involves by stating:

At the heart of informed compliance is a strategy called reasonable care, in which the trade community demonstrates its exercise of due diligence by following the suggestions and protocols promulgated by the Customs Service in its publications, which include not only the various informed compliance publications available in Customs Web site (www.customs.ustreas.gov), but also include Customs rulings, Cus-

56. *Id.* § 1509 (a)(1)(B).

57. *Id.* § 1509 (b) (1998).

58. Reasonable Care Checklist, 31 Cust. B. & Dec., available at 1997 CUSBUL LEXIS 93, at *2 (1997) [hereinafter Reasonable Care Checklist].

59. *Id.*

60. *Id.*

61. *Id.*

62. See U.S. Customs Service, *What Every Member of the Trade Community Should Know About U.S. Customs Service's Informed Compliance Publications*, (visited Feb. 22, 1999) <<http://www.customs.ustreas.gov/imp-exp1/comply/icpframe.htm>>.

toms Regulations, Court decisions and the law.⁶³

Customs indicates that an importer should "establish reliable procedures to ensure [the importer] provide[s] a correct tariff classification."⁶⁴

When "using in-house employees such as counsel, a Customs administrator, or a corporate controller," the House Report states such personnel should "have experience and knowledge of customs laws, regulations and procedures."⁶⁵ The Reasonable Care Checklist further asks whether an importer has "access to Customs Regulations (Title 19 of the Code of Federal Regulations), the Harmonized Tariff Schedule of the United States,⁶⁶ and the GPO publication, Customs Bulletin and Decisions."⁶⁷

The first requirement of "reasonable care," then, is sufficient knowledge of the law. Importers should ensure that the proper legal materials are available, and are regularly reviewed in order to apply the law properly to the imported goods.

B. Information About the Goods

As an essential part of reasonable care, an importer should provide Customs with enough information concerning the goods to be imported. An importer should furnish "information sufficient to permit Customs to fix the final classification and appraisal of merchandise," and provide "sufficient pricing and financial information to permit proper valuation of merchandise."⁶⁸ Customs has stated that the importer should provide "a complete and accurate description of [the] merchandise,"⁶⁹ and its "proper declared value."⁷⁰

C. Proper Application of the Law

Knowledge of Customs laws and regulations may not be sufficient to satisfy the duty of reasonable care. Rather, reasonable care may require the proper application of the law. Under the Modernization Act, the importer is responsible for the assessment of the proper classification and value of the merchandise. An importer should be prepared to

63. Priv. Ltr. Rul. HQ 962007 (Nov. 23, 1998), available at 1998 U.S. CUSTOM HQ LEXIS 604 at *4.

64. *Id.* at *12.

65. H.R. REP. NO. 103-361, pt. I, at 120 (1993).

66. The Harmonized Tariff Schedule of the United States was adopted by Congress through the Omnibus Trade and Competitiveness Act of 1998. 19 U.S.C. § 3001 (1998).

67. Reasonable Care Checklist, *supra* note 59, at *6.

68. H.R. REP. NO. 103-361, pt. I, at 136 (1993).

69. Reasonable Care Checklist, *supra* note 59, at *6.

70. *Id.* at *7.

apply complicated rules regarding classification and valuation.

1. Classification

The first step toward determining the tariff on merchandise imported into the United States is to identify the proper classification of the merchandise. Classification is the process of applying the proper heading and subheading of the Harmonized Tariff Schedule of the United States ("HTSUS").⁷¹ Once the proper heading or subheading is found, the duty on the merchandise is based on the rate of duty listed under that heading or subheading.⁷²

One Customs ruling demonstrates the requirement that the importer provide proper classification of each individual item imported. British Airways requested an advance ruling concerning a proposed practice of storing spare parts and other supplies in a bonded warehouse.⁷³ The airline wanted permission to store the parts in the warehouse without declaring a Customs classification, or by classifying all items stored in the warehouse under 8803.90.9050 of the HTSUS.⁷⁴ Upon withdrawal of the parts for consumption, the part would be assigned the proper tariff classification.⁷⁵

Customs denied permission. Specifically, Customs noted the duty of the importer to "show the value, classification, and rate of duty as approved by the port director at the time the entry summary is filed. . . ."⁷⁶ Customs asserted that it had no authority to approve of a request to use subheading 8803.90.9050, unless the goods actually fit under that subheading.⁷⁷ Customs further stated its belief that such a procedure would run afoul of the duty of reasonable care.⁷⁸

The British Airways ruling demonstrates that an importer cannot be indifferent to the correct classification of goods. Thus, goods cannot be imported under a tariff classification merely for the convenience of the importer if the subheading does not describe those goods. The ruling reflects the proposition that reasonable care requires an importer to

71. See U.S. TRADE STATUTES, *supra* note 41, at 5 (discussing the application of the Harmonized Tariff Schedule).

72. See *id.*

73. Priv. Ltr. Rul. HQ 226319 (July 23, 1996), available in 1996 U.S. CUSTOM HQ LEXIS 1170, at *2. Goods may be stored in a bonded warehouse duty free for up to five years. See 19 U.S.C. § 1557 (a) (1998). While goods are stored in a bonded warehouse, they may also be free from state taxes as well. See *Xerox Corp. v. Harris County*, 459 U.S. 145, 153-54 (1982).

74. Priv. Ltr. Rul. HQ 226319 (July 23, 1996), available in 1996 U.S. CUSTOM HQ LEXIS 1170, at *4.

75. *Id.*

76. *Id.* at *19 (quoting 19 C.F.R. 144.12 (1998)).

77. *Id.* at *19-20.

78. *Id.*

make an effort to provide the proper classification of all goods individually, not in the aggregate, even when they are to be stored in a bonded warehouse.

2. Valuation

Once merchandise has been classified, the tariff must be determined. There are three types of tariffs: specific, ad valorem, or compound.⁷⁹ A specific tariff is based on a stated value for merchandise while an ad valorem tariff is based on a percentage value of the merchandise.⁸⁰ Compound tariffs combine specific and ad valorem rates. Thus, in order to determine an ad valorem tariff, it is essential to determine the proper value of the merchandise. Additionally, all goods imported into the United States must be valued for the purpose of keeping trade statistics.⁸¹

Generally, the Customs value is based on the transaction value, where feasible.⁸² This is the price actually paid or payable for the merchandise, plus statutory additions.⁸³ The complexity involved in valuation stems, first, from determining whether the transaction value can be applied, and second, for determining whether an additional amount should be added to the price actually paid or payable to determine the transaction value.

a. Related Parties Transactions and Valuation

Where the parties to a transaction are related, the parties may not apply the transaction value, unless certain conditions are present.⁸⁴ First, the parties must be able to show "that the relationship between such buyer and seller did not influence the price actually paid or payable."⁸⁵ However, even where the relationship between the parties did influence the price, the transaction value may still be acceptable under

79. The House Ways and Means Committee defined these terms:

An ad valorem rate of duty is expressed in terms of a percentage to be assessed upon the customs value of the goods in question. A specific rate is expressed in terms of a stated amount payable on some quantity of the imported goods, such as 17 cents per kilogram. Compound duty rates combine both ad valorem and specific components (such as 5 percent ad valorem plus 17 cents per kilogram).

U.S. TRADE STATUTES, *supra* note 41, at 5.

80. *Id.*

81. 19 U.S.C. § 1484 (a)(1)(B)(ii) (1998).

82. *See id.* § 1401a (a). Where the transaction value is either inappropriate or cannot be calculated, the statute provides for other methods that should be used, and the order of preference of those methods.

83. *See id.* § 1401a (b)(1).

84. *See id.* § 1401a (b)(2)(A)(iv).

85. *Id.* § 1401a (b)(2)(B).

two circumstances. The transaction value will be acceptable when it "closely approximates . . . the transaction value of identical merchandise or similar merchandise, in sales to unrelated buyers in the United States."⁸⁶ Secondly, the transaction value will be acceptable when it "closely approximates . . . the deductive value or computed value for identical merchandise or similar merchandise."⁸⁷

Consequently, related parties must be cautious in a transaction with each other involving the importation of goods. The related parties should carefully consider the price paid or payable for the merchandise. By pricing the merchandise in the same range as identical or similar goods imported into the United States, related parties can help to ensure that the transaction value will be acceptable as the Customs value. However, the parties should take measures to provide documentation supporting their price.

b. Assists and Valuation

Even when parties to an import transaction are not related, however, complexity may exist in determining the proper transaction value. The price actually paid or payable may require some adjustments under the statute. One such adjustment is called an assist.⁸⁸ To arrive at the transaction value, an importer must add the assist amount to the price actually paid or payable.⁸⁹

Assists are defined as certain items which the buyer supplies to the seller, free of cost or at a reduced charge, used in connection with the item imported.⁹⁰ These items include components and parts to the merchandise,⁹¹ items used in the production of the merchandise such as tools,⁹² items consumed in the production of the merchandise,⁹³ and certain services performed outside of the United States such as engineering, development and artwork.⁹⁴ The value of an assist should be added to the price actually paid or payable, regardless of whether it was provided to the buyer directly or indirectly.⁹⁵

The importer should be aware of the fact that the transaction value includes certain additions to the price actually paid or payable. By un-

86. *Id.* § 1401a (b)(1)(B)(i).

87. *Id.* § 1401a (b)(1)(B)(ii).

88. *See id.* § 1401a (b)(1)(C).

89. *See id.*

90. *See id.* § 1401a (h)(1)(A).

91. *See id.* § 1401a (h)(1)(A)(i).

92. *See id.* § 1401a (h)(1)(A)(ii).

93. *See id.* § 1401a (h)(1)(A)(iii).

94. *See id.* § 1401a (h)(1)(A)(iv).

95. *See id.* § 1401a (h). *See also* Generra Sportswear v. United States, 905 F.2d 377 (Fed. Cir. 1990) (holding that an assist exists where buyer agrees to pay for export license through a buying agent).

derstanding the application of the law, the importer can ensure to provide Customs with the proper valuation. An importer who fails to include the value of such items as an assist will have understated the value of the merchandise. Therefore, reasonable care in the entry of merchandise would seem to require an understanding of the concept of an assist.

D. Use of Experts

Customs recognizes that the law concerning classification and valuation can be complex. Accordingly, Customs encourages the use of experts when providing the required information upon entry.⁹⁶ This is consistent with the legislative history of the Customs Modernization Act. The House Ways and Means Committee, for example, expressed its expectation "that an importer [would] consult with an attorney or an in-house employee having technical expertise about the particular merchandise in question."⁹⁷ Similarly, in its Reasonable Care Checklist, Customs asks whether the importer has "retained an expert to assist [it] in complying with Customs requirements."⁹⁸ It is clear that both Congress and Customs have expressed their view that reasonable care involves the use of an expert under the appropriate circumstances.

The employment of an expert alone, however, will not satisfy the importer's duty of reasonable care. Rather, it is evident from the House Report that when an importer utilizes the services of an expert, that importer must provide the expert with adequate information to allow the expert to analyze the transaction.⁹⁹ Customs echoes this concern, encouraging importers to ensure that they have "discussed . . . importations in advance" with their experts, and provided "full complete and accurate information about the import transactions."¹⁰⁰ Thus, an importer cannot rely on an expert's advice if that importer has not disclosed all of the relevant information concerning the good to be imported to the expert. The failure to provide this information to the expert, therefore, would constitute a breach of the duty of reasonable care.

In addition, an importer must take care in choosing its expert. Customs noted the concern "that unlicensed and unregulated individuals are regularly advising importers in the Customs matters—i.e., hold-

96. See generally Reasonable Care Checklist, *supra* note 59, at *3 (discussing the use of experts in complying with Customs requirements).

97. H.R. REP. NO. 103-361, pt 1, at 120 (1993).

98. Reasonable Care Checklist, *supra* note 59, at *10.

99. "In using a qualified expert, the importer is also responsible for providing such expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make an entry." H.R. REP. NO. 103-361, pt. 1, at 120.

100. Reasonable Care Checklist, *supra* note 59, at *11.

ing themselves out as 'Customs experts' or Customs consultants, in violation of section 641 of the Tariff Act of 1930."¹⁰¹ To these concerns, Customs replies:

A party's selection of an expert, and the expert's qualifications are part and parcel of the review of all of the facts and circumstances in the agency's determination whether the party has exercised reasonable care. In Customs' view, the importer who retains the service of an "expert" bears some responsibility in ensuring that the party is qualified to render advice on the Customs matter at issue. In Customs' view, it is not unreasonable to expect that a party selecting an expert will inquire about the Customs experience and credentials of an expert.¹⁰²

Consequently, the importer's reliance on the advice of an expert, and that the expert was mistaken on an issue of Customs law will not serve as a defense to the importer. Rather, it is clear from Customs' publications that Customs expects an importer to use reasonable care in considering the qualifications of the expert before hiring the expert's services.

E. Advance Rulings

In addition to the use of experts, both Congress¹⁰³ and Customs¹⁰⁴ encourage importers to avail themselves of the advance ruling procedures in order to ensure proper classification and valuation upon entry. To this end, an interested party¹⁰⁵ may request a ruling from Customs concerning prospective transactions.¹⁰⁶ "Each request for a ruling must contain a complete statement of all relevant facts relating to the transaction."¹⁰⁷ "The Customs transaction to which the ruling request relates must be described in sufficient detail to permit the proper application of relevant Customs and related laws."¹⁰⁸ Such information includes a description of the merchandise,¹⁰⁹ its "chief use,"¹¹⁰ "commercial, common, or technical description,"¹¹¹ and its purchase price.¹¹² In order to deter-

101. *Id.* at *3.

102. *Id.*

103. See H.R. REP. NO. 103-361, pt. 1, at 120.

104. See Reasonable Care Checklist, *supra* note 59, at *12 & *14.

105. "[A] ruling may be requested under this part by any person who, as an importer or exporter of merchandise, or otherwise has a direct and demonstrable interest in the question or questions presented in the ruling request, or by the authorized agent of such person." General Ruling Procedure 19 C.F.R. § 177.1 (c) (1998).

106. 19 C.F.R. § 177.1 (a)(1).

107. *Id.* § 177.2 (b)(1).

108. *Id.* § 177.2 (b)(2)(i).

109. See *id.* § 177.2 (b)(2)(ii)(A).

110. *Id.*

111. *Id.*

112. *Id.*

mine the proper value of the merchandise, the information should include "the nature of the transaction . . . the relationship (if any) of the parties, whether the transaction was at arm's length," and if "the same or similar merchandise" has been sold in the exporting country.¹¹³ Additionally, the party requesting the ruling should provide samples¹¹⁴ and related documentation.¹¹⁵

By requesting an advance ruling, the importer can ensure that it provides proper classification and valuation prior to entry of the goods. The regulations provide that the rulings are binding between Customs and the importer:

A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked.¹¹⁶

In addition to the ruling being binding on the specific transaction for which the ruling was requested, the ruling "may be cited as authority in the disposition of transactions involving the same circumstances."¹¹⁷ Indeed, the ruling "may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date."¹¹⁸

Federal regulations provide a procedure through which Customs may evaluate an import transaction, and supply its interpretation of the proper classification and valuation of the merchandise. Because Customs is bound by this interpretation, reasonable care would appear to involve the utilization of the advance ruling procedure when the importer possesses any doubt concerning the proper classification and valuation of the merchandise to be imported.

IV. REASONABLENESS IN OTHER LEGAL FIELDS

Reasonableness is a concept utilized in many different areas of the law. It is a concept used to create an objective standard by which to assess a person's conduct. Prior to the enactment of the Modernization Act, Customs utilized the common law concept of reasonableness in de-

113. *Id.* § 177.2 (b)(2)(iii).

114. *See id.* § 177.2 (b)(3).

115. *See id.* § 177.2 (b)(4).

116. *Id.* § 177.9 (a). The rulings, however, are only binding between the person requesting the ruling, and Customs. "Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." *Id.* § 177.9 (c).

117. *Id.* § 177.9 (a).

118. *Id.*

fining when to assess penalties for submitting false documents upon entry.¹¹⁹

Guidance for what is reasonable can be found in such legal areas as torts, corporations, trusts and estates, and income tax. An examination of these topics reveals that reasonableness entails an adequate level of knowledge, proper application of legal principles, remaining up to date on information, and the use of experts when necessary.

A. Adequate Knowledge

Generally speaking, reasonableness requires a minimum level of knowledge. In the field of torts, reasonableness is used to create an objective standard to determine whether negligence has occurred. For example, in the case of *Vaughan v. Menlove*,¹²⁰ a bail of hay that was piled too close to the boundary of the defendant's property, caught fire and burned a barn located on the plaintiff's land. The defendant claimed that he was unsophisticated and should be held liable solely if he failed to exercise his best judgment.¹²¹ The defendant's subjective lack of requisite knowledge was not accepted as a defense.¹²² Chief Judge Tindal stated that such a standard "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various."¹²³ Only the objective standard of reasonableness has been accepted by the courts as the proper measure of reasonableness.

1. Minimum Level of Professional Knowledge

Reasonableness requires professionals dealing with complex matters to possess a minimum level of knowledge.¹²⁴ "[A] professional must use reasonable care to obtain the information needed to exercise his or her professional judgment."¹²⁵ Attorneys, for example, who face allega-

119. In 1984, Customs defined negligence stating, "A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through . . . failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances." Penalties and Penalties Procedure 49 Fed. Reg. 1672, 1681 (1984) (to be codified at 19 C.F.R. pt. 171). Customs stated that this definition was meant to impose "a reasonable standard of care," and "not . . . make the importer a guarantor of the interpretation or understanding of the information presented." *Id.* at 1673. This definition was based on RESTATEMENT (SECOND) OF TORTS § 552 cmt. b (1977), which defines negligence in supplying false information to others in business transactions. *Id.*

120. 3 Bingham's New Cases 468, 469-70, 132 Eng. Rep. 490, 491 (C.P. 1837).

121. *Id.* at 472, 132 Eng. Rep. at 492.

122. *Id.* at 474, 132 Eng. Rep. at 493.

123. *Id.* at 475, 132 Eng. Rep. at 493.

124. See, e.g., *Ouellette v. Subak*, 391 N.W.2d 810, 816 (Minn. 1986) (holding that the physician must have adequate knowledge in a medical malpractice case).

125. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (applying the standard to attorney malpractice case).

tions of malpractice¹²⁶ or disciplinary proceedings¹²⁷ must show that they possess adequate knowledge of the law. In order to provide quality services, a professional must know about the subject with which he or she is dealing. When a professional does not have the minimum level of knowledge needed to perform those services, then it is unreasonable behavior to perform those services.

In corporate law, a member of the Board of Directors has a duty to be reasonably informed about certain matters involving the corporation.¹²⁸ In the case of *Francis v. United Jersey Bank*,¹²⁹ a director who was also the largest single shareholder of the corporation inherited her shares from her husband.¹³⁰ She was not active in the affairs of the corporation¹³¹ and left most of the corporation's management to her two sons, who were also directors.¹³² However, her sons engaged in "fraudulent conveyances."¹³³ The issue in the case was whether a director could be held personally liable for failing to prevent the misappropriation of funds by other directors.¹³⁴ The court held that a director of a corporation had a duty to become reasonably informed:

126. *See, e.g.*, *Hickox v. Holleman*, 502 So.2d 626, 635-36 (Miss. 1987) (holding attorney may have committed malpractice where attorney failed to check appropriate statute of limitations before filing case for clients).

127. *See, e.g.*, *Lewis v. State Bar of California*, 621 P.2d 258, 258 (Cal. 1981) (disciplining inexperienced probate attorney for failing to apply complex procedure properly); *Attorney Grievance Comm'n v. Brown*, 517 A.2d 1111, 1118-19 (Md. 1986) (disciplining attorney in estate planning matter for failing to know the law adequately); *State ex rel. Nebraska State Bar v. Holscher*, 230 N.W.2d 75, 75 (Neb. 1975) (holding attorney is required to ascertain the law to represent client adequately).

128. *See, e.g.*, *Joy v. North*, 692 F.2d 880, 896 (2d Cir. 1982) (holding lack of knowledge is not a defense when directors allow a fellow director to make major decision concerning the corporation without oversight); *Hoye v. Meek*, 795 F.2d 893, 897 (10th Cir. 1986) (holding bank chairman breached duty by failing to be informed about bank's investments); *Smith v. Van Gorkam*, 488 A.2d 858, 874 (Del. 1985) (holding board of directors liable for failing to reach an informed decision when voting to approve merger); *Brane v. Roth*, 590 N.E.2d 587, 591-92 (Ind. Ct. App. 1992) (holding directors breached their duty by failing to become informed on the essentials of hedging, and the corporation's financial condition).

129. *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981).

130. *Id.* at 818.

131. The court described her participation, stating:

Mrs. Pritchard was not active in the business of Pritchard & Baird and knew nothing of its corporate affairs. She briefly visited the corporate offices in Morristown on only one occasion, and she never read or obtained the annual financial statements. She was unfamiliar with the rudiments of reinsurance and made no effort to assure that the policies and practices of the corporation, particularly pertaining to the withdrawal of funds, complied with custom or relevant law.

Id. at 819.

132. *Id.* at 818.

133. *Id.* at 816.

134. *Id.*

As a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. Because directors are bound to exercise ordinary care, they cannot set up as a defense lack of knowledge needed to exercise the requisite degree of care. If one feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.¹³⁵

Consequently, the court found that the director had breached her duty of care.¹³⁶ In order for a corporate director to make a decision, the director requires facts. The exercise of reasonable care would necessitate enough factual information upon which to make a decision. Without such a factual foundation, corporate directors may be held personally liable for their decisions.

The very foundation of reasonableness is the acquisition of knowledge. A person must become familiar with the subject matter in that person's care. A person who fails to become informed will not be judged by his or her subjective level of knowledge, but by the minimum level of knowledge that the person should have obtained.

Therefore, a person involved in international trade, should be familiar with the importing and exporting business. That person must understand the factors that affect international trade. Such factors include Customs laws and regulations as they pertain to imports. A person engaged in an international transaction should also know the basic facts pertaining to that transaction. Whether an importer complied with the duty of reasonable care should be assessed objectively by determining the minimum level of knowledge of an international trade professional.

2. Knowledge of the Law

Under some circumstances, the duty of reasonable care will require a person to be familiar with the law applicable to that particular behavior. For example, such a requirement can be ascertained from publications of the Internal Revenue Service (IRS). Under the Internal Revenue Code, the IRS is authorized to impose penalties of up to twenty percent when a taxpayer understates his or her income due to negligence or disregard for rules or regulations.¹³⁷ The IRS defines negligence as "any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and rea-

135. *Id.* at 821-22 (internal quotations and citations omitted).

136. *Id.* at 826.

137. I.R.C. § 6662 (b)(1) (1998).

sonable care in the preparation of a tax return."¹³⁸ An example of the failure to exercise reasonable care is when "[a] taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances."¹³⁹ Other examples given by the IRS include instances where the taxpayer fails to comply with specific sections of the Internal Revenue Code.¹⁴⁰

In order to ascertain the correctness of a deduction, credit or exclusion, a taxpayer must know the relevant portions of Internal Revenue Code. Thus, the IRS defines reasonable care to include an adequate level of knowledge of income tax laws. Failure to file a return based on such knowledge may result in the assessment of penalties.

For Customs law, the foundation of reasonableness is knowledge of Customs law and regulations. An importer cannot begin to complete Customs documents, such as entry forms, without understanding the rules regarding classification and valuation. Therefore, an importer should be held to an objective standard of a person who has knowledge of the relevant Customs laws and regulations.

3. Proper Application of the Law

However, knowledge of the law alone will not satisfy the duty of reasonable care where a person misapplies the law. For example, in *Hardy v. Commissioner of Internal Revenue*,¹⁴¹ the Tax Court affirmed the imposition of penalties pursuant to Section 6651(a) of the Internal Revenue Code where a taxpayer failed to exercise reasonable care in ascertaining that no tax return was necessary. The taxpayer filed no tax returns between 1977 and 1982, and claimed he was exempt as a religious organization, but failed to produce any documentation to support that claim.¹⁴² Indeed, it was shown that during these years, the taxpayer earned income from selling real estate and working with a consulting firm.¹⁴³ In arguing against penalties, the taxpayer claimed that he briefly spoke to an accountant who told him that churches were tax

138. 26 C.F.R. § 1.6662-3 (b)(1) (1998).

139. *Id.* § 1.6662-3 (b)(1)(ii).

140. These are: (1) a failure to comply with I.R.C. § 6222 (a), (b) (1998), "which requires that a partner treat a partnership items on its return in a manner that is consistent with the treatment of such item on the partnership return (or notify the Secretary of the inconsistency)," 26 C.F.R. § 16662-3 (b)(1)(iii) (1998), and (2) failure to comply with 26 C.F.R. § 1662-3 (b)(iv) (1998), "which requires that an S corporation shareholder treat subchapter S items on its return in a manner consistent with the treatment of such items on the corporation's return (or notify the Secretary of the inconsistency)."

141. *Hardy v. Commissioner*, 60 T.C.M. (CCH) 1110 (1990), citing *Shomaker v. Commissioner*, 38 T.C. 192, 202 (1962).

142. *Hardy*, 60 T.C.M. at 1112-13.

143. *Id.* at 1111-12.

exempt.¹⁴⁴ The taxpayer made further references to IRS publications claiming they had led him to believe that he qualified for tax exempt status as an individual.¹⁴⁵

The Tax Court found that while the taxpayer received advice showing that religious organizations were tax exempt, he received no advice that he, individually, could claim tax exempt status.¹⁴⁶ Specifically, the Tax Court found that the IRS publications could not be reasonably interpreted as allowing an individual, whose primary activities were selling real estate and working for a consulting firm, to claim tax exempt status.¹⁴⁷

Hardy shows that while a taxpayer may be aware of the law, the taxpayer may fail to exercise reasonable care in applying the law. The taxpayer's belief was based on a misreading of the IRS publications discussing the tax law, and a misunderstanding of a conversation with an accountant. Therefore, simple knowledge of the law was not sufficient to qualify as reasonable care.¹⁴⁸

With respect to Customs law, it would appear to be insufficient for an importer to read various publications, such as the Customs Bulletin or the Federal Register, if the importer is ignorant on how those publications actually impact his or her business. An abstract knowledge of rules and regulations would not be enough where the importer does not understand the practical application of those rules to his or her business.

4. Adequacy of Information

Knowledge of the law, and knowledge of the proper application of the law constitute only part of the exercise of reasonable care. In order to apply the law properly, there must be a proper factual basis. Thus, reasonable care would require enough factual information to ascertain if the law has been applied properly.

An examination of the publications of the Internal Revenue Service shows that the IRS interprets reasonable care to include having enough factual information.¹⁴⁹ With respect to filing income tax returns, the IRS considers it negligent to "fail to keep proper books and records or to substantiate items properly."¹⁵⁰ Thus, in order to avoid penalties, taxpayers must have enough information to support claims made in their

144. *Id.* at 1115.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See generally id.*

149. Accuracy-Related Penalty, 56 Fed. Reg. 8,943, 8,944 (1991) (to be codified at 26 C.F.R. pt.1).

150. *Id.*

income tax returns. Taxpayers must maintain records that contain enough information to show that they are entitled to the deduction, credit or exclusion claimed.

An adequate system of record-keeping appears to be a requirement for the exercise of reasonable care as defined by the IRS in implementing other aspects of the Internal Revenue Code as well. For example, when a person (the payor) pays interest or dividends to another person (the payee), under certain circumstances, the payor will be required to withhold thirty-one percent of the payment as tax.¹⁵¹ One such circumstance is where the Secretary of the Treasury informs the payor that the payee has furnished the wrong taxpayer identification number.¹⁵² In that circumstance, the IRS requires the payor to use reasonable care in identifying all accounts that the payee has with the payor, in order to ensure compliance with the withholding requirement.¹⁵³ In order to satisfy the duty of reasonable care, the payor must have a computer or other record-keeping system that it can search in order to identify the payee's accounts using the information provided by the IRS.¹⁵⁴

The IRS, consistently defines reasonable care as requiring a system of record keeping. Those who are under the duty of reasonable care must have enough information to comply with IRS regulations. An adequate level of factual information is assured when sufficient records are kept.

The view of the IRS is consistent with the new requirements of the Modernization Act. Under the Modernization Act, importers are required to maintain records pertaining to imports for five years.¹⁵⁵ These records are open for inspection by Customs officials.¹⁵⁶ The records would assist importers in proving claims made on entry documents, such as the value of the merchandise imported. Therefore, much like reasonable care would entail maintaining records to substantiate claims on income tax returns, Customs law would require reasonable care in the keeping of records in accordance with the requirements of the Modernization Act.

5. Changes in Information

One problem that arises in determining whether a person has exercised reasonable care is the situation where the information upon which the person relied has changed. Such was the case in *Sicari v. Commis-*

151. I.R.C. § 3406(a)(1) (1998).

152. *Id.* § 3406(a)(1)(B).

153. 26 C.F.R. § 31.3406(d)-5 (c)(3)(i) (1998).

154. *See id.* § 31.3406(d)-5 (c)(3)(ii)(B).

155. 19 U.S.C. § 1508 (c) (1998); 19 C.F.R. § 143.37 (a) (1998).

156. *See id.* § 1508 (a)(3) (1998).

sioner of Internal Revenue.¹⁵⁷ When the Commissioner of Internal Revenue has determined that a deficiency in income tax exists, a taxpayer must file a petition for redetermination within ninety days of the mailing of the notice of deficiency.¹⁵⁸ When the IRS has failed to exercise reasonable care in determining the last known address of the taxpayer, however, the ninety day period does not begin to run.¹⁵⁹

In 1991, the taxpayers in *Sicari* had been assigned a new address designation by the United States Post Office.¹⁶⁰ The taxpayers used this address in their correspondence with the IRS when filing for extensions in 1991 and 1992, and in connection with a bankruptcy proceeding in 1992.¹⁶¹ Indeed, the Special Procedures Unit of the IRS had notice of the new address, and used it when corresponding with the taxpayers in June 1992.¹⁶² However, an agent from the Quality Measurement Staff of the IRS was responsible for sending the notice of deficiency to the taxpayers, and sent the notice to the old address designation in October 1992.¹⁶³

The court held that it was unreasonable for the Commissioner to rely on the old address.¹⁶⁴ Specifically, the court stated, “[n]ormally, reasonable diligence will require the Service to consult its own files, at least those maintained in computer databases in the same district initiating the disputed notices.”¹⁶⁵

The *Sicari* case raises some concern for those importers who maintain separate units, or different offices, within its business organization. Reasonable care would seem to require that these units create some mechanism to share and update information. Where one unit of a business organization fails to provide new information to other units within the same organization, Customs may find a violation of the duty of reasonable care, and choose to impose penalties if the outdated information is used upon entry of goods.

157. See *Sicari v. Commissioner*, 136 P.3d 925 (2d Cir. 1998).

158. 26 U.S.C. § 6213 (a) (1994).

159. *Tadros v. Commissioner*, 763 F.2d 89, 91-92 (2d Cir. 1985).

160. *Sicari*, 136 F.3d at 926. The old address was “Route 208.” The new address became “Route 208, Box 1370.” The designation was changed to assist in implementing a new 911 emergency system. *Id.*

161. *Id.* at 927.

162. *Id.*

163. *Id.*

164. *Id.* at 929.

165. *Id.* (citing *United States v. Bell*, 183 B.R. 650, 653 (S.D. Fla. 1995)); Russel J. Kuttell, Note, *The Current Trend in Interpreting the Internal Revenue Service’s Standard of Reasonable Diligence in Mailing Notices of Deficiency to a Taxpayer’s “Last Known Address” and the Due Process Implications: Ward v. Commissioner*, 44 TAX LAW. 625, 630 (1991).

B. Use of Experts

Complicated matters, at times, require the employment of those who possess specialized knowledge or expertise. Thus, reasonableness in those situations may entail the use of an expert.

In California, an attorney who admittedly "had no knowledge of tax matters"¹⁶⁶ drafted a trust instrument for his clients without consulting a tax law specialist. The IRS assessed a penalty on the clients for a tax deficiency.¹⁶⁷ The clients sued the attorney for malpractice. Because the attorney recognized his own deficiency, the court held that he could be held liable for failing to consult with a tax specialist in this matter.¹⁶⁸

Other states have imposed discipline on attorneys for failing to consult with another attorney with more expertise when involved in a complicated matter.¹⁶⁹ Thus, reasonableness requires one to recognize his or her own inability to address complex matters. Under those circumstances, the engagement of a professional with greater expertise would seem necessary.

Merely committing a complicated matter to the care of an expert, however, will not always satisfy the duty of reasonableness. In the case of *In re Goldstick*,¹⁷⁰ trust property was managed by two trustees. One trustee had no knowledge of real estate investment, while the second possessed expertise in this area. The first trustee delegated power to the more knowledgeable trustee over real estate matters. The second trustee, however, engaged in self-dealing.¹⁷¹ That the first trustee did not engage in self-dealing did not necessarily relieve that trustee of liability:

A trustee may delegate the exercise of trust power to a fellow trustee, especially where the latter has an expertise in some particular aspect of the trust management . . . but that does not give a trustee the right to abdicate his function to be personally "active in the administration of the trust" with regard to those functions which call for consistency with usual prudent business practice.¹⁷²

Thus, the first trustee had to show that his inactivity did not

166. *Horne v. Peckham*, 158 Cal. Rptr. 714, 716 (Cal. Ct. App. 1979). This case also involved an issue of the statute of limitations in attorney malpractice cases. The rule *Horne* established concerning the statute of limitations was overruled by the California Supreme Court in *ITT Small Business Finance Corp. v. Niles*, 885 P.2d 965, 971 (Cal. 1994).

167. *Horne*, 158 Cal. Rptr. at 717.

168. *Id.* at 720.

169. See, e.g., *Lewis*, 621 P.2d at 258; *Brown*, 517 A.2d at 1118-19.

170. *In re Goldstick*, 177 A.2d 225, 581 N.Y.S.2d 165 (NY Sup. Ct.), modified on other grounds, 183 A.2d 684 (NY App. Div. 1992).

171. *Id.* at 238, 581 N.Y.S.2d at 173.

172. *Id.*

amount to negligence, "even where he had no direct knowledge of wrongdoing."¹⁷³

Similarly, while the board of directors of a corporation may utilize information and opinions of those with greater expertise when the board makes its decisions, reliance on such experts must be reasonable. In *Smith v. Van Gorkam*,¹⁷⁴ the board of directors approved a merger relying, in part, on a report generated by an officer of the corporation. Under Delaware law, the board of directors was "fully protected in relying in good faith on reports made by officers."¹⁷⁵ However, the officer in this case was uninformed on the matter that he was presenting to the board.¹⁷⁶ The Delaware Supreme Court held that the directors "were duty bound to make reasonable inquiry" of the officer presenting the information.¹⁷⁷ The board was held liable for failing to observe this duty.¹⁷⁸

Reliance on an expert must itself be reasonable. Reasonableness would appear to include the supervision over the work of the expert, as well as taking care to select the expert properly. The expert should possess some degree of knowledge on the matter for which the expert has been employed. Therefore, failing to ensure that the expert possesses this knowledge would seem to be a breach of the duty of reasonableness.

These cases can provide guidance for determining when an importer has exercised reasonable care in selecting and relying upon the advice of an expert. First, as discussed previously, the importer must be able to recognize that he or she is in need of an expert. Such a situation arises when the transaction involves a complex subject. Second, the importer would appear to be required to take care to examine the qualifications of the experts carefully. Third, the importer should take care to see that the expert performs his or her function in a proper manner.

CONCLUSION

From its initial publications, it appears as though Customs interprets the duty of reasonable care in a manner consistent with reasonableness as applied in other legal fields. The very foundation of reasonableness is the possession of an adequate level of knowledge. Just as doctors and lawyers must possess a basic knowledge of the fundamentals of their trade, importers must be aware of and familiar with the laws and regulations concerning international trade. In addition, importers should take care to see that these laws and regulations are

173. *Id.* at 238-39, 581 N.Y.S.2d at 173 (citations omitted).

174. *Smith v. Van Gorkam*, 488 A.2d 858, 869 (Del. 1985).

175. *Id.* at 874-75 (citations omitted).

176. *Id.* at 875.

177. *Id.*

178. *Id.* at 881.

properly applied.

Like many professions, importers encounter complex laws and transactions. When an importer is confronted with a situation beyond his or her competence, reasonableness would seem to require that the importer recognize his or her limits. In such a situation, the importer should consult with one who possesses greater expertise and experience.

Reliance on an expert, however, will not automatically relieve an importer of the duty of reasonable care. Rather, it would appear as though the choice of expert must itself be reasonable.

The importer has an option available prior to the importation of goods to assist in complying with the duty of reasonable care. These are the procedures through which an importer can obtain an advance ruling from Customs. By providing Customs with all relevant information concerning the transaction prior to importation, the importer can receive a binding ruling on the proper classification and valuation of goods. An importer who possesses any doubts about the proposed transaction should utilize this procedure and ensure that the merchandise will be properly classified and valued upon entry.

HONG KONG'S 1997 TRANSITION: U.N. ENFORCEMENT MECHANISMS TO GUARANTEE HONG KONG'S HUMAN RIGHTS WILL ENDURE AFTER THE TRANSITION

CHRISTYNE J. VACHON*

I. INTRODUCTION

On July 1, 1997 the British handed Hong Kong back to the Chinese. As I walked through Sheung Wan, Hong Kong on that day, I wondered what impact the transition would have on Hong Kong residents. Had they heard of China's promises?¹ Were they concerned that China would not uphold these promises?² I witnessed the fanfare and festivities of the transition. I spoke with many people who had different views on its effects. One taxi driver expressed his fear that over the next fifty years, based on China's governmental influence, he would have to live in fear of every word he spoke and the possibility that he could be snatched up and detained as a prisoner. Contrarily, a member of the legal community shrugged his shoulders and expressed passing interest in the effects of the transition. What are the reasons for the public's uncertainty? My curiosity was provoked. Were there any sort of legal mechanisms to guarantee that the promises made in the international agreements pertinent to the transition, the Joint Declaration and the Basic Law, would be kept?

China committed itself to the Joint Declaration: Agreement on the Future of Hong Kong (Joint Declaration)³ and the Basic Law of the

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1. See *infra* notes 58-73 and accompanying text.

2. See The Committee on International Human Rights, *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry*, RECORD, May, 1996, at 357, 359 [hereinafter RECORD]. "The advent of Chinese rule has raised concern beyond Hong Kong's borders about future rights of people to be free of government arbitrariness in Hong Kong; and that concern, in turn, focuses sharply on preservation and modification of its system of justice, the rule of law and independence of its judges and lawyers." *Id.*

3. Joint Declaration: Agreement on the Future of Hong Kong, Dec. 19, 1984, P.R.C.-U.K., 23 I.L.M. 1366 [hereinafter Joint Declaration]. See *infra* notes 58-73 and accompa-

Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)⁴ to appease the rest of the world and to provide assurance for a smooth transition for Hong Kong back to Chinese rule.⁵ Pursuant to these agreements, China promised that Hong Kong will be basically autonomous and that the rule of law in Hong Kong will remain virtually unchanged for fifty years after the transition.⁶ This would mean that those laws in place prior to the transition would remain applicable for fifty years after the transition, thereby assuring certain protections to the citizens of Hong Kong.⁷ It is difficult to predict, however, whether China will actually uphold these agreements.⁸

Some argue that, at the very least, China has dubious intentions towards upholding these legal agreements. China's scarred reputation of not upholding agreements strengthens this argument.⁹ Furthermore,

nying text.

4. The Basic Law of the Hong Kong Special Administrative Region of The People's Republic of China (April 4, 1990) [hereinafter Basic Law]. See *infra* notes 74-87 and accompanying text.

5. See generally RECORD, *supra* note 2. Basic Law, *supra* note 4, at preamble; Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 304 (1996) (stating that the intent was to provide a "seamless transition where . . . people would wake up on July 1, 1997 and the only visible change would be the flag. . ."). But see *id.* at 304 (stating that "[d]reams of a smooth transition have evaporated."). The reasons for the evaporation started with Tiananmen massacre and continued into the 1992 proposals by Chris Patten for democratic reform. *Id.*

6. See Joint Declaration, *supra* note 3, at art. 1. See also Basic Law, *supra* note 4, at ch. I, art. 8; Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Laws in China*, 5 DUKE J. COMP. & INT'L L. 289, 294 (1995).

7. See generally Robert C. Berring, *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L.J. 431 (1997) (discussing the difference between the Chinese legal system and the Hong Kong rule of law).

8. The implication is that if China does not uphold these agreements, the human rights of the Hong Kong people are at stake. Interview with Gladys Li, Former Chairman of the Hong Kong Bar Association, in Hong Kong, SAR (July 7, 1997) [hereinafter Gladys Li Interview]; Angela Young, *Hong Kong: CD Products Market*, Industry Sector Analysis, August 20, 1997, available in WESTLAW, 1997 WL 9850761 (indicating that although it is impossible to predict the future of Hong Kong, there are reasons for optimism to believe that China will uphold its agreements). See generally Berring, *supra* note 7 (discussing how superficially the agreement seems to clearly indicate China's positive intention but at a closer look, Berring contends that not only will the current system probably not survive, it won't survive).

9. See Donna Deese Skeen, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L LAW 175, 178-79 (1995). The Joint Declaration for Hong Kong is compared to China's agreement with Tibet. The Tibet agreement guaranteed regional autonomy for Tibet as a method to securing the "peaceful liberation of Tibet." Despite this agreement, Tibet has, instead, been subject to Chinese rule and has been severely oppressed. Similarly, China violated its agreement to import wheat from the United States. See Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?* 6 CONN. J.

the legal policies of China do not favor ensuring international agreements;¹⁰ and China's human rights' tradition towards its citizens is replete with violations.¹¹ Other people argue that China has already violated parts of these agreements.¹² Possible violations range from abolishment of the Legislative Council¹³ to cancellation of a series of laws that ensured civil and political rights in Hong Kong.¹⁴

In light of this, the international community will likely act to ensure China's compliance. What mechanisms are available to do this? If such mechanisms fail and China violates the terms of the agreements, are there mechanisms for punishment?

INT'L L. 667, 687, 695 (1991).

10. See Paul Vitrano, *Hong Kong 1997: Can the People's Republic of China Be Compelled to Abide by the Joint Declaration*, 28 GEO. WASH. J. INT'L L. & ECON. 445, 452 (1995). "[The PRC adheres to the international legal doctrine of *rebus sic stantibus*. . . if a 'fundamental change of circumstances' occurs, a state can unilaterally terminate its obligations under an agreement. The PRC's 1956 suspension of part of the Sin-Soviet Agreement on Cultural Cooperation is an example of China's application of *rebus sic stantibus*." *Id.* See also Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309, 318-20, 323 (1992) (discussing the Chinese concept of unequal treaties and the Five Principals of Peaceful Co-existence and how China may view the treaties signed between Great Britain and the Qing Dynasty from the 1800s as unequal and therefore invalid).

11. See Davis, *supra* note 5, at 317-18 (indicating that "those searching for evidence of respect for human rights, especially civil and political rights, in mainland Chinese official practices search in vain."). In China human rights are given second rate status to the duties to which they are associated. If the duties are fulfilled by the citizens, then the state grants the human rights as it deems necessary and appropriate. *Id.* Accord Alice H. Amsden et al., *China, The United States and Human Rights*, DISSENT, Spring 1997, at 7; Robin Reichman-Coad, *Human Rights Violations in China: A United States Response*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 163 (1994) (discussing the human rights abuses in China and what the United States' response should be). See generally Kelly M. Brown, *Execution for Profit? A Constitutional Analysis of China's Practice of Harvesting Executed Prisoner's Organs*, 6 SETON HALL CONST. L.J. 1029 (1996) (providing a brief discussion of the policies of China and their impact on human rights). See also U.S. Department of State, *China Country Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/china.html>>.

12. Gladys Li Interview, *supra* note 8. See also *infra*, notes 45-48 and accompanying text. See generally U.S. Department of State, *Hong Kong Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/hongkong.html>>. Originally, Hong Kong law maintained a provision that allowed for the government to refuse to register an organization that was "incompatible with peace, welfare, or good order." However, the freedom of peaceful assembly and association in Hong Kong was "practiced without significant interference". So in 1992, the Hong Kong Government repealed the provision. This allowed for demonstrations without government interference. However, the PRC has negated that action by including language similar to the repealed provision in the Basic Law.

13. See *infra* notes 90-100, and accompanying text.

14. Christopher Patten, Governor of Hong Kong, *Our Next Five Years: The Agenda for Hong Kong*, Address at the *Opening of the 1992-93 Session of the Legislative Council* (Oct. 7, 1992).

Many international actors might have a role to play.¹⁵ However, the focus of this piece is the United Nations and its ability to encourage China to fulfill its human rights promises through the International Covenant on Civil and Political Rights (ICCPR)¹⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷ These covenants are made applicable to Hong Kong through provisions of the Joint Declaration and the Basic Law.

This article is structured as follows: Part II introduces the general history of relations between China and Great Britain including a brief synopsis of the interplay of relevant agreements. Part III provides a more detailed analysis of the agreements pertinent to the Hong Kong transition; the Joint Declaration and the Basic Law. Part IV identifies the need for this analysis. Part V analyzes the relevant U.N. covenants.

II. HISTORY OF CHINA AND GREAT BRITAIN'S RELATIONSHIP

The history of relations between the United Kingdom and the People's Republic of China regarding Hong Kong is critical to an understanding of the potential problems the world community faces in trying to make China comply with the Joint Declaration and the Basic Law.¹⁸

At the beginning of the 19th century, Hong Kong was a small parcel of rocky land.¹⁹ It was undeveloped²⁰ and had a small population.²¹

15. In 1995, the Executive Committee of the Association of the Bar of the City of New York sent a mission of inquiry to Hong Kong. The purpose of this mission was to answer questions regarding the July 1, 1997 transfer. Beyond obtaining answers for their questions, the members of the mission determined that the "rule of law in Hong Kong will require careful world-wide monitoring," RECORD, *supra* note 2, at 358-59, 387. Resulting from their conclusions, the mission developed a "proposal for an on-going relationship between the Association of the Bar of the City of New York and the Hong Kong Legal Community. *Id.* at 388. Through joint conferences and other reporting methods, the joint Hong Kong and New York committee would channel important information regarding the status of the law in Hong Kong. *See id.* at 388-89; *see also* Robert J. Guttman, *Etienne Reuter: Head of the European Commission Delegation to Hong Kong*, EUROPE, July 17, 1997, at 22 (discussing the European Commissions role in securing Hong Kong post transition). Other possible international actors are Amnesty International, Human Rights Watch: Asia Watch, and other non-governmental organizations.

16. International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967), art 6, § 1 [hereinafter ICCPR]. *See infra*, notes 124-167 and accompanying text.

17. International Covenant on Economic, Social and Cultural Rights, 6 I.L.M. 360 (1967) [hereinafter ICESCR]. *See infra*, notes 201-232 and accompanying text.

18. *See* Davis, *supra* note 5, at 303.

19. *See* Keith M. Harris, *The Hong Kong Accord as a Model For Dealing With Other Disputed Territories*, 80 AM. SOC'Y INT'L L. PROC. 348, 349 (1986); Kristen Choo, *Zero Hour for Hong Kong*, 83 ABA J. 70, 70 (1997).

20. Harris, *supra* note 19, at 349. *But see* Choo, *supra* note 19, at 71 (stating that Hong Kong is the "planet's eighth-largest trading economy").

21. *See* John H. Henderson, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 506 n.4 (1995) (stating that Hong Kong's population in 1851 was about 30,000);

Trading conflicts between western nations and China provoked the Opium War of 1840, the First Anglo-Chinese War.²² China's attempt to halt the British import of opium into China, further aggravated the conflicts between China and Great Britain.²³ After much wrangling, the Convention in the Treaty of Nanking of 1842 expanded the rights of the British to provide imports to China, compensated the British for the destroyed opium, and established Great Britain's possession of Hong Kong "in perpetuity."²⁴ On June 26, 1843, Hong Kong formally came into British possession following the conclusion of the Opium War.²⁵

The Second Anglo Chinese War occurred in 1860 and Great Britain acquired the southern tip of the Kowloon peninsula and Stonecutters Island.²⁶ At the end of that century, China, greatly weakened by the Sino-Japanese War, was forced to make additional concessions to Great Britain.²⁷ Great Britain leased the remainder of Kowloon from China in 1898 with a ninety-nine year lease of the "New Territories" designated to end on July 1, 1997.²⁸

Through the years, China has continued to nurse the open wound created by Britain's acquisition of the Hong Kong territories.²⁹ Nonetheless, since 1898 Hong Kong has been a British colony and the laws and policies of the United Kingdom have governed Hong Kong.³⁰ Laws

Huang & Qian, *supra* note 6, at 301 n.80 (providing statistics that "Hong Kong covers approximately 412 square miles . . . with a population in 1985 of 5.4 million"); Choo, *supra* note 19, at 71 (indicating that Hong Kong's population in 1997 was 6.3 million).

22. See Skeen, *supra* note 9, at 176-77 (discussing the politics behind Britain's opium trade and Britain's acquisition of Hong Kong).

23. *Id.*

24. Treaty of Nanking, Aug. 29, 1842, China-Gr. Brit., 30 BRIT. FOR. ST. PAP. 389, 93 CONSOL. T.S. 465; Skeen, *supra* note 9, at 176-77 (quoting Jan Morris, *Hong Kong*, at 18).

25. See Elizabeth G. Bynum, *Hong and China: The 1997 Transition*, 34 COLUM. J. TRANSNAT'L L. 299, 299 (1996); RECORD, *supra* note 2, at 357, 362; Henderson, *supra* note 21, at 349-350

26. Convention of Friendship, Oct. 24, 1860, China- Gr. Brit., 50 BRIT. FOR. ST. PAP. 10, 123 CONSOL. T.S. 71; See Skeen, *supra* note 9, at 176-77.

27. See Henderson, *supra* note 21, at 509.

28. Convention of Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 90 BRIT. FOR. ST. PAP. 17, 186 CONSOL. T.S. 310. See also Vitrano, *supra* note 10, at 446.

29. See Henderson, *supra* note 21, at 510-11 (discussing China's strong desire to reunite all of China and China's belief that Hong Kong was acquired by Britain through "unequal treaties"); Kieron Flynn, *HK Says Nothing Changed After 100 Days, But Doubters Remain*, AGENCE FR. PRESSE, Oct. 7, 1997, available in WESTLAW, 1997 WL 13409085; Berring, *supra* note 7, at 433.

30. See RECORD, *supra* note 2, at 357, 362. Consequently, Hong Kong's legal system is identical to the English legal system. Hong Kong's body of law, prior to the reversion, included statutory provisions and common law doctrines, for example, letter patent, royal instructions, & colonial regulations. See Huang & Qian, *supra* note 6, at 296-97. After July 1, 1997, the effect of the enactment of laws in Parliament on Hong Kong became obsolete. See Denis G. Brock, *Hong Kong*, in ENFORCEMENT OF JUDGMENTS WORLDWIDE 39 (Charles Platto & William G. Horton, ed., 1992) [hereinafter Platto & Horton].

enacted in Parliament in England either directly affected Hong Kong law or indirectly affected Hong Kong law via statutory implementation.³¹

In 1949, communism was established in China with the success of the Chinese Communist Revolution.³² China established a civil law system, but this system was unable to replace the traditional beliefs of Confucianism.³³ A communist Shanghai became less attractive as the primary trade port into China.³⁴ Instead, Hong Kong rapidly became the center of trade with China.³⁵ The 1950s were significant years for Hong Kong as it increased its importance in the international community.³⁶

Hong Kong's vulnerability to the influences of China became obvious when, as a result of the Great Leap Forward and the Cultural Revolution in China, Hong Kong experienced societal upheavals.³⁷ Since Hong Kong had become an integral part of international trade and the

31. Since the Hong Kong legal system was derived from the British legal system, the Letters Patent are the core constitutional documents. Within the Letters Patent are the Royal Instructions to the Governor and the power for the legislature. Hong Kong law is constituted by [1] "statutes made by the Governor by and with the consent of the Legislature, 2) the common law of England and rules of equity except insofar as they are oppressive; 3) Act of Parliament specifically incorporated by reference in local legislation; 4) Act of Parliament which either expressly or by necessary implication applies to Hong Kong; and 5) Orders-in-Council made by the Queen on the advice of her Privy Council." Neoh, *supra* note 10, at 339. See, e.g., Davis, *supra* note 5, at 306 (discussing British Colonial Rule, which was characterized by authoritarian colonialism with acknowledged strength in economic success, laissez faire policies, a free press, the rule of law, etc.); *Hong Kong: New IP Regime In Hong Kong*, BUS. MONITOR, Sept. 9, 1997, available in 1997 WL 10293455 (discussing whether intellectual property regulations will continue after the transition); Ann Jordan, *Lost in the Translation: Two Legal Cultures, The Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L. J. 335, 337 (1997) (stating that this common law system applied by Britain "sets out objective procedures that, under a rule of law system, are applied equally to everyone. . . [and] has been accepted by the majority of Hong Kong people. . .").

32. See RECORD, *supra* note 2, at 363; see also Huang & Qian, *supra* note 6, at 289 (indicating that the People's Republic of China (PRC) was established in 1949 and it has been a "unitary socialist legal system with a single legal district").

33. See Jordan, *supra* note 31, at 338. Confucianism is based on complicated rituals and codes of conduct based on etiquette. *Id.*

34. See Elizabeth Yee, *Hong Kong and China in 1997: An Examination of Possible Legal and Economic Implications for United States Business*, 36 SANTA CLARA L. REV. 595, 595-96 (1996).

35. See generally *id.* Currently, Hong Kong "is an important international financial center, second only to Tokyo in the Pacific region. . . Hong Kong is among the top twelve traders in the world. Its Gross Domestic Product Per Capita in 1989 was H.K. \$85, 325 (U.S. \$11,000). . ." Neoh, *supra* note 10, at 310.

36. See Yee, *supra* note 34, at 595 (discussing Hong Kong's role as "the Pearl of the Orient"). See also RECORD, *supra* note 2, at 363.

37. See RECORD, *supra* note 2, at 364; see also Skeen, *supra* note 9, at 192 (stating that Hong Kong is presently the "best gateway to China", however, Hong Kong's stock market is "vulnerable to internal Chinese politics.").

date for Hong Kong's transition back to China loomed closer, Hong Kong residents and international onlookers became concerned about the ground rules for the transition.³⁸

This concern provided the push to Great Britain and China to sign the Sino-British Joint Declaration,³⁹ the reversion agreement, on December 19, 1984.⁴⁰ The Joint Declaration is the precursor to the Basic Law,⁴¹ the final plan of law and government for post-transition Hong Kong. Requirements for the Basic Law stem from the Joint Declaration's demands that the Basic Law must enumerate and ensure all the guarantees provided in the Joint Declaration.⁴² Between the time that the Joint Declaration took effect on December 19, 1984 and the last day of British rule on June 30, 1997, the Government of the United Kingdom was responsible for the "administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability."⁴³ The government of China was to cooperate towards this end.⁴⁴

38. See Harris, *supra* note 19, at 350 (indicating that one of the primary concerns was the future of property transactions which were dictated by a 15 years lease plan, until the end of the United Kingdom's lease of part of the Hong Kong territory); Davis, *supra* note 5, at 310-11.

39. See generally Joint Declaration, *supra* note 3. Not every article of the Joint Declaration will be discussed since certain aspects of the agreement are more relevant to this discussion than others; therefore not every article of the Declaration will be itemized.

40. See Vitrano *supra* note 10, at 446. See also Harris, *supra* note 19, at 350-51.

41. The Basic Law, *supra* note 4. The Basic Law was designed to take effect on July 1, 1997 and to last for 50 years.

42. See Yee, *supra* note 34 at 600; Vitrano, *supra* note 10, at 447, 455-56. The Joint Declaration was the original agreement between the United Kingdom and China. The two countries agreed, in the Joint Declaration, to the content of the Basic Law. The Joint Declaration provides that the Basic Law will be established after the Joint Declaration but will contain all of the parameters agreed to in the Joint Declaration. Joint Declaration, *supra* note 3, at arts. III, XII. The Basic Law was created by the Basic Law Drafting Commission, comprised of 59 people, all of whom were appointed by the government of China and less than 50% of whom were from Hong Kong. See Harris, *supra* note 19, at 352. This deserves skepticism because a group of people hand picked by China and not adequately representative of the Hong Kong people created a document for Hong Kong to preserve Hong Kong's current system. It is difficult to imagine that this group would not be biased in favor of granting more power to China than originally assumed in the Joint Declaration, to take away Hong Kong's rights. Pursuant to this view, the group created the Basic Law, which is unclear and leaves flexibility for multiple interpretations in favor of granting more authority to China. Gladys Li Interview, *supra* note 8.

43. Joint Declaration, *supra* note 3, at art. IV. See generally, Vitrano, *supra* note 10, at 449 (discussing the reforms attempted by Governor Chris Patten in Hong Kong following 1992 and prior to July 1, 1997).

44. Joint Declaration, *supra* note 3, at introduction, art. IV (stating: [T]he government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection."). See generally, RECORD, *supra* note 2, at 367, 369 (discussing Annex I); Harris, *supra* note 19, at 351 (indicating that before June 30, 1997 "the British Government

The 1989 Tiananmen Square massacre in China created a tremendous scare in Hong Kong. The British colonial government responded by passing the Bill of Rights Ordinance (BRO) and amending their current laws to comply with the BRO.⁴⁵ The Hong Kong BRO incorporated the ICCPR into Hong Kong rule of law.⁴⁶ To avoid protest from China that the BRO violated the Joint Declaration, Great Britain copied the ICCPR almost identically.⁴⁷ China was nonetheless agitated and indicated that the BRO was unnecessary because the Basic Law already provided adequate protection of rights.⁴⁸

In 1994, Governor Patten established limited economic and political reforms, including electoral reforms.⁴⁹ The reforms were to "safeguard Hong Kong's way of life, the way of life set out in page after page of the Joint Declaration. . ." and to provide for more democracy post-1997.⁵⁰

On July 1, 1997 Hong Kong transitioned from British colonial rule to the Hong Kong Special Administrative Region of China (SAR).⁵¹ No

[was] responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability, and China will cooperate in that effort.") This provision is the counter argument to China's claim that the political and economic reforms instituted by Patten in 1992 were contrary to the Joint Declaration. The United Kingdom maintained that movement towards democracy was necessary for the administration of Hong Kong, and that China should cooperate. In fact, China is violating the Joint Declaration by denying the legitimacy of the United Kingdom's actions to administer to Hong Kong's needs.

45. See RECORD, *supra* note 2, at 378; Choo, *supra* note 19, at 72.

46. See Skeen, *supra* note 9, at 199-200; Jordan, *supra* note 31, at 368. The Bill of Rights Ordinance (BRO) was Hong Kong's first written bill of rights. See RECORD, *supra* note 2, at 378.

47. See Jordan, *supra* note 31, at 365. The Joint Declaration may be violated by a fundamental change in the Hong Kong rule of law. Since the ICCPR remained applicable to Hong Kong, according to Article 39 of the Basic Law, China should not have had any qualms. See RECORD, *supra* note 2, at 379. China, nonetheless, was troubled by the BRO. See *id.* at 379-80 (indicating China's fundamental issue was with Article 3(a) of the BRO because it nullified any previous laws that contradicted the BRO).

48. See Jordan, *supra* note 31, at 367-68.

49. See Choo, *supra* note 19, at 72. Prior to 1994, the Governor of Hong Kong was always nominated by London and 39 out of 60 members of LegCo were elected. Vitrano, *supra* note 10, at 449.

50. Vitrano, *supra* note 10, at 449 (quoting a speech given by Governor Patten and discussing the impact of the reforms).

51. See Harris, *supra* note 19, at 351-52 (stating that Hong Kong is to be restored to Chinese sovereignty effective July 1, 1997 and will become a special administrative region (SAR)). Article 31 of the Chinese Constitution provides for the establishment of a special administrative region. See also Daniel R. Fung, *Foundation for the Survival of the Rule of Law in Hong Kong - The Resumption of Chinese Sovereignty*, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 288 (1996). See also RECORD, *supra* note 2, at 367, n.14. See also *infra* note 55 and accompanying text (indicating that part of the motivation for the establishment of Special Administrative Region is the "one country, two systems" policy); Jordan, *supra* note 31, at 351-52 (stating that an "SAR is not just an economic unit distinct from the rest of the country. It is a localized political-legal entity and a socio-economic reality differentiated from the general socialist system but forming part of a unitary state. . .").

longer subject to the administration of Great Britain, Hong Kong law became administered by China based on Deng Xiaoping's "one country, two systems" policy.⁵² This policy was guaranteed in the Sino-British Joint Declaration and promulgated in the Basic Law.⁵³ In the past, when the British have ceded a territory, they have established a clear and detailed plan for the change.⁵⁴ The usual and most ideal procedure would have been for the existing legislature in Hong Kong, the Legislative Council (LegCo),⁵⁵ to provide rules for the new incoming legislature. However, China would not allow this type of conversion.⁵⁶ Instead, the new government of Hong Kong started with a new plan of law, the Basic Law.⁵⁷

III. AGREEMENTS PERTINENT TO THE HONG KONG TRANSITION

A. *The Joint Declaration: An International Agreement*

The Sino-British Joint Declaration is a treaty expressing the general agreement that the common goal of the government of the United Kingdom and the government of the People's Republic of China is for China to resume authority over Hong Kong on July 1, 1997.⁵⁸ Ratified

52. Deng Xiaoping established the "one country, two systems" policy in 1978 in response to China's controversy with Taiwan. See Huang & Qian, *supra* note 6, at 289. The Joint Declaration, *supra* note 6, art. III, para. 5. Under this policy Hong Kong will maintain its capitalist system despite the fact that China, its sovereign power, is a socialist system. See Yee, *supra* note 34, at 600.

53. The "one country, two systems" policy is guaranteed in the Sino-British Joint Declaration and promulgated in the Basic Law. See Yee, *supra* note 34, at 600. The Joint Declaration was the original agreement between the United Kingdom and China. The two countries agreed, in the Joint Declaration, to the content of the Basic Law. The Joint Declaration provides that the Basic Law will be established after the Joint Declaration but will contain all of the parameters agreed to in the Joint Declaration.

54. Gladys Li Interview, *supra* note 8. See, e.g., Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'Etat & Common Law*, 27 CORNELL INT'L L. J. 49, 60 (1994) (discussing the extensive legal provisions made by the British government for the transition of Southern Rhodesia from a British colony to an independent nation); see also *id.* at 90-91 (discussing the legal mechanisms provided by the British government for establishing the government and laws of Lesotho when it gained independence from Britain).

55. The Legislative Council was the legislative body existing in Hong Kong prior to July 1, 1997.

56. Gladys Li Interview, *supra* note 8. See also Davis, *supra* note 5, at 305 n.7 and accompanying text (discussing that although China's original intent was to keep negotiations between itself and Great Britain, Hong Kong had an un-severable interest in the process and therefore this tripartite relationship was termed the three legged stool).

57. *Id.* I believe that China's motivation was to ensure that they had the maximum opportunity to interpret and configure the Joint Declaration and the Basic Law to their advantage. Since the Basic Law is open to varied interpretation and interpretation by China alone (following the transition Great Britain no longer has any influence), much of the autonomy and guarantee of basic rights for Hong Kong citizens could vanish.

58. Joint Declaration, *supra* note 3. The issues that developed during these discus-

in 1985,⁵⁹ the Joint Declaration provides the framework for the transition of control agreed to by China and the United Kingdom,⁶⁰ for the interactions between Hong Kong and China after the transition occurs (committing the "one country, two systems" polity to writing),⁶¹ and for the establishment of the Basic Law.⁶²

The Joint Declaration institutes the general framework agreed to by China,⁶³ in which China guarantees a high degree of autonomy and basic human rights for Hong Kong and its citizens, except with regard to foreign affairs and defense affairs.⁶⁴ According to the Joint Declaration, "the laws currently in force in Hong Kong will remain basically unchanged"⁶⁵ and "[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the life-style."⁶⁶ The Joint Declaration guarantees basic human rights such as freedom of person,

sions related to the differences between the capitalist Hong Kong society, which provides a high degree of personal and economic freedoms, and the communist government of China and its socialist society. See Harris, *supra* note 19, at 349 (indicating that the assurance that the "one country-two systems" concept would be available helped to mitigate controversies that developed during the discussions that led to the Joint Declaration and helped ensure adoption of the Joint Declaration).

59. Subsequent to being signed, the Joint Declaration was registered with the United Nations. See Fung, *supra* note 51, at 289-90. Some scholars argue that registration with the U.N. was "merely a symbolic gesture" by China to the people of Hong Kong. As an enforcement mechanism, it is insubstantial. See Vitrano, *supra* note 10, at 458-59.

60. See generally Harris, *supra* note 19, at 351-52 (stating that the Joint Declaration features Britain's agreement to "restore" Hong Kong to Chinese sovereignty effective July 1, 1997. . . and during the transitional period prior to June 30, 1997, the British government is responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability, and China will cooperate in this effort. . . upon China's resumption of sovereignty in 1997, Hong Kong becomes a special administrative region (SAR), as provided in [A]rticle 31 of the Chinese Constitution." For fifty years Hong Kong will be a "quasi-autonomous entity of a semi-capitalist nature within the framework of a Socialist polity", in other words, the "one country, two systems" idea.

61. See Yee, *supra* note 34, at 600. See also Huang & Qian, *supra* note 6, at 289.

62. See Yee, *supra* note 34, at 600; see also Vitrano, *supra* note 10, at 445 (indicating that the "one country-two systems" policy has been promoted by China for the conversion of both Hong Kong and Macau back to the PRC).

63. See Harris, *supra* note 19, at 350-51.

64. See Joint Declaration, *supra* note 3, at introduction, art. III, para. 2 (stating that foreign and defense affairs are the PRC's responsibility). See generally Fung, *supra* note 51, at 290-91 (elaborating that Hong Kong "will maintain her present freedoms and lifestyles as well as her own political, economic, social, cultural, legal, and judicial systems which are fundamentally different and separate from those of the rest of China. Capitalism will continue to be the prevailing economic system. Socialism, as state policy, will not be applied.").

65. Joint Declaration, *supra* note 3, at art. III, para. 3. "[t]he Hong Kong SAR will be vested with executive, legislative and independent judicial power, including that of final adjudication." *Id.* In other words, the current legal system in Hong Kong, which is derived from the English legal system, will remain basically unchanged. See also Basic Law, *supra* note 4, at art. 8 (discussing the laws in force).

66. Joint Declaration, *supra* note 3, at introduction, art. III, para. 5.

speech, assembly, correspondence, academic research, and association.⁶⁷ In theory, the "one country, two systems" policy provides a means to this end.

The Annexes of the Joint Declaration elaborate on the basic points outlined in the main body of the Joint Declaration.⁶⁸ Annex I, part 1 provides in part, that China will enact a Basic Law that ensures that the capitalist system of Hong Kong will remain unchanged for fifty years after the transition⁶⁹ and provides guidelines for achieving.⁷⁰

Annex I, part II provides the laws to be enforced in Hong Kong. They include the Basic Law and the laws "previously in force in Hong Kong and law enacted by the Hong Kong Special Administrative Region legislature. . ." provided they do not contradict the Basic Law. Any laws enacted by the legislature of Hong Kong that are not in accordance with the Basic Law are not valid.⁷¹ Part III discusses the judicial system for the Hong Kong SAR.

Part XIII protects basic rights and freedoms that existed in Hong Kong prior to the transition and these rights include "freedom of person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike of demonstration. . ."⁷² Part XIII further stipulates that the "International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights *as applied* to Hong Kong shall

67. *Id.* at para. 3. "Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong SAR. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."

68. See Harris, *supra* note 19, at 350-51.

69. Joint Declaration, *supra* note 3, at Annex I, para. 1 ("Except for foreign and defense affairs. . . the Hong Kong Special Administrative Region shall be vested with executive, legislative, and independent judicial power, including that of final adjudication."). See generally RECORD, *supra* note 2, at 368-69 (discussing Annex I).

70. Joint Declaration, *supra* note 3, at Annex I, para. 1. The chief executive of the Hong Kong SAR is to be "selected by election or through consultations held locally and be appointed by the Central People's Government." The legislature of Hong Kong will be established through elections and the chief executive will be accountable to the legislature to certify that transactions are legal. See also Gladys Li Interview, *supra* note 8.

71. Joint Declaration, *supra* note 3, at Annex I, para. 2; RECORD, *supra* note 2, at 370. Annex I, part 3 provides for the judicial processes in the Hong Kong SAR. The judges for Hong Kong will be appointed by the chief executive of Hong Kong who will act "in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Annex I part 3 further provides that the power of final judgment is to be vested in the court of final appeal in Hong Kong. Joint Declaration, *supra* note 3, at Annex I, para. 3.

72. Joint Declaration, *supra* note 3, at Annex I, para. XIII. "The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong. . ."

remain in force."⁷³

B. *The Basic Law*

As indicated by the Joint Declaration, the Basic Law was adopted by the PRC's National People's Congress and is considered by Hong Kong citizens to be the mini-constitution for the Hong Kong SAR.⁷⁴ The Basic Law reiterates the promises made in the Joint Declaration but elaborates further on the actual law to uphold the promises made in the Joint Declaration.⁷⁵

First, the Basic Law stipulates the rights of the Hong Kong people.⁷⁶ The Basic Law provides for the fundamental rights and duties of the residents. These rights include a right to life, equality before the law, freedom from torture, personal liberty, liberty of movement, privacy of communications, freedom of expression, religion, freedom of association, and the right of peaceful assembly.⁷⁷

Second, the Basic Law establishes the plan of government for Hong Kong.⁷⁸ Continuing the theme of the Joint Declaration, the Preamble of the Basic Law indicates "that under the principle of '*one country, two systems*', the socialist system and policies will not be practiced in HK."⁷⁹ Chapter IV details the political structure. Article 45, while discussing the method for selection of the Chief Executive, stipulates that the ultimate goal is to elect the Chief Executive through *universal suffrage*.⁸⁰ Article 68 stipulates that another ultimate goal for change in Hong Kong is to have a legislature that is elected by *universal suffrage*.⁸¹

73. Joint Declaration, *supra* note 3, at Annex I, para. XIII.

74. See Vitrano, *supra* note 10, at 447; Jordan, *supra* note 31, at 335, 350. See also RECORD, *supra* note 2, at 370 (discussing that the Basic Law "will become the Hong Kong SAR's "constitution", replacing the Letters Patent, the document issued under the Queen's hand that establishes the basic framework of the colonial government.") But see Jordan, *supra* note 31, at 350-52 (indicating that China differs with Hong Kong as to the perception that the Basic Law is a mini-constitution. China perceives the Basic Law as a "non-enforceable statement of policy").

75. See Vitrano, *supra* note 10, at 447. See also RECORD, *supra* note 2, at 370.

76. See Harris, *supra* note 19, at 352; Jordan, *supra* note 31, at 335.

77. Basic Law, *supra* note 4, at ch. 3, arts. 24-42. Annex III to the Basic Law provides exceptions to the general rule that the national law of the PRC will not be applied to Hong Kong. These exceptions include: 1) recognition of Beijing as the capital of the PRC; 2) "The March of Volunteers" as the National Anthem; 3) the Five-star red Flag as the National Flag; 4) National Day falls on Oct. 1; 5) PRC's government's Declaration of the Territorial Sea; 6) the PRC nationality law; and 7) PRC regulations concerning Diplomatic Privileges and Immunities.

78. See Harris, *supra* note 19, at 352; Jordan, *supra* note 31, at 335.

79. Basic Law, *supra* note 4, at pmb1 (emphasis added). The assumption that Chinese and English are interchangeable is flawed and causes much difficulty for interpretation. See Jordan, *supra* note 31, at 339.

80. Basic Law, *supra* note 4, at art. 45.

81. *Id.* at art. 68. Provisions in the Basic Law that indicate that the ultimate goal is

However, the way the Basic Law was written allows China to manipulate Hong Kong's autonomy.⁸² Chapter I, Article 8 of the Basic Law proscribes that the laws previously operable in Hong Kong will apply only if they do not contravene with the Basic Law.⁸³ If the Hong Kong courts need to interpret a provision of the Basic Law, the Hong Kong courts need to seek the relevant interpretation from the PRC Standing Committee. Article 158⁸⁴ dictates that it is the PRC Standing Committee's power to interpret the Basic Law.⁸⁵

universal suffrage imply that the political movement in Hong Kong SAR should be towards democracy. Members of the democratic movement firmly believe that the Basic Law stipulates that the path is to be towards democracy. See Martin Lee, *The Slow Squeeze on Hong Kong*, WASH. POST, Sept. 12, 1997, at A25.

82. See Davis, *supra* note 5, at 308 (discussing that early in the drafting of the Basic Law, China seemed willing to incorporate varying political viewpoints including those of liberals like Marline Lee, but following direct confrontation with these liberals, China reformed its policies and refused to incorporate liberals whose views opposed China's). The Basic Law creates a huge gateway for China to influence the laws of Hong Kong. Gladys Li Interview, *supra* note 8.

83. Basic Law, *supra* note 4, at ch. I, art. 8. See Bryan A. Gregory, *Envisioning Futures, The Battle Over Democracy in Hong Kong*, N.C. J. INT'L L. & COMM. REG. 175, 193 (1993) (indicating that "it is possible that the Standing Committee could legally implement or rescind procedures almost at will."). The Basic Law, Chapter I, Article 11 indicates that "[t]he systems and policies practiced in the Hong Kong SAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and relevant policies, shall be based on the provisions of this Law." The Basic Law, Chapter I, Article 11 further provides that "[t]he courts of the Hong Kong SAR shall have jurisdiction over all cases in the Region, except. . . shall have no jurisdiction over acts of state such as defense and foreign affairs. . ." But see Jordan, *supra* note 31, at 336 (stating that the "ambiguity errs in favor of the common law interpretation", in other words the common law of Hong Kong).

84. See Jordan, *supra* note 31, at 354 (stating that "Articles 17, 158, and 160. . . transfer considerable judicial powers of interpretation to the Standing Committee."). Since Article 158 gives complete power to the Standing Committee of the PRC to interpret the Basic Law, by implication it gives the Standing Committee the power to dictate which parts of the Basic Law are enforceable. *Id.* at 355. See Fung, *supra* note 51, at 301.

85. Basic Law, *supra* note 4, at ch. VIII, art 158. See also RECORD, *supra* note 2, at 370-71. See Gladys Li Interview, *supra* note 8. Article 158 of the Basic Law does not allow Hong Kong to have the "final say in the interpretation of the Basic Law" and it is understood that it is "undesirable" to make amendments to the Basic Law. The Standing Committee delegates to the SAR courts the power to interpret the Basic Law if issues concerning the Basic Law should arise in the course of litigation. If an issue should arise which falls within the autonomy of the SAR, the SAR courts may interpret relevant provisions of the Basic Law in the normal course of litigation up to the Court of Final Appeal. Before the Court of Final Appeal delivers final judgment however, it must seek the review of the Standing Committee of the NPC. The Standing Committee is then obliged to consult a committee of constitutional experts know as the Committee for the Basic Law. It consists of six mainland members and six Hong Kong members, including persons from the legal profession, who will render an advisory opinion to the Standing Committee. The Standing Committee will then make its interpretation, which will be binding on the Court of Final Appeal. No interpretation of the Standing Committee affects judicial decisions

Since no clear procedure indicates when a law contravenes with the Basic Law, there is tremendous latitude for China to influence the laws that will be allowed to continue to apply to Hong Kong. Additionally, review by the National People's Congress of all of Hong Kong's laws to determine if they violate the Basic Law undermines the autonomy of Hong Kong and the ability for final adjudication.⁸⁶ In further derogation of Hong Kong's autonomy, Article 17 maintains a similar procedure for new law enacted by the Hong Kong legislature. Ultimately, when Article 158 is read with Article 19, it gives the Standing Committee the unreviewable power to determine what cases fall within the definition of "acts of state" and thus outside of the jurisdiction of the SAR's courts.⁸⁷

IV. ANALYSIS OF POST-TRANSITION HONG KONG

Within months of the transition, problems confronted the Hong Kong people and challenged the efficacy of the Joint Declaration and the Basic Law.⁸⁸ Current issues are multi faceted. One issue that developed immediately concerns the validity of the new governing legislative body.⁸⁹

Originally, the members of the former Hong Kong legislature, the LegCo, were elected by more than one million people.⁹⁰ However, after the transition, LegCo was abolished by the Preparatory Committee⁹¹ and replaced with the Provisional Council.⁹² The first startling element of this action is that China threatened to take this drastic action in 1995. China had threatened to abolish the LegCo and established a leg-

already reached. In other words, such interpretations carry no retroactive effect.

86. Gladys Li Interview, *supra* note 8.

87. See generally RECORD, *supra* note 2.

88. Since China refused to allow the Legislative Council to pass laws that would be effective after July 1, 1997 and since the Basic Law has not been in effect long, there is no clear body of law. Gladys Li Interview, *supra* note 8. Over arching all of these considerations, if China determines that the Standing Committee has the complete power to determine which provisions of the Basic Law will be enforceable, this would be a breach of China's guarantee that Hong Kong will be permitted to retain a great deal of autonomy. See Jordan, *supra* note 31, at 355.

89. There are "grey" areas in terms of the recent "scrapping" of the Legislative Council, which shed an uncertain shadow on the new legislature. Gladys Li Interview; *supra* note 8; Jordan, *supra* note 31, at 336. But see *H.K. Changes Little One Month After Handover*, BERNAMA (Malaysia), July 31, 1997, available in 1997 WL 12110903.

90. Lee, *supra* note 81, at A25.

91. The Preparatory Committee is body appointed entirely by China. It seems unlikely that a group appointed entirely by China and not Hong Kong, will be able to adequately represent the interests and needs of the Hong Kong people. In fact, the group will more likely favor China's position on issues pertaining to basic rights. Huang & Qian, *supra* note 6, at 292 n.9.

92. See Lee, *supra* note 81, at A25.

islative body of its own appointment⁹³ in retaliation for the passage of Hong Kong's Bill of Rights and the 1995 elections which resulted in major victories for the pro-democracy party.⁹⁴ China adamantly refused to acknowledge the validity of the democratic reforms because, according to China, they were directly contrary to the Joint Declaration.⁹⁵

The second alarming issue related to this action is that the Provisional Council members were *appointed* by China.⁹⁶ As discussed earlier, the Basic Law indicates that one goal for the Hong Kong SAR is that Hong Kong should have a chief executive and legislature *elected by universal suffrage*.⁹⁷ The Basic Law provides for the establishment of the new legislative body.⁹⁸ However, Annex II stipulates that the first legislative body will be an exception to the rule, "formed in accordance with the 'Decision of the National People's Congress on the Method for the Formation of the First Government' and the First Legislative Council. . . ." This process takes a step backward from the goal expressed in Article 68 of the Basic Law to have a legislature elected by universal suffrage.⁹⁹ It also contravenes the Article 5 provision that the capitalist

93. Choo, *supra* note 19, at 72. See The Department of State, *Hong Kong Report on Human Rights Practice for 1996* (visited June 15, 1997) <<http://www.usis.usemb.se/human/hongkong.html>>. This report indicates that the status of human rights abuses in Hong Kong is included in the report for the United Kingdom. The report acknowledges that the 60 LegCo. seats were filled in 1995 either through direct or indirect balloting. They were contested by the PRC. The report indicates that the PRC's intent for post-transition was to declare as null and void the 1995 LegCo, district boards, and municipal counsels because it was not consistent with the electoral rules adopted by the Hong Kong Government in 1994 for election to these bodies. The report also indicates that China's design was to install a PRC appointed preparatory committee to decide how to establish the first legislative council post July 1, 1997. The report issued no statement as to these indications. See also Vitrano, *supra*, note 10, at 453-55 (indicating that if the PRC's discontinued the democratic reforms implemented by Governor Patten, it would be a violation of the Joint Declaration).

94. See Choo, *supra* note 19, at 72.

95. See *supra* note 44 and accompanying text. China believed that the status quo in Hong Kong at the time of the signing of the Joint Declaration should not be radically changed by the United Kingdom.

96. Editorial Writer's Desk, *Beijing-Style Democracy Hong Kong Will Have to Endure a Convoluted Voting Scheme*, L.A. TIMES, Sept. 30, 1997, at B6 [hereinafter *Beijing Style*]; The cut in the number of office holding Democratic Party members such that they will not hold the majority as they did before the reversion. This will result in more distance between the public and the government officials of Hong Kong, decreasing democracy. *When the Outline of Hong Kong's Electoral Arrangements was First*, S. CHINA MORNING POST, Oct. 14, 1997, at 18 [hereinafter *Outline*]. A decrease in democracy will mean that the Hong Kong people will not be able to influence the administration of the laws pertaining to their basic rights and increase the chances that China will abuse the loopholes in the Basic Law.

97. Peter Montagnon, *Legal Eagles Remain Wary*, FIN. TIMES, June 16, 1997, at VII. See also Gladys Li Interview, *supra* note 8.

98. Basic Law, *supra* note 4, at art. 68, Annex II.

99. *But see* Keith B. Richburg, *100 Days of Chinese Rule; Hong Kong's People Seem Content as New Leader Promises Prosperity, Not Democracy*, WASH. POST, Oct. 9, 1997, at

system will remain in place and practiced for the next fifty years. Since this seems to violate the Basic Law's provisions, it is unclear whether the new legislative body, the Provisional Legislature, is legally in place.¹⁰⁰

Furthermore, it is also doubtful whether the legislative body will be able to comply with the procedures laid out in the Basic Law.¹⁰¹ Part of the plan for the Provisional Legislative Council was to confirm the judges appointed to the Court of Final Appeals.¹⁰² Since the judges were approved by the Provisional Legislature, whose legal existence is in doubt, this creates doubt as to the legal validity of the judges on the Court of Final Appeals.¹⁰³

Second, Tung Chee-Hwa, the new chief executive, canceled the laws created by Governor Patten prior to July 1, 1997 that ensured basic civil and political rights of Hong Kong residents.¹⁰⁴ "As incrementally and inevitably as pages being ripped from a daily calendar, Hong Kong's new administration stripped away the fledgling rights and democratic reforms enacted during the last days of British rule."¹⁰⁵ As contemplated by the Joint Declaration, these rights pertained to freedom of the press, public expression in government, right to peaceful demonstration, and the movement towards democracy in Hong Kong.

A third possible violation is the new laws introduced by Tung following the reversion. These new laws limit the right to demonstration and institute controls on political and other organizations.¹⁰⁶ The laws have also weakened trade union rights by freezing labor laws,¹⁰⁷ limited the right to protest, and limited the right to form political parties.¹⁰⁸

In August 1997, new election laws withdrew voting power from

A25 (construing Chief Executive Tung as having promised that a new legislature will be established on May 24, 1998 but that more democracy will not occur for another 10 years).

100. Gladys Li Interview, *supra* note 8.

101. *Id.*

102. Article 88 of the Basic Law indicates that the Chief Executive appoints the judges. Basic Law, *supra* note 4, at art. 88. Article 73, paragraph 7 indicates that the legislative council endorses appointments and removals. *Id.* at art. 73(7).

103. Gladys Li Interview, *supra* note 8.

104. Tung was appointed by China and therefore, would presumably have China's best interests in mind. Maggie Farley, *A Hundred Days in Hong Kong: A Matter of Haves, Have-Nots*, L.A. TIMES, Oct. 8, 1997, at A4.

105. *Id.* These election laws were drawn up by the China-appointed Preparatory Committee with the same motivations that lead the Committee to abolish LegCo and make it more difficult for the pro-democracy candidates to obtain seats in the legislature. See Lee, *supra* note 81, at A25; Eric Bjornlund, *Hong Kong Election Law Fair?*, CHRISTIAN SCI. MONITOR, Oct. 8, 1997, at 20.

106. See Flynn, *supra* note 29. Although no one has felt repercussions from these laws, there is no guarantee that they won't tomorrow. Lee, *supra* note 82, at A25.

107. See Farley, *supra* note 104, at A4.

108. *Id.*

close to 2 million Hong Kong citizens¹⁰⁹ and greatly crippled the democratic movement in China.¹¹⁰ There are sixty seats in the legislature. Now the electorate for thirty of those seats has been cut from 2.7 million to 186,000¹¹¹ and "corporate voting".¹¹² Furthermore, Tung is trying to introduce further legislation that will additionally weaken the democratic representation.¹¹³ These new laws are directly in confrontation to the Basic Law's guarantee to move towards democratic elections.¹¹⁴

Fourth, Tung also called for a "watering down"¹¹⁵ of the U.N. Universal Declaration of Human Rights.¹¹⁶ His reasoning was that the U.N. Declaration was not representative of the beliefs of developing countries. Instead, it represented the views of the West.¹¹⁷ Fifth, the Human Rights Report of the State Department discussed the continuing problem of self-censorship by the media.¹¹⁸

However, before July 1, 1997, Great Britain and Hong Kong endeavored to insulate Hong Kong from China's lower standard of human rights.¹¹⁹ According to the Joint Declaration¹²⁰ and the Basic Law,¹²¹ the ICCPR and ICESCR will remain applicable to Hong Kong following

109. *See id.*

110. *See Lee, supra* note 81, at A25.

111. *See Outline, supra* note 96, at 18.

112. *See Beijing-Style, supra* note 96, at B6 (indicating that "[a]ccording to the new rules, Hong Kong will use a complex proportional representation system to prevent any one party from dominating the 60-seat legislature. Under Beijing's scheme, 20 seats will be filled at large by all voters and 30 seats will go to business representatives elected by a smaller number, 180,000 people. The remaining 10 seats will be filled by an 800-member electoral committee of pro-Beijing and business interests."); *Lee, supra* note 81.

113. *See Lee, supra* note 81, at A25.

114. Bjornlund, *supra* note 105, at 20.

115. *See Lee, supra* note 81, at A25.

116. *See* G.A. Res. 217A (III), U.N. GAOR, Resns., U.N. Doc. A/810, at 71 (1948).

117. *Lee, supra* note 81, at A25. *But see* Michael Chugani, *Washington Urges More Democracy*, H.K. STANDARD, Sept. 10, 1997, available in WESTLAW, 1997 WL 14153419 (quoting Wang Yusheng, consul general of San Francisco, "Hong Kong's democracy, human rights, and freedom of the press have been increased and will be more extensive in the future. . .")

118. *See* The Department of State, *Hong Kong Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/hongkong.html>>. *But see* Richburg, *supra* note 99, at A25 (construing Chief Executive Tung's speech as reassuring the Hong Kong people the freedom of the press and media). A notorious issue was the release of cartoonist Larry Feign from the South China Morning Post in quick succession to his publication of cartoons that criticized PRC leaders. The report indicates that although the South China Morning Post management vowed the cartoonist's release was due to staff cuts, reports in Hong Kong remain convinced that his release was politically motivated. *Id.*

119. *Id.*

120. Joint Declaration, *supra* note 3, at Annex I.

121. Basic Law, *supra* note 4, at art. 39

the transition.¹²² Article 39 of the Basic Law contains a policing mechanism for checking the actions of China as pertaining to Hong Kong. Article 39 of the Basic Law guarantees that the United Nations International Covenant on Civil and Political Rights, the United Nations International Covenant on Economic, Social and Cultural Rights, and the UN's international labor conventions shall remain applicable to Hong Kong through the laws of the Hong Kong SAR. Any rights of the Hong Kong citizens will not be restricted unless sanctioned by law and those restrictions will not contravene the previously mentioned U.N. conventions.¹²³

V. U.N. COVENANTS

A. *The International Covenant on Civil and Political Rights and the Optional Protocol, December 16, 1966*

1. Description of the International Covenant on Civil and Political Rights

Although similar in content to the U.N. Declaration of Human Rights,¹²⁴ the International Covenant on Civil and Political Rights (ICCPR)¹²⁵ goes further and requires State Parties to provide remedies in the case of a Covenant violation.¹²⁶ "The International Covenant on Civil and Political Rights is one of the fundamental instruments created by the international community for the global promotion and protection of human rights."¹²⁷ The Covenant is binding on each State Party to the Covenant, subject to reservations.¹²⁸

Part III of the Covenant enumerates the rights protected by the ICCPR. Among these rights are the right to life,¹²⁹ freedom from forced

122. See Skeen, *supra* note 9, at 199-200.

123. Basic Law, *supra* note 4, at art. 39.

124. See generally B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, FORTY YEARS AFTER THE UNIVERSAL DECLARATION (1989) (discussing the Universal Declaration, its impact, and subsequent actions).

125. The United Nations' International Covenant on Civil and Political Rights (ICCPR) was ratified on December 16, 1966 and went in to force on March 23, 1976. ICCPR, *supra* note 16.

126. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 125 (1996).

127. UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, (1992), 31 ILM 645 [hereinafter SENATE REPORT].

128. See STEINER & ALSTON, *supra* note 126, at 123. There are disputes between States as to the interpretation of terms of the Covenant. *Id.*

129. ICCPR, *supra* note 16, at art. 6, sec. 1.

servitude and slavery,¹³⁰ liberty and security of persons,¹³¹ liberty of movement and freedom to choose his residence,¹³² freedom of thought, conscience, and religion,¹³³ to hold opinions without interference,¹³⁴ to freedom of expression,¹³⁵ peaceful assembly,¹³⁶ to take part in the conduct of public affairs, directly or through freely chosen representatives,¹³⁷ to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,¹³⁸ and to have access, on general terms of equality, to public service in his country.¹³⁹ It is the responsibility of each State to ensure that all of the Covenant measures are implemented appropriately.¹⁴⁰

The ICCPR provides three means to guarantee that the Covenant's provisions are properly respected and ensured by State Parties. As Article 40 provides, State Parties must periodically provide reports to the Human Rights Commission (HRC)¹⁴¹ illustrating the progress made to enhance those rights and the measures taken by the State to ensure the provisions of the Covenant.¹⁴² The reports must be submitted within one year of becoming a party to the Covenant.¹⁴³

HRC members dispute over the uncertain role of specialized agencies and non-government organizations (NGOs) in this reporting procedure. The Covenant does not contain any provision for consideration of this type of outside information.¹⁴⁴ The specialized agencies may only

130. *Id.* at art 8, sec. 1

131. *Id.* at art 9, sec. 1

132. *Id.* at art 12, sec. 1

133. *Id.* at art 18, sec. 1

134. *Id.* at art 19, sec. 1

135. *Id.*

136. *Id.*

137. *Id.* at art 25, sec. a

138. *Id.* at art 25, sec. b.

139. *Id.* at art 25, sec. c.

140. UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 149 (Hurst Hannum & Dana D. Fischer, eds., 1993) [hereinafter Hannum & Fischer].

141. The Human Rights Committee of the United Nations was created entirely for the purpose of being the administrator of the ICCPR. See DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: IT'S ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 126 (1991); Hannum & Fischer, *supra* note 140, at 149. STEINER & ALSTON, *supra* note 126.

142. ICCPR, *supra* note 16, at art. 40. According to Article 40, the State Party reports must be periodically filed with the HRC and must indicate "(1) measures [the State] ha[s] adopted, including legislative or judicial action, which give effect to the rights recognized within the Covenant; (2) the progress made in the enjoyment of those rights; and (3) the factors and difficulties encountered in giving them effect." See Hannum & Fischer, *supra* note 140, at 151.

143. ICCPR, *supra* note 16, at art. 40

144. See Hannum & Fischer, *supra* note 140, at 153. A purely textual analysis would indicate that specialized agencies have no opportunity to comment on reports provided by

provide comment when it is requested by the HRC. However, past practice has indicated that although formal reports are not permitted, work produced by specialized agencies of the U.N. *has* influenced HRC decisions.¹⁴⁵ Likewise, since there is no specific Covenant provision that prohibits or permits formal reporting by NGOs, NGOs are not prevented from providing information and statistics to individual members of the Committee. Recently, the HRC has frequently relied on the information provided by NGOs such as Amnesty International.¹⁴⁶

After all of this information is assimilated, the HRC is able to provide only "general comments" to the parties on the reports filed by each State Party.¹⁴⁷ More importantly, however, the HRC files an annual report¹⁴⁸ on its activities for publication with the General Assembly.¹⁴⁹ In this manner, it is available to inform the rest of the international community.

A second method of ensuring that the Covenant is respected is through Article 41 of the Covenant, which provides an optional inter-State complaint procedure.¹⁵⁰ This procedure permits one State Party to execute a communication to the HRC that another State Party is not ensuring the provisions of the Covenant.¹⁵¹ This process under is not automatically available.¹⁵² A State Party to the ICCPR must file a separate declaration that it "recognizes the competence of the HRC to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."¹⁵³ Furthermore, only a State Party that has accepted Article 41 can report a violation by another State Party of the Covenant.¹⁵⁴ The accusing State Party must have exhausted all domestic remedies; and both parties must first try to settle the dispute amongst themselves.¹⁵⁵ If these conditions are met, then a State Party may file a communication alleging that the accused State is not fulfill-

the State Parties. The content of the report is a description and evaluation, consistent with the ICCPR terms, of the protections measures for civil and political rights enumerated in the Covenant in the State Party under scrutiny. MCGOLDRICK, *supra* note 141, at 9.

145. See Hannum & Fischer, *supra* note 140, at 153.

146. See *id.* at 153-54.

147. See STEINER & ALSTON, *supra* note 126, at 131 (stating that according to Articles 40 & 45 of the ICCPR, general comments should be submitted to the U.N. Secretary General).

148. MCGOLDRICK, *supra* note 141, at 131 (indicating that the annual reports not contain information about Optional Protocol reports).

149. See Hannum & Fischer, *supra* note 140, at 154.

150. See ICCPR, *supra* note 16, at art. 41.

151. *Id.*

152. *Id.*

153. *Id.* See Hannum & Fischer, *supra* note 140, at 155.

154. See *id.*

155. *Id.* at 156.

ing its obligations under the Covenant.¹⁵⁶ Inter-State communications are rare.¹⁵⁷

If the alleged violation reaches the HRC, the HRC can not opine as to whether there has been a violation of the Covenant. The HRC's purpose is to be a fact-finder and to assist in friendly settlement between the accused and the accused state.¹⁵⁸ If a settlement is not reached, the State Parties may agree to the appointment of an ad hoc conciliation commission, which will also assist towards a friendly settlement.¹⁵⁹ If a settlement still is not reached, the HRC submits a report with its position on the likelihood and means toward a friendly settlement.

Third, the Optional Protocol (OP)¹⁶⁰ provides an opportunity for an individual citizen or an individual subject to the control of a State to file a communication with the HRC against his or her State Party.¹⁶¹ Eventually, the General Assembly adopted the Optional Protocol to provide for individual petition,¹⁶² but NGOs were still denied the right of petition.¹⁶³ The OP is a separate agreement from the ICCPR, requiring the State Party to assent to the OP and the ICCPR separately. Therefore, the Human Rights Commission is only allowed to consider petitions from individuals alleging an ICCPR violation by a State Party if the State Party is a signatory to the ICCPR *and* the OP.¹⁶⁴

156. *Id.* at 155.

157. *Id.* at 156-57.

158. *Id.* at 156.

159. *Id.* (indicating this is done according to procedure laid out in Article 42).

160. HUMAN RIGHTS COMMITTEE, SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (Vol. 1: U.N. Sales No. E.84.XIV.2, 1985; Vol. 2: U.N. Sales No. E.89-XIV.1, 1990). Originally, the final draft of the ICCPR by the Human Rights Commission contained no provisions for petitions by individuals or organizations. However, many argued that States were not the only actors affected by international law. International persons and organizations were affected as well. "[U]nder the very terms of the Covenant the individual was plainly a subject of international law and the purpose of the Covenant was to protect him against abuses of power by the State." MCGOLDRICK, *supra* note 141, at 122.

161. HUMAN RIGHTS COMMITTEE, *supra* note 160, at 9-10. STEINER & ALSTON, *supra* note 126, at 776. "[A] failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed." Hannum & Fischer, *supra* note 140, at 149. The UN Secretary General determines whether communications pursuant to the OP are submitted to the HRC. MCGOLDRICK, *supra* note 141, at 128.

162. *See* MCGOLDRICK, *supra* note 141, at 124.

163. *See id.* at 125. The Human Rights Commission is the administrator for the ICCPR and Optional Protocol; although, it is important to clarify that they are separate agreements. *Id.* at 126. There are no explicit rules as to which submissions the Secretary General may or may not determine are submissable to the HRC. However, there is an explicit rule that stipulates that any communications against a State that is not a party to the OP will not be determined reviewable by the HRC because the HRC would not have jurisdiction. *Id.* at 128.

164. *Id.* at 124. "The OP is open for signature by any State that has signed the ICCPR (Article 8(1) OP). It can only be ratified or acceded to by a State which has ratified by or acceded to the ICCPR (article 8(2)(3) OP). . . For States subsequently ratifying or acceding

As dictated by Article 4(1), following submission, the individual communication is brought to the attention of the State Party against which it was brought. The State Party must reply within six months by providing a submission to the HRC.¹⁶⁵ It is also the State Party's burden to prove, in detail, that the individual did not exhaust the remedies available to settle the issue.¹⁶⁶ Once the HRC has considered the communication, the HRC states its "views on the matter", which includes the HRC legal analysis of the issue and a determination whether a violation of the Covenant occurred.¹⁶⁷

2. Application

"An important part of Hong Kong's [pre-transition] legal system derives from international treaties."¹⁶⁸ In the past, international treaties were applicable to Hong Kong either through the terms of the treaties or through the British legislative process.¹⁶⁹ However, Hong Kong's reversion to China rendered this process obsolete¹⁷⁰ and a fledgling system has been established in its place. In order for a State Party, like China, to adhere to the terms of the ICCPR, the State's laws might have to be revised to meet these standards.¹⁷¹ China might have to establish enforcement mechanisms if none exist.¹⁷² The principal means to achieve implementation of the ICCPR is through legislation or judicial remedies.¹⁷³

Based on China's approval of the ICCPR in Article 39 of the Basic

to the OP, the OP enters into force three months after the date of the deposit of the instrument of ratification or accession (article 9(2) OP)." *Id.* at 126-27. In order for an individual to provide a communication to the Human Rights Commission regarding a violation of the ICCPR, it must be submitted in written form according to Article 2 of the Optional Protocol. Article 2 and 5 (2)(b) of the Optional Protocol indicate that all domestic remedies must have been attempted and not achieved the proper result before an individual petition would be considered. According to Article 3, any communications to the HRC that are anonymous, or that the HRC considers to be an abuse of the communication or inconsistent with the purpose of the Covenant, will not be considered by the HRC. *Id.* at 125.

165. *Id.*

166. See Hannum & Fischer, *supra* note 140, at 159. Article 4 (2) further explains that the State Party's submission can be "[w]ritten explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State".

167. See Hannum & Fischer, *supra* note 140, at 160.

168. See Skeen, *supra* note 9, at 188.

169. See *id.*

170. *Id.*

171. STEINER & ALSTON, *supra* note 126, at 775.

172. *Id.* Reservations by the State Party to terms of the Covenant would reduce the requirement for domestic legal changes. Compliance would be rendered obsolete as to reserved terms. *Id.* at 775.

173. *Id.* at 269. As we have seen before, the validity of the legislature and judiciary in Hong Kong is already in question.

Law, the following four examples are current violations which could be determined to violate the ICCPR. First, Article I of the ICCPR establishes that all "peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹⁷⁴ Hong Kong's right to self-determination was quashed by China, when the UN Special Committee accepted China's request to remove Hong Kong from the list of colonies covered by Article I of the ICCPR.¹⁷⁵

Second, the ICCPR's guarantee that people have a right to take part in the conduct of public affairs, directly or through freely chosen representatives,¹⁷⁶ would challenge China's actions regarding the recent alteration in election laws that took Hong Kong one step further away from democracy.¹⁷⁷ By reducing the electorate, the ability of the Hong Kong people to participate in public affairs has been diminished.

Third, the ICCPR ensures the right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.¹⁷⁸ Members of the democratic party in Hong Kong would be among the first people to claim China's violation of the terms of election and the guarantee to move toward universal suffrage.

Fourth, the ICCPR upholds the civil and political rights guaranteed in the Universal Declaration of Human Rights.¹⁷⁹ The rights protected in the ICCPR are the key composites of a democratic society.¹⁸⁰ Tung's weakening of the force of the Declaration is counter to the ICCPR.

In response to these derogations of the ICCPR, there are four possible scenarios to ensure or attempt to ensure compliance with the ICCPR. First, if everything was *ideal*, the ICCPR would be applied to the Hong Kong SAR as it was applicable under United Kingdom's administration. Article 39 of the Basic Law and Annex I, part XIII of the Joint Declaration stipulate China's approval of the ICCPR *as it applied* to Hong Kong at the time those agreements were ratified. Originally, Great Britain adopted the ICCPR and extended its application to Hong Kong.¹⁸¹ The tradition would continue and China would provide reports to the HRC once a year following the first year after July 1, 1997. If

174. ICCPR, *supra* note 16, at art. I.

175. See Neoh, *supra* note 10, at 323-23.

176. ICCPR, *supra* note 16, at art. 25, sec. a.

177. See *supra* notes 109-12 and accompanying text.

178. ICCPR, *supra* note 16, at art. 25, sec. b.

179. SENATE REPORT, *supra* note 127, at 649.

180. *Id.*

181. LIESBETH LUNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY OR RUIN? 275 (1995). There are reservations made by the United Kingdom for Hong Kong as to Articles 13 and 25.

this were the most likely situation, this research would be unnecessary.

A second scenario is imaginable if China does not comply with the reporting requirement, and the ICCPR is applied to the Hong Kong SAR as it was applied under the United Kingdom's rule. Great Britain made a declaration as to its acceptance of the "competence of the Human Rights Committee under Article 41" of the ICCPR.¹⁸² If the United Kingdom's declarations carried forward past the reversion, another State Party to the Covenant, with similar acceptance of Article 41, could bring a communication to the Human Rights committee claiming that China was not fulfilling the terms of the ICCPR. For example, as part of the United States consideration for ratification of the ICCPR, it considered the resulting influence the U.S. would have upon shaping human rights development in other countries.¹⁸³ Therefore, under Article 41 the United States would be able to provide reports if it had accepted Article 41 as well.

The Optional Protocol would not be applicable to the Hong Kong SAR because the United Kingdom was not a party nor a signatory to the Optional Protocol and therefore, an *individual* could not file complaints against the United Kingdom.¹⁸⁴

A third scenario would be if China insisted that its acceptance of the ICCPR did not include Article 41, and China refused to comply with the reporting requirements. The chief executive of Hong Kong might be able to provide reports on behalf of the Hong Kong SAR to the HRC. Additionally, NGOs could effectively protect rights such as freedom of speech, association and participation.¹⁸⁵ To draw a parallel, in 1995 Amnesty International submitted a report to the Human Rights Commission concerning the abuses of human rights in Kashmir.¹⁸⁶ Prior to this report, the Indian government had denied the truth of allegations of human rights abuses.¹⁸⁷ However, this report angered the Indian government and spurred the government to provide its own reports and take action to enforce these rights.¹⁸⁸

However, China included Article 23 in the Basic Law, which limits the "foreign political organizations or bodies from conducting political activities in the Region" or those same organizations from establishing ties with similar organizations in the Region.¹⁸⁹ It remains unclear

182. ICCPR, *supra* note 16, at Declarations

183. SENATE REPORT, *supra* note 127, at 659.

184. *See supra* notes 160-64 and accompanying text.

185. STEINER & ALSTON, *supra* note 126, at 463.

186. *Abuse of Human Rights Commission*, ECONOMIST, Feb. 4, 1995, at 30.

187. *Id.*

188. *Id.* However, the article further indicates that although Amnesty International got this reaction from India, the UN Commission on Human Rights did not assume the influential role it could have.

189. Basic Law, *supra* note 4, at art. 23.

whether China intended for this article to apply to NGOs.¹⁹⁰

Fourth, the worst and most likely scenario, China will refuse to comply with the reporting procedure for the ICCPR or acknowledge its application to Hong Kong. China would insist that Article 39 of the Basic Law was merely a recognition of the ICCPR as an international convention but that Article 39 in no way bound China. Already, China adamantly refuses to acknowledge an intergovernmental organization's, like the U.N., authority over human right issues that are specifically State concerns.¹⁹¹ The Government of China maintains a doctrine of absolute sovereign immunity¹⁹² and emphatically denies that the ICCPR is enforceable through Article 39 of the Basic Law.¹⁹³ "It seems pretty clear, that a suit against the PRC, or against its top officials, would be regarded as violating the basic principles of the laws of the PRC."¹⁹⁴ According to Chinese law, the PRC court could reject a matter issued by a foreign court because it was incompatible with the sovereignty or security of the People's Republic of China.¹⁹⁵ Furthermore, the Basic Law indicates that China will determine whether international agreements to which it is a party will apply to Hong Kong.¹⁹⁶

Overarching all of these concerns is the questionable competency of the HRC to address human rights violations. If China does not comply, the HRC does not have recourse. Even if China does file a report with the Committee, there is no guarantee that it will be accurate.¹⁹⁷ The petition mechanism,¹⁹⁸ whereby another State Party or individual may submit reports, may increase the accuracy of the reports.

Finally, and most importantly, the HRC can only provide reports and appropriate general comments to the Parties. The Committee has no police power.¹⁹⁹ The matter may be further referred, with prior con-

190. See Davis, *supra* note 5, at 315.

191. Vitrano, *supra* note 10, at 458. Great Britain is a party to the Joint Declaration which was registered with the U.N. Britain could submit a complaint to the U.N. concerning a violation by China. As an additional measure, the United States, even as a third State Party, could submit a complaint to the U.N. on the behalf of Hong Kong or defending its own, the United States', interests.

192. Platto & Horton, *supra* note 30, at 20.

193. Jordan *supra* note 31, at 367-68. China is inconsistent in its approach to human rights in Hong Kong. It insists that the BRO is unnecessary because the Basic Law provides all of the necessary safeguards for human rights so this "implies that Article 39 of the Basic Law and other rights provisions in the Basic Law are directly enforceable." *Id.*

194. Platto & Horton, *supra* note 30, at 20.

195. *Id.*

196. *Id.*

197. MATHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 31 (1995) (stating that "[r]eporting systems are dependent, to a large extent, upon the good faith of the States concerned.")

198. See *id.* at 32 (stating that a petition mechanism is "generally considered the most effective means for the protection of human rights.")

199. Timothy Jones, *Fundamental Rights in Australia and Britain*, in

sent by the Parties, to an appointed ad hoc Conciliation Commission. The Commission, also, does not have policing powers, instead, they endeavor to reach an "amicable solution".²⁰⁰

The ICCPR, like its counterpart the ICESCR, does not have any police mechanism but it does serve as a gatherer and conveyor of information. This will be an important function to notify the rest of the community that China is not upholding its promises.

B. International Covenant on Economic, Social and Cultural Rights

1. Description of the ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on January 3, 1976.²⁰¹ The ICESCR's obligations are primarily listed in Article 2 as well as other provisions of Part I and Part III.²⁰² Among the rights included in the ICESCR are the right to work,²⁰³ to "just and favourable" work conditions,²⁰⁴ to form trade unions and strike,²⁰⁵ to the greatest protection for the family unit,²⁰⁶ to education,²⁰⁷ and to participate in cultural life.²⁰⁸

While the ICCPR requires State Parties to "respect and ensure"²⁰⁹ rights, the ICESCR necessitates that States should "take steps, individually and through international assistance and cooperation. . . . to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights."²¹⁰ This principle in Article 2 is generally called the principle of progressive implementation.²¹¹ Most of the rights set forth in the ICESCR, as opposed to the ICCPR, are positive rights that require affirmative government action to ensure

UNDERSTANDING HUMAN RIGHTS 91, 104 (Conor Gearty & Adam Tomkins, eds., 1996) (stating that "[t]he Committee is not a judicial body; it is not a Supreme Court of Human Rights. Nor are the views expressed by the Committee legally binding. Nor are there any means of enforcement, apart from the Committee's moral authority and the potential pressure of public opinion.").

200. ICCPR, *supra* note 16, at art 7(a)

201. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 410 (1995).

202. *See Id.* at pt. I, pt. III, & art 2.

203. *Id.* at art 6

204. *Id.* at art 7

205. *Id.* at art 8.

206. *Id.* at art 10.

207. *Id.* at art 13.

208. *Id.* at art 15.

209. ICCPR, *supra* note 16, at art. 2(1).

210. ICESCR, *supra* note 17, at art. 2. *See* Geraldine Van Bueren, *International Human Rights Law*, in UNDERSTANDING HUMAN RIGHTS 596, 598 (Conor Gearty & Adam Tomkins, eds., 1996).

211. Van Bueren, *supra* note 210, at 598.

these rights.²¹² These government actions will require the use of scarce resources, and the availability of these resources directly determines the ability of the State Party to comply with the terms of the ICESCR.²¹³

The ICESCR has a mandatory reporting procedure for State Parties that ratified the Covenant.²¹⁴ Similar to the ICCPR State reports, these State reports are designed to indicate the measures instituted by the State Party to uphold the Covenant rights and the progress made towards achieving the standards. If a State has difficulty meeting the standards, it should indicate this in the report with the reasons for its noncompliance.²¹⁵ Within two years of ratification of the ICESCR, a State Party must submit an initial report. These reports are submitted to the U.N. Economic and Social Council (ECOSOC).²¹⁶ An additional report is required every five years thereafter.²¹⁷ When a State does not submit a report or is tardy in its submission, the ECOSOC includes this in its report to the Secretary-General.²¹⁸ If there is no State report and no one has been identified that should have compiled the report, an individual from the Committee is delegated to develop a report of the important and relevant issues.²¹⁹

No specific committee or review group was established to evaluate the ICESCR reports.²²⁰ According to Articles 16 through 22, enforcement of the Covenant is to be administered by ECOSOC.²²¹ In 1985, the ECOSOC established the Committee on Economic, Social and Cultural Rights (ESCC) to review the Covenant Reports.²²² The ESCC carries forth three primary objectives for the ICESCR: (1) development of standards for evaluation of the rights recognized in the Covenant; (2) catalyzing State Parties' ability to uphold the rights and to confront

212. Hannum & Fischer, *supra* note 140, at 163-64. Civil and political rights are negative rights because the state must only refrain from committing a violation of those rights. Van Bueren, *supra* note 210, at 599. "The Human Rights Committee has, however, pointed to the positive duties involved in protecting the right to life . . ." *Id.*

213. Hannum & Fischer, *supra* note 140, at 164-65.

214. STEINER & ALSTON, *supra* note 126, at 316 (reports must be consistent with the "reporting guidelines").

215. CRAVEN, *supra* note 197, at 38.

216. *See infra* note 214; CRAVEN, *supra* note 197, at 38 (indicating that the Commission on Human Rights may also review these reports).

217. STEINER & ALSTON, *supra* note 126, at 264.

218. CRAVEN, *supra* note 197, at 59.

219. *Id.* at 59-60 (indicating that in some situations this technique has proven successful)

220. The ICCPR established the Human Rights Commission to review the ICCPR reports. Hannum & Fischer, *supra* note 140, at 262.

221. *Id.*

222. STEINER & ALSTON, *supra* note 126, at 264 (indicating that "[i]ts principal activities are the adoption of 'general comments' and the examination of states parties' reports leading to the adoption by the Committee of 'concluding observations' thereon.").

those State Parties that do not comply; and (3) ensuring that State Parties comply with the standards.²²³

Since the 1990s, however, there has been a pile up of State reports to be reviewed, so specialized agencies of the U.N. have also become involved in the review process.²²⁴ These review bodies have the ability to make recommendations according to the State reports. Article 22 permits the ECOSOC to apprise other U.N. bodies of the status of a State's report in order to more effectively guarantee that the Covenant provisions are upheld.²²⁵

As a part of the reporting procedure, the Covenant has a mechanism for input from NGOs and specialized agencies.²²⁶ "State Parties and specialized agencies may comment to ECOSOC on any such recommendations."²²⁷ Article 18 provides that specialized agencies may provide updates on progress made by the States towards achieving the standards.²²⁸ The Covenant does not include any other provisions for outside contributions such as specialized agencies participating in the evaluation of the reports or other groups providing reports.²²⁹ However, the Committee has invited all parties concerned with the issues to submit information.²³⁰

Unlike the ICCPR, the ICESCR does not have an Optional Protocol allowing for individuals to communicate a violation by a State Party of the ICESCR.²³¹ Over the years since its adoption, there have been motions to provide for a similar method of individual petition. Thus far there has been no success.²³²

2. Application

Unlike the ICCPR, any violation by China of the ICESCR will not be immediately perceptible. The ICESCR mandates progressive programs that do not necessitate immediate results. Thus, the ICESCR will require compliance from China *over time*. China's obligation is to reach an end result. This will require that China implement programs that assure economic, societal and cultural rights will be preserved.

223. CRAVEN, *supra* note 197. See also STEINER & ALSTON, *supra* note 126, at 316.

224. See Hannum & Fischer, *supra* note 140, at 263.

225. See *id.* at 264.

226. CRAVEN, *supra* note 197, at 355.

227. See Hannum & Fischer, *supra* note 140, at 264.

228. CRAVEN, *supra* note 197, at 76.

229. *Id.*

230. *Id.* at 76-77 (indicating that the Committee's Rules of Procedure clearly include the specialized agencies as part of the evaluative process of State reports). The Committee also passed a resolution that allows for NGOs to submit written reports and make oral statements. *Id.* at 80.

231. *Id.*

232. *Id.*

Over time, if this does not occur, then there are grounds for complaint and action. Here are two examples of areas where China might be remiss in the future.

First, according to Article 2(2) of the ICESCR, there is a provision against discrimination based on national origin.²³³ China might aggravate this provision, if, while hiring people for Hong Kong government jobs, China discriminates against Hong Kong-born Chinese versus Chinese mainland born Chinese. China would not have as much leeway for non-compliance compared to other ICESCR provisions. The elimination of discrimination does not require as many resources as other ICESCR provisions do for compliance.²³⁴ In fact, compliance can be attained with barely any resources at all. A history of certain types of discrimination may actually justify or necessitate the implementation of affirmative action programs.²³⁵

A second compliance issue could be equality of opportunity for all, according to Article 7(c) and 1(2)(c) of the ICESCR.²³⁶ If the trend continues that democrats are stymied from obtaining public office positions due to the new election laws, this may be actionable inequality of opportunity. When the UN Committee evaluates China's compliance with the ICESCR, it will consider measures taken by the legislature to determine whether China is adequately using its resources to reach its ultimate goal. On the contrary, Hong Kong legislative action has, in fact, cut back the electorate with the effect of legislating against election of democrats. China is currently not directing its resources to reach an ultimate goal of equal opportunity.

In the years to come, the prediction of China's violations of the ICESCR may become reality. However, the applicability of the ICESCR to the Hong Kong situation may be bogged down by peripheral issues. The ICESCR will probably be second-in-line to the ICCPR as a UN enforcement mechanism alternative because the trend in international favors the importance of civil and political rights over economic, social and cultural rights.²³⁷ For this reason, often the rights in the ICESCR have been termed "non-justiciable" or "programmatic"²³⁸ and the greatest challenge facing the ICESCR is ensuring enforcement of its provisions.²³⁹

233. ICESCR, *supra* note 17, at art 2(2).

234. *See generally id* (discussing various rights protected by the ICESCR and the resource issues pursuant to compliance).

235. *Id.*

236. *See* ICESCR, *supra* note 17, at arts. 7 & 1(2).

237. Van Bueren, *supra* note 210, at 599; CRAVEN, *supra* note 197, at 9 (indicating that in reality these rights are "ignored").

238. CRAVEN, *supra* note 197, at 353.

239. STEINER & ALSTON, *supra* note 126, at 268-69 (indicating that one of the greatest difficulties to ensure compliance with the Universal Declaration of Human Rights). Ini-

Another difficulty relates to the ICESCR's insufficient reporting mechanisms. Although the reporting procedure is the best method for monitoring a particular human rights record,²⁴⁰ in general, the history of reporting by State Parties to the Covenant has been poor.²⁴¹ This begs the question, then why should China submit reports? State Parties that do not contest the applicability of the Covenant are negligent to comply with the reporting requirement. China, who is loath to accept the applicability of the Covenant, therefore, will have no compunction ignoring the reporting requirement.

Under the ICCPR, if the State Party did not provide reports, there were alternatives. However, the ICESCR does not offer solutions like the Optional Protocol or Article 41. The ICESCR does provide for participation by NGOs. However, NGOs may not be as effective advocating economic, social and cultural rights as they are for advocating civil and political rights.²⁴² First, the NGOs, in practice, are reluctant to advocate economic, social, and cultural rights alone.²⁴³ Second, even if a NGO may pursue upholding these rights, the actual enforcement of the terms of the ICESCR requires a state to have available resources.²⁴⁴ The availability of resources is not controllable by the NGO.

A third deficiency of the effectiveness of the ICESCR is the imprecise language of the Covenant. Although the Covenant indicates that "appropriate means" must be used to protect the rights in the ICESCR, the Covenant does not identify those means.²⁴⁵ The legislative and judicial methods recommended for enforcement of the ICCPR may not suffice for the ICESCR.²⁴⁶ Once again, the lack of development of enforcement mechanisms for economic, social and cultural rights, as compared to civil and political rights, can be attributed to the relative lack of concern in the international arena.²⁴⁷

tially one of the greatest challenges to the ICESCR was whether economic rights were really rights. This issue has been settled. *Id.*

240. CRAVEN, *supra* note 197, at 33.

241. *Id.* at 57 (indicating that 14 States have not produced one report in 10 years).

242. *But see id.* at 32. The means of petition are considered among the most effective ways to protect human rights.

243. STEINER & ALSTON, *supra* note 126, at 269-70. A tug of war exists over whether or not economic, social, and cultural rights are really rights. Thus, NGOs are often not apt to pursue something that might not be a right.

244. *Id.* at 271-72 (quoting Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW 33 (Theodore Meron, et. al, 1984).

245. STEINER & ALSTON, *supra* note 126, at 268-69.

246. *Id.* at 269.

247. *Id.* (indicating the reasons are "1) the ambivalence of most governments, but particularly those from the Third World; 2) the demonstrated reluctance of non-governmental organizations (NGOs) to focus specifically on economic and social rights; and 3) the lack of innovative legal and other approaches to implementation by those governments that clearly do support the concept.")

VI. CONCLUSION

The ICCPR and IECSCR are both applicable to the Hong Kong SAR. The Joint Declaration, an international agreement that has been registered with the U.N., is proof of this intent by both the United Kingdom and China.²⁴⁸ Furthermore, the Basic Law, written by China, characterizes this provision as a promise to the Hong Kong people.

The Joint Declaration establishes China's international legal duty to administer Hong Kong pursuant to the provisions of the Declaration.²⁴⁹ The primary purpose of an international treaty is that it serves as reliable proof that each party to the treaty is bound to its provisions and must fulfill them in good faith.²⁵⁰ If China does not uphold its promises in the Joint Declaration and the Basic Law to maintain the capitalist system in Hong Kong for the next fifty years and to pursue a plan for greater democracy, the international community could resort to the UN Covenants.

The primary obstacle, as we have seen is that these Covenants can do little more than serve as conduits for protest and dialogue. The Committees to the Covenants have very little judgment power and no police power. However, this is not as ineffective as it may seem. It is important that the international community is aware that China is not upholding its promises, that there are human rights violations. Reports that the Committees provide to the Secretary-General of the UN will provide notice that collective action needs to be taken. Collective action, countries working in concert, will be the ideal means through which Hong Kong's human rights will be secured.²⁵¹

248. See Neoh, *supra* note 10, at 327 n.78 (quoting The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, at art. 2(1)(a). Article 2(1)(a) defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

249. Skeen, *supra* note 9, at 178.

250. Vienna Convention, *supra* note 248, at art. 26. An international treaty takes precedence over internal law. "Primary responsibility for carrying out treaty obligations rests with States Parties." *Id.*

251. Maleiha Malik, *Communal Goods as Human Rights*, in UNDERSTANDING HUMAN RIGHTS, 138, 141 (Conor Gearty & Adam Tomkins, eds. 1996).

