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INTRODUCTION

Pollution and other environmental issues have traditionally been treated as domestic issues. However, the effects of environmentally-unsound behavior do not obey political boundaries; pollution freely crosses national borders. As one commentator aptly stated, "[t]he jurisdictional reality of nation-states has long clashed with planetary ecology 'not arranged in national compartments.'"[1]

Domestic policy-making procedures fail to solve international environmental problems for several reasons. First, political systems, such as our own, are designed to represent the interests of their constituents. Second, conventional political methods fail to consider the effects felt outside national boundaries. Furthermore, under the traditional model, the interests of those outside our borders are not encompassed by the circle of interests that shape policy, even though the neighboring populations experience the very real consequences and costs of actions taken within our borders.

The international nature of the acid rain problem complicates the process of developing an effective solution. The difficulty of controlling emissions that create acid rain stems from the fact that individuals living in the vicinity of Midwestern coal-powered electric generators do not experience the ill effects produced by those generators. The effects are transported by the air currents to Canada and states of the Northeast. The generators have no

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[1] Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 85 (1991).

incentive, nor are they forced to consider the transboundary effects of their behavior. The problem of acid rain and transboundary pollution places two regions of this country, as well as two nations, Canada and the United States, on opposing sides.

This Note discusses the problem of acid rain in the context of Canadian-American relations. First, the history of transboundary problems between the two countries and past diplomatic efforts to address transboundary problems will be examined.[2] Second, this Note will look at how the domestic policy of the United States Clean Air Act and the Canadian Clean Air Act attempt to consider transboundary effects of air emissions.[3] The probable effect of the Clean Air Act Amendments and the United States-Canadian Agreement on Air Quality signed in March 1991 will be discussed.[4] Finally, the availability of traditional legal redress for the harmful effects of transboundary air pollution will then be discussed as an alternative control.[5]

I. PAST DIPLOMATIC EFFORTS TO ADDRESS AMERICAN-CANADIAN TRANSBOUNDARY POLLUTION PROBLEMS

A. The Boundary Waters Treaty of 1909

Transboundary air pollution has long been an issue of diplomatic efforts between Canada and the United States. Unlike European countries which typically utilize an existing international organization to address transboundary problems, Canada and the United States have sought solutions to their common problem of acid rain through bilateral agreements and negotiation.[6]

Diplomatic efforts to deal with transboundary air pollution began with the Boundary Waters Treaty of 1909 negotiated between Great Britain[7] and the United States.[8] The treaty's use

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[2] *See infra* notes 6-36 and accompanying text.

[3] *See infra* notes 37-71 and accompanying text.

[4] *See infra* notes 72-79 and accompanying text.

[5] *See infra* notes 80-98 and accompanying text.

[6] JUTTA BRUNNEE, ACID RAIN AND OZONE LAYER DEPLETION: INTERNATIONAL LAW AND REGULATION 192 (1988).

[7] At that time Canada was under British control.

[8] JOHN E. CARROLL, ENVIRONMENTAL DIPLOMACY: AN EXAMINATION AND A PROSPECTIVE OF CANADIAN-U.S. TRANSBOUNDARY ENVIRONMENTAL RELATIONS 39 (1983) [hereinafter CARROLL, ENVIRONMENTAL DIPLOMACY]; BRUNNEE, *supra* note 6.

has been expanded beyond its original purpose of regulating shared boundary waters. Innovative use of the treaty to deal with other transboundary disputes rests upon the broad language contained in the preamble which provides:

> to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends . . . .[9]

Most significantly, the treaty created the International Joint Commission (IJC).[10] The functions of the IJC fall into two categories, judicial and investigatory. Any proposal or action affecting boundary waters or waters associated with boundary waters must first meet IJC approval. Upon request by either the United States or Canada, the IJC may investigate issues of common concern. Unlike its judicial powers, the IJC's investigations serve informative purposes only and are not binding upon either country.[11]

The IJC's early work and decisions were limited to specific matters relating to boundary water issues. However, as awareness of environmental problems grew, requests for the IJC to investigate and to recommend solutions to related transboundary problems have increased.[12] The IJC's role expanded to encompass issues of transboundary air pollution.[13]

Two bilateral agreements between Canada and the United States expanded the power and importance of the IJC. The Great

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[9] Treaty between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, *reprinted in* CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 315.

[10] BRUNNEE, *supra* note 6, at 193; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 44; Gallob, *supra* note 1, at 112-13. This bilateral institution has become the most important aspect of the treaty. The IJC is made up of six members, equally drawn from each country.

[11] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 46-47.

[12] Article IX authorizes the IJC to act upon such requests. CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 47-48; BRUNNEE, *supra* note 6, at 194; Gallob, *supra* note 1, at 113-14.

[13] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 48, 316. The IJC's work in this new area rests upon a phrase in Article IV of the 1909 treaty which states that, "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." *Id.* at 316.

Lakes Water Quality Agreement of 1972 and its amendments of 1978 authorized the IJC to identify sources of emissions having "significant adverse effects on environmental quality . . . through atmospheric deposition . . . ."[14] This development expanded the IJC's authority beyond sources of pollution found along the borders.[15]

While important in the resolution of specific air pollution disputes, neither Canada nor the United States has used the IJC to tackle the broad issue of acid rain. However, the IJC has been involved in two notable transboundary pollution disputes: the *Trail Smelter* case and the Detroit-Windsor and Port Huron-Sarnia problems. The IJC was referred the *Trail Smelter* case which involved damage caused to American farmers from a Canadian smelter. After recommending the payment of damages to the injured parties, the case was referred to another arbitration tribunal for final action. This referral eventually resulted in compensation for those injured and the famous decision regarding transboundary pollution and the doctrine of good neighborliness.[16] It is notable that the IJC, while involved in the case, did not provide final resolution of the dispute.

Both countries requested the IJC take action as to the air pollution problems surrounding the area of Detroit-Windsor and Port Huron-Sarnia. In its request for assistance from the IJC, both countries authorized the IJC to examine the larger issue of air pollution problems along the boundary. In response, the IJC created the International Air Pollution Advisory Board. As to the problems at Detroit-Windsor and Port Huron-Sarnia, the IJC identified Canadian and American industrial sources and recommended a joint institution to address the problem, which led to the establishment of the International Michigan-Ontario Air Pollution Board. Many critics argue, however, that nothing has been accomplished by the IJC or the Air Pollution Board regarding the problems at Detroit-Windsor and Port Huron-Sarnia.[17]

The IJC has been an innovative approach to dealing with common problems arising on the border. In effect, it has insti-

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[14] BRUNNEE, *supra* note 6, at 194-95.

[15] *Id.*

[16] Gallob, *supra* note 1, at 120; *see also* BRUNNEE, *supra* note 6, at 195; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 210-11.

[17] BRUNNEE, *supra* note 6, at 196; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 212-14.

tutionalized an acknowledgment of the importance of cooperation in addressing common environmental issues.[18] Though it has never addressed the acid rain issue directly, the IJC did focus attention upon the issue[19] and thus, has played a role in American-Canadian efforts to resolve the issue. However, several factors limit the IJC's ability to address the problem of acid rain with any true force. First, the 1909 Boundary Waters Treaty confines the IJC to emissions and problems arising along the border.[20] Second, the IJC has no independent authority to consider an issue. Either nation must present a dispute to the IJC before it may take any action. Likewise, IJC's recommendations hold no binding force on either nation.[21] Given these structural limitations, the IJC does not offer a viable solution to the acid rain dispute.[22]

B. The Memorandum of Intent

As awareness about the acid rain issue increased, Canada and the United States sought to reach a bilateral agreement addressing the problem in the late 1970's.[23] The perceived adverse effects from the proposed Canadian power plants in Atikokan and Poplar River drove the United States to the bargaining table, while the damaging effects of acid rain upon Canadian forests and lakes readily brought Canada to the discussion.[24] However, other international events and domestic pressures dampened the negotiations. The oil crisis forced President Carter to approve the conversion of oil fueled utilities to coal and consequently, the hope for reaching a solution to the problem of acid rain quickly vanished.[25]

Although the oil to coal conversion plan seriously undermined any attempt to reach a diplomatic solution to acid rain,

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[18] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 50.

[19] BRUNNEE, *supra* note 6, at 198; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 252 (citing the IJC as the forerunner in early recognition of the problem).

[20] BRUNNEE, *supra* note 6, at 208.

[21] Gallob, *supra* note 1, at 143.

[22] *See* Anthony Scott, *The Canadian-American Problem of Acid Rain*, 26 NAT. RESOURCES J. 337, 347-52 (1986) (discussing the strengths and weaknesses of the IJC).

[23] BRUNNEE, *supra* note 6, at 198.

[24] *Id.* at 199; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 260.

[25] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 260; JOHN E. CARROLL, ACID RAIN: AN ISSUE IN CANADIAN-AMERICAN RELATIONS 39-40 (1982) [hereinafter CARROLL, ACID RAIN].

the two countries were successful in obtaining a Memorandum of Intent (MOI) in an effort to keep alive the momentum for a bilateral agreement. Significantly, this document represented an official acknowledgment by both countries that acid rain was an "important and urgent bilateral problem . . . ."[26] Furthermore, it bound both nations to continued efforts to deal with the problem through new bilateral agreements and previous agreements like the 1909 Boundary Waters Treaty.[27]

The MOI embodies a commitment on behalf of each party to reach a binding bilateral agreement on acid rain and established four interim measures to be taken during the development of this agreement. First, the MOI set a deadline for the beginning of formal negotiations between Canada and the United States. Second, it bound each nation to develop new domestic controls on emissions contributing to transboundary air pollution as well as to enforce and implement existing controls and limitations. Third, the MOI reinforced the existing practice of notification of proposed actions expected to create transboundary air problems. Fourth, it set up a monitoring and evaluation program for scientific data, which included the creation of five technical working groups to provide the data and technical assistance necessary to the ongoing negotiations aimed at producing a bilateral agreement to reduce emissions.[28]

Generally, commentators attribute the ineffective implementation of the MOI's provisions and intent with the change of political administrations in the United States. Many commentators feel President Reagan did not fully support the MOI, because his administration failed to place importance upon the enforcement of emission standards as the MOI had provided.[29] Gradually, the negotiations between Canada and the United States under the framework of the MOI dissolved during the Reagan administration.[30] However, efforts to reach an agreement returned with the Bush administration. As promised during his

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[26] BRUNNEE, *supra* note 6, at 200 (relying on the Memorandum of Intent between the Government of Canada and the Government of the United States concerning Transboudary Air Pollution of August 5, 1980, *reprinted in* 20 I.L.M. 1371 (1981)).

[27] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 263-64; CARROLL, ACID RAIN, *supra* note 25, at 40-41.

[28] BRUNNEE, *supra* note 6, at 201-02.

[29] *Id.* at 203-204, nn.334-55.

[30] *Id.* at 205.

campaign, President Bush reached a diplomatic agreement with Canada dealing with acid rain.[31]

C. *Multilateral Efforts*

Both Canada and the United States are signees of the Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution (L.R.T.A.P. Convention). This document was the first multilateral agreement dealing with transboundary air pollution issues.[32] The L.R.T.A.P. Convention required the signees to exchange information and reduce emissions resulting in long-range transboundary air pollution as well as support research on the subject.[33] Three protocols were adopted in accordance with the L.R.T.A.P. Convention, providing for a thirty percent reduction in sulfur dioxide emissions and a freeze upon nitrogen oxide emissions. Canada has undertaken action to implement the provisions of these protocols within its borders. In fact, Canada passed legislation to reduce sulfur dioxide emissions by fifty percent. However, the United States has been less than eager to submit to such restrictions.[34] As with most multilateral agreements of this nature, the L.R.T.A.P. Convention contains no enforcement mechanism.[35] A nation may decide for many reasons to abide by an agreement; however, without the voluntary commitment upon the part of the nation, the terms of most of these agreements are unenforceable.[36]

II. NATIONAL LEGAL SYSTEMS AS AN ALTERNATIVE TO BILATERAL OR MULTILATERAL AGREEMENTS

Given the difficulty in reaching bilateral or multilateral agreements and the inherent problems with enforcing such agreements, use of existing legal institutions provides the most promising answer to the problem of acid rain. The development of controls and effective enforcement of environmental legislation in both countries have the potential to produce tangible results. Direct legal redress for damages resulting from polluting emissions from American sources also holds great promise.

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[31] *See infra* notes 78-79 and accompanying text.
[32] Gallob, *supra* note 1, at 123.
[33] *Id.* at 123.
[34] *Id.* at 125.
[35] *Id.* at 126.
[36] *Id.* at 89.

A. Statutory Approach

As a general rule, legislation developed in a domestic forum is shaped by domestic politics and interests. Rarely are the interests of individuals outside national boundaries contemplated when formulating policy. However, in the Clean Air Act, the legislators broadened the scope of interests considered to include Canadian interests.[37] There are several reasons why the Act's drafters considered the transboundary effects of air pollution. First, Canadian interests, both private and governmental, actively and aggressively lobbied Congress.[38] Second, Congress wanted to promote good relations with the Canadian government and people. Third, acid rain affects Northeastern states as well as Canadian land.

Section 115[39] of the Clean Air Act addresses the transboundary effects of air emissions from domestic sources. Under this

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[37] For a discussion of this statutory approach, see Gregory S. Wetstone & Armin Rosencrantz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 127-37 (1984); John L. Sullivan, *Beyond the Bargaining Table: Canada's Use of Section 115 of the United States Clean Air Act*, 16 CORNELL INT'L L.J. 193 (1983).

[38] CARROLL, ACID RAIN, *supra* note 25, at 43; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 266.

[39] 42 U.S.C. § 7415 (1983) (Section 115) states as follows:

> (a) Endangerment of public health or welfare in foreign countries from pollution emitted in United States
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> Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.
>
> (b) Prevention of elimination of endangerment
>
> The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section. Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.
>
> (c) Reciprocity
>
> This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

section, the Administrator of EPA shall take action upon receipt of information or data from "any duly constituted international agency" that creates a belief that emissions originating in the United States are contributing to the degradation of air quality or endangering the public health or welfare of a foreign country.[40] Upon reaching a belief that sources within the United States are causing adverse affects upon a foreign country, the Administrator must notify the source states that emissions from that state are having adverse effects beyond our national borders. Upon notification by the Administrator, each state identified as the source of transboundary air pollution must revise its state implementation plan. A state implementation plan (SIP) describes how that state intends to meet ambient air quality standards. Each SIP must receive EPA approval.[41] The Administrator has the authority to withhold approval or force the state to modify its SIP to consider the effect of its emissions upon Canadian soil.[42] Section 115 also invites the foreign country to appear at any public hearings pertaining to the revision of the SIP.[43] Without such a provision, states ignore the long range consequences of emissions originating within their borders that do not adversely affect the surrounding area.

Applicability of section 115 of the Clean Air Act depends upon corresponding legislation in the foreign country. Subsection (c) conditions action upon a finding by the Administrator that the United States has been given reciprocal rights "with respect to the prevention or control of air pollution occurring in [the foreign] country as is given that country by this section."[44] Despite the common perception that the United States is the perpetrator and Canada the victim in the acid rain crisis, Canadian sources account for a large percentage of acid rain emissions damaging the Northeastern states. Section 115(c) ensures American sources do not carry the entire burden of reducing acid rain and that Americans along the border receive protection from Canadian sources.[45]

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[40] 42 U.S.C. § 7415(a). This provision was a part of the 1977 amendments to the Clean Air Act.

[41] 42 U.S.C. § 7410.

[42] *See* Wetsone & Rosencranz, *supra* note 37, at 128.

[43] 42 U.S.C. § 7415(b).

[44] 42 U.S.C. § 7415(c).

[45] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 255-56.

The Canadian counterpart to section 115 of the Clean Air Act is section 21.1 of the Canadian Clean Air Act. Passage of what is known as Bill C-51 was intended to provide the reciprocal rights required under section 115 of the Clean Air Act.[46] The Canadian provision states as follows:

> Where the Minister has reason to believe that an air contaminant emitted into the ambient air by any source, or any sources of a particular class or classes, in Canada creates or contributes to the creation of air pollution that may reasonably be expected to constitute a significant danger to the health, safety or welfare of persons in a country other than Canada, the Minister shall, . . . recommend to the Governor in Council with respect to that source or each of those sources, as the case may be, such specific emission standards in relation to that air contaminant . . . as he may consider appropriate for the elimination or significant reduction of that danger.[47]

The passage of this provision in December of 1980 accomplished two things. First, it provided the reciprocity element required under the Clean Air Act. Second, it fulfilled the MOI's interim goal to develop and enforce statutory emission controls.[48]

B. Application of Statutory Provisions: Section 115, Section 21.1 and the Courts

Passage of section 21.1 by the Canadian legislature completed the statutory framework for dealing with transboundary effects of emissions through domestic legislation. This section was passed to meet the reciprocal rights requirement of section 115(c) of the Clean Air Act. In the last days of the Carter administration, EPA Administrator Costle performed the last required act to fully activate section 115's provisions by stating in a letter to Secretary of State Edmond Muskie and Senator George Mitchell of Maine that the statutory requirements of section 115 had been meet. As Costle left office in early 1981, he left instructions that SIP modification of the source states should be pursued by the new administration. However, officials

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[46] CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 267; BRUNNEE, *supra* note 6, at 131.

[47] Gallob, *supra* note 1, at 127.

[48] CARROLL, ACID RAIN, *supra* note 25, at 43-44.

under the Reagan administration never undertook such action.[49]

This inaction led to a line of cases dealing with section 115. The cases of *Thomas v. New York*[50] and *Her Majesty the Queen in Right of the Province of Ontario v. U.S. EPA*[51] interpret the Clean Air Act's approach to transboundary pollution. The first case, *Thomas I*, (and later *Thomas II*) was an action brought under section 115 to compel the Administrator to take the necessary steps to require Midwestern States to revise their SIPs to consider the transboundary effect of emissions.[52] The plaintiffs included states suffering from the effects of acid rain, citizen groups and individuals including Canadian citizens.[53]

In *Thomas I*, the plaintiffs succeeded in their efforts. The district court held the requirements of section 115 had been fulfilled and thus the Administrator must act by notifying the source states and requiring a SIP revision. The district court analyzed section 115 as having three elements. The first statutory element was the receipt, by the Administrator, of a report or study from a duly constituted international agency. The court held Costle had indeed received such a report from the IJC describing the effects of acid rain.[54] The second statutory element was the "reason to believe" requirement. The conclusions Costle drew from the IJC's report sufficiently satisfied the statute's language that there must be "reason to believe" that emissions from sources within the United States "endanger public health or welfare in a foreign country . . . ."[55] The final statutory element the court analyzed was the reciprocity requirement. Costle concluded Canadian legislation gave the United States comparable rights to the ones granted by section 115. However, Costle qualified this conclusion by stating that this determination may change should "future Canadian actions interpreting or

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[49] Gallob, *supra* note 1, at 129; BRUNNEE, *supra* note 6, at 130-31; CARROLL, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 267.

[50] 613 F. Supp. 1472 (D.C. 1985), *rev'd*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) [hereinafter *Thomas I*].

[51] 912 F.2d 1525 (D.C. Cir. 1990) [hereinafter *Ontario v. EPA*].

[52] *See generally* Beverly A. Ohline, *Clean Air Act - Transboundary Acid Rain Pollution Abatement - Administrative Discretion Citizen Suit*, 27 NAT. RESOURCES J. 707 (1987).

[53] *Thomas I*, 613 F. Supp. at 1479.

[54] *Id.* at 1482. Costle relied upon the Seventh Annual Report on Great Lakes Water Quality issued by the IJC in October of 1980.

[55] *Id.* at 1482, 1488 (Muskie letter), 1489 (Mitchell letter).

implementing their legislation [not give] essentially the same rights to the U.S."[56]

The district court interpreted section 115 as directing the Administrator to perform certain actions upon fulfillment of the statutory prerequisites. Once the Administrator has made the necessary findings, notification must be given to those states producing the emissions having transboundary effects.[57] However, Costle's letters to Muskie and Mitchell did not identify the source states. The district court also noted that the "identity [of] the polluting states is incidental to giving formal notification and not a prerequisite to the conclusion that Costle made the requisite findings under section 115."[58]

The Court of Appeals reversed this decision in *Thomas II.* The court found that a statement binding future EPA Administrators to perform particular actions was a statement of "future effect designed to implement . . . law or policy," as covered under the Administrative Procedure Act.[59] The court concluded that if Costle's comments bound new EPA officials to issue notices of SIP revisions to emitting states, the comments were in essence a rule, and thus, must be implemented through the notice and comment procedures of the APA.[60] The Court of Appeals also ruled that source states must first be identified before the Administrator is compelled under section 115 to require SIP revisions.[61]

Following the rulings in *Thomas II,* a Canadian province, several states, and environmental groups asked EPA "for a rulemaking that would essentially set in motion section 115's international pollution abatement procedures."[62] They made this request for action with supporting evidence and data of findings of endangerment and reciprocal Canadian legislation, and met with EPA officials. Litigation ensued when EPA refused to act upon the rulemaking request citing lack of information to take

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[56] *Id.* at 1483.

[57] *Id.* at 1485.

[58] *Id.* at 1484 n.*.

[59] *Thomas II,* 802 F.2d 1443, 1446.

[60] *Id.* at 1446-47.

[61] *Id.* at 1446. (The court's decision was written by Justice Scalia sitting as Circuit Judge).

[62] *Ontario v. EPA,* 912 F.2d 1525, 1529; *see generally* Dayna Ellen Peck, *Environmental Law - Clean Air Act Section 115 Requires EPA Knowledge of Emissions Sources in United States Responsible for Transboundary Acid Rain,* 15 SUFFOLK TRANSNAT'L L.J. 357 (1991-92).

action under section 115.[63] In *Ontario v. EPA*, the plaintiffs argued the EPA's refusal to take action under section 115 was arbitrary and capricious and that EPA must publish endangerment and reciprocity findings, thus initiating the section 115 process.[64]

The district court held the EPA official's decision not to pursue notice and comment under section 115 as to the endangerment and reciprocity findings was a final action by the agency interpreting section 115.[65] The EPA's response to plaintiffs' request for rulemaking stated:

> [S]ection 115 is a unitary proceeding which can not be segmented, since the prescribed finding and notification are inextricably interrelated. Making the findings in the manner in which you request would trigger a vast regulatory mechanism which we currently do not believe we can undertake in an informed manner. . . . [O]ur present understanding of the acid rain problem is not sufficient to make a judgment regarding the state by state, or even the aggregate reductions necessary to eliminate observed effects.[66]

Under the two-part test of *Chevron U.S.A. Inc. v. NRDC Inc.*,[67] the court found the agency's interpretation of section 115 as a unitary proceeding "permissible, as it is both entirely reasonable and consistent with the statutory plan."[68]

The ruling of *Ontario v. EPA* limits section 115's ultimate usefulness. The protective measures of section 115 remain inactive until the Administrator makes findings as to endangerment and reciprocity as well as identification of source states. As illustrated by this case, the Administrator will not be forced by the court to make such findings.[69] The court deferred to EPA's conclusion that it was unable to address the transboundary acid rain issue due to lack of information. The court justified such deference by reference to the Acid Precipitation Act of 1980, which provided for a ten-year study of acid rain to identify the

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[63] Ontario v. E.P.A., 912 F.2d at 1530.

[64] *Id.*

[65] *Id.* at 1531.

[66] *Id.* (quoting from the court's quotation of a letter written by Mr. Don R. Clay, acting Assistant Administrator for Air and Radiation).

[67] 467 U.S. 837 (1984).

[68] *Ontario v. EPA*, 912 F.2d at 1533.

[69] *Id.* at 1534. (finding that the Administrator's refusal to make the required findings under was not arbitrary or capricious).

sources of acid rain. The court felt comfortable that the future results of this study would provide the data necessary to address the acid rain issue and section 115.[70]

While section 115 of the Clean Air Act and section 21.2 of the Canadian Clean Air Act appear to be a solution to the transboundary effects of acid rain and other air pollution, in practice the statutory approach has failed to operate as planned.[71] The case law surrounding section 115 casts doubt upon the use of this section as a meaningful limitation of emissions contributing to acid rain. Future use of this section is dependent upon the EPA Administrator making the necessary findings. Unfortunately, the court has proved to be reluctant to compel the Administrator to make the necessary findings and instead defers to agency discretion in such matters.

C. The Clean Air Act Amendments

Section 115 is not the only provision controlling the emissions that produce acid rain. The recent Clean Air Act Amendments of 1990[72] dramatically cut sulfur dioxide and nitrogen oxide emissions that lead to the formation of acid rain. The amendments call for a reduction in total emissions allowed from utilities, and the amendments require utilities to cut sulfur dioxide emissions to 8.9 million tons by the year 2000 and reduce nitrogen oxide emissions by 2 million tons.[73] The amendments also require reduction in nitrogen oxide emissions from cars, allowing only 0.4 grams per mile (a 0.6 reduction in the standard).[74]

Even though the amendments result in closer control of the emissions creating acid rain, these statutory controls fail to completely answer the problem of acid rain for several reasons. Many commentators believe the Clean Air Act "cannot ensure adequate protection against acid deposition . . . ."[75] Also, emission levels under the Clean Air Act were not developed solely

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[70] *Id.* at 1535.

[71] While acknowledging that §§ 115 and 21.1 have failed to yield tangible efforts to reduce acid rain emissions, some commentators have suggested a new role for the IJC under the framework of these statutory provisions. Wetsone & Rosencranz, *supra* note 37, at 135, 138.

[72] Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

[73] Gallob, *supra* note 1, at 134-35 (citing Clean Air Act Amendments § 401, 104 Stat. at 2585-2589).

[74] *Id.*

[75] *Id.* at 134.

for the purpose of eliminating acid rain. The Clean Air Act is primarily a tool for controlling and improving local air quality. Furthermore, it was not "designed to respond to long range pollution emissions."[76] However, a reduction in the emissions that create acid rain brings us closer to a solution.

D. United States-Canada Agreement on Air Quality

During the Reagan administration, very little progress was made toward reaching an agreement with Canada concerning acid rain.[77] In fact, negotiations with Canada and efforts to reduce emissions producing acid rain ground to a stand still. This impasse was broken by the Bush administration. Under Bush's term, the Clean Air Act was amended to include more stringent limitations and an acid rain agreement was signed with Canada in early 1991.[78] The agreement binds the United States to meet the emission limitations of the Clean Air Act amendments and requires Canada to adopt more stringent controls on acid rain emissions and set a cap on sulfur dioxide emissions by the year 2000. The agreement also incorporates the IJC in its effort to control acid rain. All formal complaints and disputes arising from the agreement and acid rain in general shall be referred to the IJC for resolution. The agreement is a major step in controlling emissions from both countries that are damaging to their neighbors across the border.[79]

E. Legal Redress through the Court System

As an alternative to action under section 115 of the Clean Air Act, Canadians suffering injury from emissions originating in the United States may seek redress directly through the American court system.[80] Our legal system provides three methods by

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[76] *Id.* at 134-35.

[77] Sullivan, *supra* note 37, at 202-06.

[78] Michael Kranish, *US and Canada Sign Acid Rain Pact Benefiting New England*, BOSTON GLOBE, Mar. 14, 1991.

[79] *Bush Keeps His Word to Canada*, CHI. TRIB., Mar. 16, 1991 (Editorial).

[80] The American and Canadian Bar Associations produced the 1979 Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution [hereinafter Draft Treaty] to expand the usefulness of the court system to these disputes. Despite support from these organizations, neither the United States nor Canada adopted the Draft Treaty. The Draft Treaty's provisions are designed to facilitate the use of the courts as a control for transboundary pollution problems, by securing the injured party

which a Canadian may bring suit for acid rain damage. Diversity jurisdiction of the federal courts provides foreigners access to the federal court system. An injured foreigner may also bring suit directly under the provisions of a particular state statute protecting that injured party's interests. Another narrow possibility is to seek Supreme Court original jurisdiction by naming a state as a party.[81]

The only transboundary pollution case brought under federal diversity jurisdiction is *Michie v. Great Lakes Steel Division, National Steel Corp.*[82] This class action suit was brought by several Canadian residents against American power plants. The plaintiffs claimed that emissions from the plants were "noxious in character" and thus constituted a nuisance for which they were entitled to damages.[83] The central issue of the court's decision was the issue of joint and several liability. The court concluded the defendants could be held jointly and severally liable to the plaintiffs even though the mixing of the emissions with the air made it impossible to separate specific cause and effect.[84] The court never ruled on the actual merits of the case due to an out-of-court settlement.[85]

The *Michie* decision is notable for several reasons. The emissions at issue in this case were local in nature and did not involve long-range transport of air pollutants. Nonetheless, this case is important precedent for the recovery of damages due to transboundary pollution. When compared to the *Trail Smelter Arbitration*, it is apparent that *Michie's* relief may be preferable, considering the elements of timeliness and efficiency of relief.[86]

Canadian plaintiffs have also been successful in bringing suit in state courts under state environmental statutes. The court held in *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*[87] that a foreign plaintiff must show injury in

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equal access to legal remedies despite the international character of the injury. The Draft Treaty provides the injured party "shall at least receive equivalent treatment to that afforded in the Country of origin, in cases of domestic pollution or the risk thereof and in comparable circumstances, to persons of equivalent condition or status resident in the Country of Origin." Gallob, *supra* note 1, at 92-107.

[81] *Id.* at 135-36.

[82] 495 F.2d 213 (6th Cir. 1974), *cert. denied,* 419 U.S. 997 (1974).

[83] *Id.* at 215.

[84] *Id.* at 215-16.

[85] Gallob, *supra* note 1, at 136-37.

[86] *Id.* at 137.

[87] 874 F.2d 332 (6th Cir. 1989), *rev'g* Detroit Audubon Soc'y v. City of Detroit, 696 F. Supp. 249 (E.D. Mich. 1988).

fact that lies "within the 'zone of interests' protected by the statute."[88] While this avenue is useful in compensating those suffering the effects of transboundary air pollution, its availability is dependent upon the existence of and content of a state environmental statute. As the court's opinion illustrates, recovery is dependent upon a finding that the statute protects the plaintiff's interest.[89]

The Supreme Court's original jurisdiction offers a narrow opportunity for a transboundary pollution action to come before the Court if the suit involves a state as a party.[90] In *Ohio v. Wyandotte Chemicals Corp.*,[91] the state of Ohio sought to address the polluting of Lake Erie by several chemical companies across the border in Canada.[92] While acknowledging that upon its face its original jurisdiction applied to the facts before it, the Supreme Court refused to allow its original jurisdiction to be used in that instance.[93] Articulating a need for selective exercise of this jurisdiction,[94] the Court found Ohio's case did not implicate the policies underlying its original jurisdiction.[95] The Court was also reluctant to become involved in such a complex case due to the nature of the dispute and the "number of official bodies . . . already actively involved in regulating the conduct complained of here."[96] It was on this point that Justice Douglas dissented. He felt Ohio's complaint presented "a classic type of case congenial to [the Court's] original jurisdiction."[97] He also found the involvement of the IJC under the 1909 Boundary Waters Treaty did not preclude the Court's involvement.[98]

III. CONCLUSION

As with other transboundary issues, there are no easy answers to the problem of acid rain. The approaches taken by the United States and Canada have been varied, and not all have

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[88] 696 F. Supp. at 253; 874 F.2d at 335.
[89] 874 F.2d at 336-38.
[90] Gallob, *supra* note 1, at 136, 139-40.
[91] 401 U.S. 493 (1971).
[92] *Id.* at 494.
[93] *Id.* at 496.
[94] *Id.* at 497.
[95] *Id.* at 499-500.
[96] *Wyandotte,* 401 U.S. at 502.
[97] *Id.* at 505 (Douglas, J., dissenting).
[98] *Id.* at 506-07 (Douglas, J., dissenting).

been successful. However, the long history of open discussions and negotiations between the United States and Canada on this subject increases the likelihood a solution may be reached. The Boundary Waters Treaty of 1909 and the Memorandum of Intent laid a foundation for future progress. The IJC represents an institutional commitment on the part of both countries to resolve its environmental disputes. These past efforts laid the foundation for reaching the United States-Canadian Agreement on Air Quality and will ultimately aid in its implementation. However, the amiable relations between Canada and the United States do not eliminate the inherent difficulties in reaching an effective and binding diplomatic solution. Despite the desire of both countries to reach a solution, each will continue to safeguard its sovereign integrity.

Efforts to deal with this international problem have not been limited to the traditional diplomatic efforts and agreements. Given the difficulty in reaching and limitations inherent in bilateral agreements, other methods of control are needed to supplement diplomatic efforts. The national legal systems of Canada and the United States provide a number of controls. Statutory approaches such as section 115 and section 21.2 could potentially control transboundary air pollution problems. However, without the support and commitment of administrators on either side of the border to fully implement such provisions they will lie unused and without meaning. Increased legal action by parties concerned with acid rain may provide a means to continue to pressure lawmakers and those responsible for implementing laws to deal with this politically difficult issue, as well as offer a relatively speedy method of compensation for acid rain damage. In summary, the solution to the acid rain problem will ultimately encompass many methods and means of cutting emissions. A truly interdisciplinary approach will yield the most effective results as no single solution will deal effectively with the entire problem and its complexities.

External Harms: Toyota, the Japanese "Maquiladora," and the Need for Countries to Regulate Their Nationals Abroad

LORI S. VANHOOSE*

I. INTRODUCTION: THE PROBLEM AT HAND

The words Shakespeare attributed to Macbeth could easily reflect the current enforcement of international law as it relates to human rights and the environment: "it is a tale, [t]old by an idiot, full of sound and fury, [s]ignifying nothing."[1] The struggle to make this tumultuous field of international law meaningful begins with an understanding of the regulatory field as it now exists and ideally draws upon current mistakes to formulate a policy for the future.

This proposal examines the expanding role of the Japanese in the international automotive industry, from their struggle to succeed within Japan to their current status as a formidable force in the international market.[2] The role of trade tensions and the development of Japanese environmental law in the decision to expand production into the United States will also be assessed.[3] Finally, the Japanese auto corporation will be compared to the U.S. "maquiladoras," American businesses which seek refuge in South America to dodge environmental regulations and thereby gain more favorable operating conditions.[4] This

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[1] WILLIAM SHAKESPEARE, MACBETH, Act 5, sc. 5.

[2] C.S. CHANG, THE JAPANESE AUTO INDUSTRY AND THE AMERICAN MARKET 10-17 (1981); PHYLLIS A. GENTHER, A HISTORY OF JAPAN'S GOVERNMENT-BUSINESS RELATIONSHIP: THE PASSENGER CAR INDUSTRY 24-31 (1990).

[3] *Id.*

[4] Daniel I. Basurto Gonzalez & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operation: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L. J. 659 (1991).

comparison is intended to illustrate the problems which may arise when companies are permitted to operate outside their borders with little or no regulation from their nation of origin. This study will specifically focus on the expansion of Toyota as it relates to the establishment of a manufacturing plant in Scott County, Kentucky.[5] In this analysis, the costs to taxpayers and the environment will be assessed in light of the actual benefit received by Kentucky's citizens.[6]

Finally, this examination leads to a proposal for the development of an international code of environmental conduct.[7] Based upon the premise that every human being possesses among his or her inherent rights the right to be free from exploitation and environmental degradation, the United Nations should enforce the right of all nations to be free from choices between financial gain and the quality of life.[8] As an operating framework, the International Declaration on Human Rights establishes the common denominators which make disparate corporate regulations an affront to good business practice and environmental integrity.

II. JAPANESE INDUSTRY AND ENVIRONMENTAL LAW

A. Understanding the Relationship Between Industry and the Government in Japan

The Japanese operate under a system of political and economic cooperation which is quite unfamiliar to the average American. This cooperative atmosphere is rooted in the historical development of the Japanese economy. From the outset of automotive production, the Japanese struggled to develop and maintain a viable motor vehicle industry. Unfortunately, early manufacturing attempts by businessmen, inventors, and other would-be producers all failed due to financial difficulties.[9] Successful production was further hindered by foreign competition

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[5] *See* Dep't of Highways v. Taub, 766 S.W.2d 49 (1988); Hayes v. State Property and Bldgs Comm'n., 731 S.W.2d 797 (1987).

[6] DAVID GELSANLITER, JUMPSTART: JAPAN COMES TO THE HEARTLAND 81-90 (1990).

[7] RAYMOND J. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT (1980).

[8] *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. (1948) [hereinafter *U.N. Declaration*].

[9] CHANG, *supra* note 2, at 10-11.

when, following the Kanto earthquake in 1923, Ford began sending trucks to Japan.[10] As the need for vehicles continued without a domestic industry to meet demands, General Motors and Ford subsequently began production in Japan between 1924 and 1925.[11] As a result, these two companies controlled approximately 90% of the Japanese auto market until 1934. Their production finally tapered off due to a nationalistic policy that led to a "Produce and Buy Japanese Movement."[12] In June 1926, this protectionist philosophy led to the creation of the Committee for the Promotion of Domestic Products within the Ministry of Commerce and Industry, a group formed with the primary objective of increasing native manufacturing. Its activities were carried out in an effort to combat the markedly unbalanced ratio of domestic to foreign goods.[13] Frustrated with the slow development of domestic technology, in 1935 Japanese automakers tentatively proposed joint ventures with American corporations to gain technology and financial backing.[14] Because the Japanese sought to implement the automotive industry concurrent with the national defense, this union was entirely contrary to Japan's long-term goals.[15] At this juncture, the Japanese announced an Outline of Automobile Manufacturing Law which would ultimately prove successful. The purpose of this law was to exclude the United States from the Japanese automotive industry in order to develop a strong domestic market.[16]

Japan continued to encourage this industry, but the fledgling automakers experienced numerous challenges. During the reconstruction period following World War II, Toyota was the only manufacturer in the war-torn nation initially able to produce automobiles.[17] Since the United States was busy meeting its own domestic transportation needs, the Japanese managed to reconstruct their pre-war protectionist system and began producing domestic vehicles once again.[18] This action was facilitated by an agreement signed by the U.S. which excluded the automotive

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[10] *Id.* at 14.
[11] *Id.* at 15.
[12] *Id.* at 16-17.
[13] GENTHER, *supra* note 2, at 24.
[14] *Id.* at 18.
[15] *Id.* at 31.
[16] *Id.* at 30-31.
[17] *Id.* at 43.
[18] GENTHER, *supra* note 2, at 45-47.

industry from paying reparations.[19] It was during this postwar lull in the Japanese economy that the Supreme Commander for Allied Powers ironically predicted the rise of Japan's international automotive industry, although he did not forecast the ultimate competitive position it would eventually achieve.[20]

During the Allied occupation, the Japanese developed a protectionist theory which has allowed government and industry in Japan to work together effectively. Japanese culture focuses on achieving harmony, and this goal was perpetuated by a cooperative governmental-industrial effort.[21] The Japanese government carefully nurtured the automobile manufacturing industry, protecting it from foreign investment and competition. In the 1870's, this nurturing first found expression in the Japanese term of "shokusan kogyo" which means "develop industry and promote enterprise."[22] They put this philosophy to work when they renewed automotive production and succeeded in creating an industry that has proven strong within Japan's own borders as well as around the world. Once the industry began to compete successfully on a global scale, however, this cooperative relationship began to grow adversarial.[23]

As the Japanese auto industry became a competitive force in the United States, trade imbalances caused the U.S. government to react with increasing hostility toward imported goods. Concurrently, the intricate protectionist system which had incubated developing Japanese auto manufacturing concerns effectively limited incoming flows of U.S. autos to a trickle, exacerbating a trade imbalance already fraught with tension.[24] The balance of power had shifted, and the U.S. was on the receiving end of Japan's market surplus.

B. Environmental Concerns

Around the same time that trade tensions increased, the Japanese began to react with alarm to environmental degradation.[25] During the early 1960's, the Japanese government became

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[19] *Id.* at 47.
[20] *Id.* at 51-52.
[21] JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 18 (1980).
[22] GENTHER, *supra* note 2, at 15.
[23] GRESSER ET AL., *supra* note 21, at 228.
[24] *Id.* at 18.
[25] *Id.* at 18.

increasingly aware of the need for comprehensive environmental legislation. Problems had arisen due to federal preemption of local laws, resulting in an absence of any concrete authority to monitor environmental degradation.[26] A symptomatic illustration of this conflict occurred in the Mishima-Mumazu region, which had been targeted by the government as a "special development zone."[27] The residents of the area were outraged because their environment appeared to be on the auction block awaiting the highest bidder. These citizens mobilized effectively, expressing their objection to the government's industrial plan.[28] As a result of this internal pressure, the Japanese elected to develop a regulatory scheme in order to allay citizens' fears by guaranteeing a minimum environmental standard.[29]

The pressure exerted by citizen groups demanding action to stop environmental exploitation led to the appointment of a panel of experts known as the Environmental Pollution Commission.[30] Significantly, this body was organized as a branch of the Ministry of Health and Welfare, reflecting the initial emphasis in Japanese law on the protection of the environment only for the sake of human health.[31] This group prepared an investigatory report to analyze the environmental issues which Japan faced. Despite differing views, the group consensus was that parties that inflicted environmental damage must be held accountable for their actions. They insisted that sweeping legislative reforms were necessary to prioritize health concerns above industrialization.[32] Additionally, the group proposed that polluters be held responsible for liability costs when injuries occurred and that pollution charges be assessed to fund public works.[33]

Following this comprehensive assessment, in 1967 the Japanese developed a Basic Law for Environmental Pollution Control.[34] This legislation reflected the "social values and attitudes" of Japanese citizens. The document proposed control of air, water, noise and other pollution, and the ideas presented spurred

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[26] *Id.* at 19.
[27] *Id.*
[28] GRESSER ET AL., *supra* note 21, at 19.
[29] *Id.*
[30] *Id.* at 20.
[31] *Id.*
[32] *Id.*
[33] GRESSER ET AL., *supra* note 21, at 21.
[34] *Id.* at 24.

specific legislation. The Basic Law acknowledged the shortcomings of existing regulations and specifically outlined remedies in response to these flaws.[35] One unfortunate weakness of the proposal and the ensuing legislation was the specificity of remedies, which focused upon the minimization of human suffering while nearly ignoring the integrity of the natural environment.[36] However, a framework was constructed upon which additional legislation could be built in response to evolving knowledge and concerns.

Remedies in Japanese environmental law became compensation-oriented in the wake of four pollution cases in the early 1970's.[37] Thus, Japanese legal doctrine in the environmental arena has focused on comprehensive pollution control and tort compensation for health damages almost from its inception.[38] Legislation followed judicial precedent by granting relief to the injured parties in the form of monetary reparations.

Although environmental law originally focused on personal rights and health, it has expanded to allow access to less well-defined legal rights through civil litigation.[39] Interests have come to be protected because individuals have exhibited their fundamental needs to the judicial system, resulting in preservation of their environment. To illustrate, the Japanese recognize a need for sunlight as one of these fundamental requirements.[40] This standard, which some Americans would regard as highly unusual, is more easily understood after considering the crowded atmosphere and overtaxed environment of the Japanese island. Gradually, the Japanese interest grew beyond just a need for sunlight.[41] They began to view the use and enjoyment of their environment as a collective right, unattached to the ownership of real estate and earned by virtue of their existence as human beings.[42] Subsequently, this expression of fundamental guaran-

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[35] *Id.*

[36] *Id.* at 26.

[37] Leigh West, *Mediated Settlement of Environmental Disputes: Grassy Narrows and White Dog Revisited*, 18 ENVTL. L. 131 (1987).

[38] *Id.*

[39] GRESSER ET AL., *supra* note 21, at 136-38.

[40] *Id.* at 139-41.

[41] *Id.*

[42] The Japanese Federation of Bar Associations put forth this idea at the 1972 Niigata Symposium on Environmental Protection.

tees was incorporated into a legislative proposal for a basic protected environmental right belonging to all people and to be advanced by the state.[43]

As this historical study illustrates, the protection of personal environmental rights within the Japanese state appears to have been an overwhelming success. One fact amazing to outsiders is the enforcement of Japanese environmental legislation, which has had minimal impact on their gross national product and employment levels.[44] This was first recognized after the pronouncement at the Tokyo meeting of the Organization of Economic Cooperation and Development in 1976, when the Japanese announced their achievement of slowing environmental harm.[45] At this conference, the Japanese were enjoying a dramatic turnaround from the 1972 Stockholm Conference, when the Japanese presented the dismal picture of Japan as a festering wasteland of environmental degradation.[46] Japan's highly structured system of government contributed in large part to its successful battle to protect the environment.[47] The Japanese bureaucracy historically served as guardian of "imperial institutions and moral order."[48] This guardianship is facilitated by the fact that the administrative system is a closed body which recruits from the bottom.[49] The system is also closed in the respect that it drafts and operates as the principal interpreter of laws. All acts are based upon statute, however, and there is no discretionary interpretation.[50] This system is successful because of the government's traditional relationship with industry through well-defined administrative channels. A framework for cooperation has long been in place, and such a framework is arguably necessary for a system of environmental control to be effective.[51]

The system is likewise beneficial because the regulations may be tapered to individual situations. This cooperative effort makes the government more receptive to industrial input.[52] There are

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[43] *Id.* at 148-49.
[44] *Id.* at 229.
[45] *Id.*
[46] *Id.*
[47] GRESSER ET AL., *supra* note 21, at 229.
[48] *Id.* at 232.
[49] *Id.* at 233.
[50] *Id.*
[51] *Id.*
[52] GRESSER ET AL., *supra* note 21, at 234.

perils, however, in such an internalized focus: the system lacks review, decisions may be quite arbitrary, and political influences rule in numerous instances. Likewise, decisions may conflict with broader societal objectives and be incompatible with international commerce and foreign relations, in general.[53]

The Japanese system of environmental regulation is highly specialized, with categories, functions, relevant laws, and jurisdictions specified for each segment of the department.[54] Outsiders have difficulty identifying with the critical role that peer sanction plays in the Japanese culture. The cooperative union between government and industry makes it relatively easy for the government to time public reprimands to coincide with citizen outrage. In this manner, the party at fault is publicly dishonored, losing face with his or her countrymen.[55] The car manufacturers found themselves subjected to these higher standards in personal ways. Such sanctions were used to punish Toyota when it rebelled against the maintenance of higher emissions standards to satisfy the stringent regulations set forth in the original Clean Air Act. Although the U.S. waived these required standards until a later date, the Japanese continued to view compliance as feasible.[56]

Although both the United States and Japan share a common origin of comprehensive tort legislation in environmental law which centers on victims' rights,[57] when the United States enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), it unfortunately lost much of the focus of its early provisions for toxic tort recovery and third party compensation in legislative revision.[58] The Japanese, however, enacted the Pollution-Related Health Injury Compensation Law and the Pollution Dispute Resolution Law, both of which make for a positive and innovative system that encourages recovery without litigation.[59] Japan's system of dealing with environmental disagreements is an excellent example of mandatory mediated dispute settlement.[60]

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[53] *Id.* at 237-40.
[54] *Id.* at 252-53.
[55] *Id.* at 273.
[56] *Id.* at 272.
[57] GRESSER AT AL., *supra* note 21, at 272.
[58] *Id.*
[59] *Id.*
[60] *Id.*

C. *The Benefits of Operating in the United States*

Toyota believed that tax incentives for the development of pollution control technology allowed smaller companies to drive a wedge into the market and increase their market share.[61] The company felt threatened by such competition, since only recently it had enjoyed the protection of the Japanese government. This competition for market share most likely impacted Toyota's decision to expand toward the West.

With the increasingly protectionist stance of the United States and stricter Japanese environmental legislation, the Japanese began to target the U.S. market, first with sales franchising and finally with established production sites.[62] By the time the Japanese "invaded" the mainland to establish manufacturing plants, Japan had an extremely powerful lobby in Washington and several job-hungry states fighting for the right to grant every wish to accommodate a Japanese manufacturing concern.[63]

One example of Japan's influence lies in its lobbying clout, which allowed the auto manufacturers to reclassify light trucks for importation into the U.S.[64] The U.S. charges 2.5% for passenger car tariff duties, but light trucks have a surcharge of 25%.[65] While the Japanese used the truck classification to supplement the quota numbers for passenger cars going into the U.S. in the early 1980's, the transplanted Japanese manufacturing plants were able to meet domestic demand by 1988. For this reason, export allowances in excess of demand were available at the 2.5% passenger car rate.[66] The Japanese were subsequently able to use their political influence to have their light trucks classified as passenger cars for import tariff purposes, then reclassified as trucks once they entered the U.S.(thus enabling Japan to avoid the stricter emissions standards applicable to passenger cars.)[67] Thus, they were subjected to lower standards and lower tariffs due to these strategic classifications.

Incentive packages prepared by individual state governments to entice the Japanese into expanding their production into the

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[61] *Id.* at 254.
[62] PAT CHOATE, AGENTS OF INFLUENCE (1990).
[63] *Id.*
[64] *Id.* at 4-6.
[65] *Id.*
[66] *Id.*
[67] CHOATE, *supra* note 62, at 4-6.

U.S. were extremely attractive, as well (see III., infra).[68] From the perspective of a tiny island nation with overworked resources, the wide open spaces and relatively clean air of America's heartland seemed like paradise. The state governments which sought to attract these plants also promised to exert the political influence necessary to acquire any permits (such as environmental permits) or waivers. When the sites and guaranteed lobbying power were combined with extensive roads, tax incentives, and payment for employee training, as well as the added advantage of operating as an American business with respect to tariffs and duties for shipping products into the U.S., the benefits of relocation simply became too appealing to refuse.[69]

Summarily, the Japanese auto manufacturers had numerous reasons to find expansion to the United States financially advantageous. First, the Japanese could avoid tariffs imposed upon incoming goods while leaving numerous open spaces in their import quotas for extra vehicles (e.g., light trucks) which are not manufactured in the U.S., allowing Japan to increase its share of the American market.[70] Another important factor with respect to the incentive packages is the easing of a stigma which some consumers in the U.S. attach to foreign products. When economic times are tough, foreign imports are often blamed for the increase in unemployment. Since Americans have less of a tendency to object to corporations employing their neighbors and operating within their communities, the Japanese seek to blend in, integrating their families into the American cultural fiber.[71]

Although financial incentives granted to the relocating company are considerable (see III., infra), economic incentives alone do not seem to be the ultimate deciding factor. Perhaps the area where Japan benefits the most is by taking advantage of the regulatory framework in the United States. After examining Japanese environmental law on the domestic front, it becomes apparent that the Japanese have the laws, skills, and regulatory policies to specifically enforce environmental regulations, as well

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[68] ERNEST J. YANARELLA & WILLIAM C. GREEN, THE POLITICS OF INDUSTRIAL RECRUITMENT: JAPANESE AUTOMOBILE INVESTMENT AND ECONOMIC DEVELOPMENT IN THE AMERICAN STATES 53-84 (1990).

[69] Gonzalez & Rodriguez, *supra* note 4.

[70] CHOATE, *supra* note 62, at 4-6.

[71] GELSANLITER, *supra* note 6, at 169-84.

as the absolute necessity to do so.[72] The overburdened environment of Japan has caused the question of regulation to go far beyond the level of an "either/or" proposition. For this reason, and since the Japanese auto industry no longer requires nurturing, it has become subject to all environmental legislation enacted; the government knows it may act without sabotaging the manufacturing concerns themselves. The realities of regulation hit home with these corporations when such standards as emissions controls are not relaxed even at the urging of the auto manufacturers.[73] Japanese environmental law is thus enforceable, with substantial specificity to preclude discretion. Companies may, quite simply, be forced to pay if they play.[74]

In the United States, however, discretionary authority vested in the EPA allows for the interpretation of laws which have a great deal of linguistic flexibility. Although the two nations have similar laws, their application is quite disparate. Thus, an agency decision which promotes financial gain at the expense of the environment may well pass the necessary muster.

Finally, Japanese corporations realize that their country has no intention of applying its laws extraterritorially.[75] Japan is strictly committed to sovereignty and believes that the applicable laws in any country are the domestic regulations which apply to that country's nationals. Consequently, the corporation is allowed to operate free of any regulatory pressure from its own country.[76]

As a parallel, the United States has a class of corporations which have established operations in Mexico to obtain the benefits of cheaper operating costs, reduced environmental standards, and the duty-free entry of components for assembly.[77] They are able to avoid import tariffs and quotas, which leaves them free to sell more vehicles.[78] Additionally, as the Toyota example illustrates, the company may avoid taxes and receive funding for employee training and other requested items.[79] There has even been some suggestion that the Environmental Permits

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[72] GRESSER ET AL., *supra* note 21, at 229-34.
[73] *Id.* at 58.
[74] *Id.* at 233.
[75] *Id.* at 355.
[76] *Id.* at 374.
[77] Gonzalez & Rodriguez, *supra* note 4.
[78] CHOATE, *supra* note 62, at 4-6.
[79] *See* Hayes v. State Property & Bldgs. Comm'n., 731 S.W.2d 797 (1987).

required for various actions taken by Toyota were pushed through for approval.[80] In the 1980's and 1990's, Japanese plants which established operatives in the United States became a type of "maquiladora" operation, leaving its own country to take advantage of economic incentives available elsewhere. However, these "runaways" must be made to conform to the stricter laws established by their own countries, or the international environment will continue to suffer the consequences.[81]

III. THE TOYOTA EXAMPLE

A. How the Japanese Came to the Bluegrass

When Toyota began looking for a place to base its U.S. operations, Kentucky was only one possibility in a competitive field. Having already lost the battle with Tennessee as a location for the Saturn plant, however, governor Martha Layne Collins was determined that Toyota would make the Bluegrass region its American home.[82] Eight trips to Japan and a $125 million incentive package later, Toyota began constructing an assembly plant in Scott County, Kentucky.[83] The path that finally led Toyota to Georgetown is strewn with litigation, questionable environmental evaluations, and bizarre constitutionality rulings.[84] What the entire entanglement illustrates is the need for a comprehensive international consensus on the environment, so that internal governing bodies will not be faced with a choice between human rights and increased economic benefits. What happened with Toyota shows how overwhelming decisions can be in a system which allows too much interpretive leeway to parties which lack equality of bargaining power.

B. Toyota's Day in Court

Two cases stand out from the flurry of lawsuits that accompanied Toyota's impending arrival. The first of these is *Commonwealth Transportation Cabinet Department v. Taub*, in which

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[80] GELSANLITER, *supra* note 6, at 89-90.

[81] Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 ECOLOGY L. Q. 477 (1990).

[82] GELSANLITER, *supra* note 6, at 77.

[83] *Id.* at 53.

[84] *Id.* at 78-79.

a land condemnation proceeding allowed the state to acquire the property necessary to build an access road to the Toyota plant.[85] One of the concessions made to facilitate Toyota's decision to locate in Kentucky was the provision of a four-lane access road to the Toyota property. Taub's farm stood in the path of this construction, and the state of Kentucky authorized the acquisition of a right of way by land condemnation to facilitate installation of the road.[86]

The first argument against the offer of the Toyota road was that the acquisition mandate was issued from the Commerce Cabinet before the Transportation Department was even made aware of the road's proposed construction.[87] Under K.R.S. 177.081(1), the Kentucky Transportation Cabinet has singular authority to make such designations, and then only in connection with a comprehensive six-year plan of development or an emergency.[88] One factor for determining the necessity of a road construction project is an evaluation of the site area in regard to the needs of the surrounding community and the road's affect on the area. There were no documented studies prepared, nor was more than a cursory consideration made of the site involved.[89] Another required assessment under K.R.S. 176.430 is the impact on the environment, an issue which seems to have received little, if any, consideration.[90] No alternative plans appear to have been considered, nor was the potential for environmental degradation fully assessed. Ultimately, "the powers that be" at Toyota wanted a road, and the State of Kentucky gave them one. Mr. Taub was unfortunate enough to be blocking the path that Toyota had chosen to take to its "New Kentucky Home."

The second case considered raises the key issue to which all other litigation is tied: was the incentive package given to Toyota by the state of Kentucky constitutional? The Kentucky Supreme Court made an analysis of this question in *Hayes v. State Property & Buildings Commission* and in so doing, apparently created a constitutionality argument from whole cloth.[91]

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[85] Dep't of Highways v. Taub, 766 S.W.2d 49 (1988).

[86] *Id.* at 50-51.

[87] *Id.* at 52.

[88] KY. REV. STAT. ANN. §177.081(1)(Baldwin 1988)[hereinafter KRS].

[89] *Taub*, 766 S.W.2d at 52.

[90] KRS § 176.430.

[91] *See* Hayes v. State Property & Bldgs. Comm'n., 731 S.W.2d 797 (1987).

The document which spawned this constitutional litigation was Senate Bill 361, which detailed the incentives to be given to Toyota in compensation for its selection of the Kentucky site.[92] First, the state purchased 1600 acres of land which it acquired and developed at a cost of $35 million.[93] The state also agreed to provide requested highway access, state-funded comprehensive training programs for the employees, assistance with rezoning, and help in securing foreign-trade-zone status. These elements cost the state $125 million initially, which will result, after interest, in an obligation of $385 million for the people of Kentucky.[94]

The *Hayes* case was an action by the State Property and Buildings Commission seeking a declaration of rights against the State Budget Director to proclaim the constitutionality of Senate Bill 361.[95] The legislative act led to the provision of a fee simple title to the 1600 acre tract of land in Georgetown, Kentucky, with improvements to allow for the construction of an automobile manufacturing plant.[96] Toyota was not required to pay for this property, which was to be financed by revenue bonds paid by appropriations made by the General Assembly now and in the future.[97] In other words, the people of Kentucky are paying for the Toyota plant with their tax dollars. This cost was supposed to be offset by aggregate "incremental taxes" resulting from the development of the Toyota Industrial Project.[98] "Incremental Taxes" were defined rather laboriously in Senate Bill 361 and include revenues such as state corporate income taxes, income tax on employees, property taxes, and the like.[99] The idea of this offsetting the cost of the Toyota plant appears to use the same line of reasoning that would apply if an individual who built a $1 million house were to have the construction funded by the state because the owner employed a large staff and paid property taxes. Since the same amount of tax would be assessed if Toyota paid for its own site, the money paid out by the state is never effectively recovered. Although the executive

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[92] *Id.* at 798.
[93] Appellant's Brief at 2, *Hayes*, 731 S.W.2d 797 (86-SC-918-TG).
[94] *Id.* at 5.
[95] *Id.* at 2.
[96] *Id.* at 6.
[97] *Id.* at 5.
[98] Appellee's brief at 10, *Hayes*, 731 S.W.2d 797 (86-SC-918-TG).
[99] S. 361, Reg. Sess., Ky Gen. Assembly (1986) at 7.

branch is free to implement policy which is beneficial to the state and its citizens, such policy must conform to pre-existing legislation and constitutional provisions.

Although the Toyota incentive package was intended to spur economic growth, the method used to attract Toyota is quite simply forbidden under Kentucky law. In Section 3 of the Kentucky Constitution, the state is forbidden to grant credit or make donations to private industry.[100] Although the state and the court alike said that the bond issue for Toyota did not constitute such a "grant or donation," the reasoning to support this conclusion was singularly focused. When the court's final analysis is examined in context, it becomes difficult to see how this decision was ever reached by an analysis of existing state law.[101]

The first problem that arises involves the order in which the activities leading up to the drafting of Senate Bill 361 occurred. Once the opportunity to attract Toyota arose, Collins and the Commerce Cabinet had no intention of letting it slip by. Consequently, they put forth a "policy" of promoting economic development in the Commonwealth and set about the acquiring of Toyota in furtherance of this goal. Although the policy is admirable, its furtherance arguably bordered on violation of executive authority.[102] Once the legislature was in session, Senate Bill 361 parroted an authorization of the actions which had already been taken.[103]

Next, Section 177 of the Kentucky Constitution forbids the exclusive grant of funds or credit to private individuals or corporations.[104] Toyota is a private corporation, however, with no intention of establishing a business venture merely to serve the people of Kentucky.[105] There is no exception given in the constitution for the use to which the funds are applied, even if the ultimate result is beneficial. The Court relied on a Virginia decision, *Almond v. Day*, to say that if the state receives a benefit from the transaction and its underlying financial obligation, then no credit has been granted.[106] The cited case was

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[100] KY. CONST. §3.

[101] *See generally*, KY. CONST. §§ 3, 171; *see also*, Turnpike Authority of Ky. v. Wall, 336 S.W.2d 551 (1960).

[102] GELSANLITER, *supra* note 6, at 78.

[103] *See generally* S. 361, Reg. Sess., Ky. Gen. Assembly (1986).

[104] KY. CONST. § 171.

[105] Hayes v. State Property & Bldgs. Comm'n., 731 S.W.2d 797, 809 (Leibson, J. dissenting).

[106] Almond v. Day, 91 S.E.2d 660 (1956) (cited in *Hayes*, 731 S.W. 2d at 800).

not decided under Kentucky law, however, and in this state, a loan does not become less of a loan merely because it is used to benefit the lender. Thus, the Toyota incentive package is still a grant of funds to a private corporation, even if it was extended to promote a valid public policy.

Although Appellee's brief denoted a "strong presumption of validity" to the Senate Bill, it should be noted that Section 171 of the Constitution says that taxes are to "be levied and collected only for public purposes."[107] In accordance with this provision, the analysis of Toyota leads to only one conclusion: the company is a private, for-profit corporation.[108] The grant of credit for an increase in tax revenues from other Kentucky taxpayers amounts to a direct taking of public funds for private use. Kentucky taxpayers are to pay the debt service on the Toyota bonds through general taxes that flow through the Commerce Cabinet.[109] In this sense, the Kentucky taxpayers are being taxed to support private industry.

Since taxation is permissible to serve a larger good, the question of what constitutes a "public benefit," thus, becomes an issue. Toyota was projected to employ 3,000 people when completed, and this was the presumed public benefit to be received.[110] Since that number is about 1/15 the size of the city of Lexington and 1/7 the size of the University of Kentucky, it is difficult to see how a public benefit would arise from this construction. In Appellee's brief, it was stated that Kentucky had a 4.5% unemployment rate. The breakdown of that rate by geographic area was conspicuously absent from the analysis.[111] What it fails to say is that Toyota did not even locate in a high unemployment area, which might have shown more legitimacy as a public benefit which could revitalize an economically-depressed region beyond the sheer number of employees.

The idea of an incremental tax does not obligate Toyota in any way.[112] The accrued tax revenues that are to apply to the cost of the Toyota site will not become applicable unless Toyota sells to a third party.[113] No source of revenue to specifically

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[107] *Hayes*, 731 S.W.2d at 801.

[108] *Id.*

[109] Appellee's Brief at 7-8, *Hayes* (86-SC-918-TG).

[110] *Hayes*, 731 S.W.2d at 812.

[111] *See* Appellee's Brief at 7, *Hayes* (86-SC-918-TG).

[112] *Hayes*, 731 S.W.2d at 811 (Liebson, J. dissenting).

[113] Appellant's Brief at 6-7, *Hayes* (86-SC-918-TG).

reduce the debt is provided. The only security comes from the assumption that the State of Kentucky will continue to back the funding.[114]

The Kentucky Supreme Court had previously invalidated proposals for bond issues which committed the state beyond the length of a legislative term. In *Curlin v. Weatherby* , the court held in part that:

> [w]e think it is an inescapable conclusion that if a state agency performing a major function of government obligates the funds to be appropriated to it in future years, a debt of the state is created, because the state cannot abandon or discontinue the function and still continue to operate as a government.[115]

It is difficult to see how an obligation to make payment through the Commerce Cabinet falls outside of what constitutes a grant of credit under this theory.[116]

In another decision, the court held it was illegal for the Turnpike Authority to make up a funding deficiency from the general purpose fund.[117] This, too, is similar to the case before the Court, because the general tax revenue of the state is being used to fund the debt service on these bonds.

The only cases where validity was even construed for public projects was if some sort of assessment for payment was made to the benefitted party, and even then the Commonwealth was not obligated beyond the current biennium.[118] In this case, however, the project was private and the funding renewable for the long term, even though the renewal is for two year increments. The project produces no guaranteed revenue for the Commonwealth and, indeed, creates a mandatory drain.[119] One legislator explained the practical effect of this commitment when interviewed by the court: "I don't think we could ever afford to default. The economic impact on the state in future bond issues would be pretty devastating."[120] Justice Liebson showed great

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[114] *Id.* at 9-10.

[115] Curlin v. Weatherby, 275 S.W.2d 934 (1955) (quoted in Appellant's Brief at 13, *Hayes* (86-SC-918-TG).

[116] *Hayes*, 731 S.W.2d at 815-16 (Stevens, J. dissenting).

[117] Turnpike Authority of Ky. v. Wall, 336 S.W.2d 551 (1960) (quoted in Appellant's Brief at 13, *Hayes* (86-SC-918-TG).

[118] Appellant's brief at 14, *Hayes* (86-SC-918-TG).

[119] *Id.* at 15.

[120] *Id.* at n. 12 (quoting Rep. Joe Clark, Deposition 55).

skepticism in his dissent when he pondered what this action constitutes if not a sale or a grant of credit.[121] After examining the briefs and the decision of the court, that issue is still no clearer.

If this case is to establish precedent, it would appear to allow a state government to "buy" a company any time the unemployment rates are high and to bill the cost to the taxpayers.[122] This plan would appear to facilitate an alarming trend as unemployment rises in the United States. States will take whatever action is necessary to secure jobs for their citizens, and without a clearly defined national policy to regulate this competition, the incentives can only increase. Unfortunately, the people who benefit in terms of economic success are sold short in other ways, and ultimately, everyone pays. No single group or individual is at fault; rather, no one is in control, so every country and corporation fights for whatever it can get.

On the environmental issues, the actions taken by the State in allowing permits were obfuscated by a rushed procedure with little administrative exploration.[123] The proposed road construction received only a cursory site inspection before it was approved, as well.[124] One wonders if an environmental impact statement might not have been a legitimate response to such a major project. An environmental impact statement would obviously have indicated such problems as the groundwater disturbance on a neighboring farm, which had to be alleviated during the course of the project by running pipes under the property.[125] A comprehensive study would also have revealed the history of opposition that area residents had to such industrial degradation, evidenced by their organized protest against the building of a coal gasification plant near historic Royal Spring. The citizens of Georgetown were also proud of their tradition of controlled growth and planning, which allowed great sensitivity to the impact expansion would have on the environmental and social structure.[126] The groundwater problems arose when a wastewater treatment plant was proposed that would dump 2.2 million

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[121] *Hayes*, 731 S.W.2d at 810 (Liebson, J. dissenting).

[122] *Id.* at 811.

[123] GELSANLITER, *supra* note 6, at 89-90.

[124] Dep't of Highways v. Taub, 766 S.W.2d 49, 50 (1988).

[125] GELSANLITER, *supra* note 6, at 89-90.

[126] YANARELLA & GREEN, *supra* note 68, at 158.

gallons of treated waste per day into a local stream. Despite a well-planned attack and a thoughtful appeal to the county board of adjustments, the State assured area residents that the plant was perfectly safe.[127] The Scott County Board of Adjustments heard the arguments, but they granted a conditional building permit to Toyota that included provisions for monitoring and routed the water around affected residents. The decisions were being made higher up, and the governor's office was not intimidated by the protests.[128] The residents of Georgetown simply did not have the time to band together with other concerned citizens in the state to mount an effective attack. The argument remained a battle fought by the upper-middle-class residents whose farms were being affected and failed to include the legitimate concerns of the working-class citizens who would also be affected.[129] This consideration leads to questions about what other environmental damage, besides the obvious air pollution created by a manufacturing facility, has been overlooked in the push for economic benefit.

Finally, the State seemed to regard "satellite industries" as a compelling benefit of this project. These industries, likewise, produce a strain on the environment of Kentucky. Perhaps, since these industries played a beneficial role in the State's incremental tax assessment, they should also have been included in an environmental impact assessment.

IV. DEVELOPING INTERNATIONAL ENVIRONMENTAL LAW AND INDUSTRIAL POLICY

A. National Sovereignty and Human Rights

The first attempt to establish an international system of human rights was embodied in the Universal Declaration of Human Rights, prepared by the United Nations General Assembly in 1948. This document was intended to promote the dignified treatment of human beings and respect for their fundamental rights.[130] This resolution was followed by an International Covenant on Economic, Social, and Cultural Rights in 1966, a

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[127] *Id.* at 158-59.
[128] *Id.* at 160.
[129] *Id.* at 160-61.
[130] *U.N. Declaration*, *supra* note 8.

document which was ultimately adopted in 1976.[131] The rights contained therein pertained to an individual's relationship with the state and other peoples. More recently, it has been suggested that a clean environment should be officially recognized as a fundamental human right. On August 31, 1989, Decision 1989/108: Human Rights and the Environment was adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.[132] This decision proposed a study of human environmental rights for ". . .development of urgently needed universal minimum standards regarding human environmental rights."[133]

Such progress in the international perspective of human rights becomes fraught with irony when the exploited resources at issue lie within the borders of the United States. While the American people look askance at U.S. corporations that operate in foreign countries in order to derive economic benefits,[134] these same individuals welcome foreign industry to the U.S. with open arms. Americans are accustomed to dominance, and they fail to perceive that their rights may also be exploited—"cooperation" has too often become "submission."[135] As exemplified by Toyota, however, Americans are willing to sacrifice part of their environment, and even allow their taxes to be used as incentives for the polluter, as long as they believe they are being compensated for their trouble.[136]

Although the scale is not comparable, the exchange is not really that different from the relation between the Mexican people and the maquiladoras, whose pollutants choke the air over Mexico: the people need jobs, and they are willing to give up environmental integrity for a share of financial well-being.[137] The choice is a difficult one, and it should not fall to the citizens of a state to make the choice between quality of environment and economic gain. To achieve this goal, the fundamental human

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[131] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360 (entered into force Jan. 3, 1976).

[132] U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Decision 1989/108 (Aug. 31, 1989).

[133] *Id.* at 1.

[134] Gonzalez & Rodriguez, *supra* note 4.

[135] YANARELLA & GREEN, *supra* note 68, at 201.

[136] Gonzalez & Rodriguez, *supra* note 4.

[137] WALDMAN, *supra* note 7, at 20; *see also* Catherine Tinker, *Environmental Planet Management by the United Nations: An Idea Whose Time Has Not Yet Come?* 22 N.Y.U. J. INT'L L. & POL. 793.

rights of every worker must become a priority, and national governments must submit themselves to international environmental regulation if a sustainable environment is ever to become a reality.[138] Rhetoric unfortunately lacks the power to clean the air, detoxify the water, or give people back their dignity. The U.N. must make finding a means to enforce its regulations a primary goal.[139]

B. Enforcing International Environmental Law

The United Nations is uniquely well-suited to collecting and assimilating data that measures environmental harm as well as making recommendations to mitigate the potential damages resulting from this harm.[140] Unfortunately, the U.N. has been unable to facilitate its environmental policies on a global scale because it lacks an effective system of enforcement mechanisms. The judicial rhetoric on the environment that has issued from the International Court of Justice reflects the limited access to this forum, for legal remedies compel the consideration of additional organizations to police environmental violations.[141]

Enforcement mechanisms have been suggested by various groups.[142] First, the "legal experts group" of the World Commission on the Environment raised the possibility of the creation of a commission that would hear and address environmental grievances.[143] This type of system has been successful in resolving human rights issues and refugee disputes.[144] The then Soviet Union suggested the creation of "green cross" centers to collect data on the environment and assess enforcement possibilities.[145] The "green cross" units could be mobilized quickly to the scene of an environmental emergency to minimize its detrimental impact. Like the successful peacekeeping force after which it was modeled, its goal would be to contain disaster in an emergency situation.[146]

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[138] Tinker, *supra* note 137, at 797.

[139] *Id.*

[140] *Id.* at 798.

[141] *Id.* at 798-800.

[142] *Id.* at 805-08.

[143] Tinker, *supra* note 137, at 806.

[144] *Id.* at 807. The Hague Declaration on the Environment recommended the establishment of an institutional authority within the U.N. to specifically combat global warming.

[145] *Id.*

[146] *Id.* at 807-08.

These enforcement problems and their proposed solutions illustrate the biggest dilemma in international law: how to establish binding legislation for a group of sovereign states with diverse goals and values. Sovereignty of the state incorporates the theories of absolute control over internal action and freedom from outside interference by other sovereigns in exercising these controls.[147] This fundamental principal of a sovereign right is so ingrained into members of the world social order that international regulation of independent states and their private corporations is exceedingly difficult.[148] The most compelling illustration of the need for such enforcement occurs when civilized nations sacrifice their rights within their own borders and, by doing so, sell out their workers and their environment.

Beginning with the Stockholm Conference in 1972, industrialized nations attempted to set standards for environmental protection to act as an international frame of reference.[149] The unfortunate drawback to these agreements is that states are not legally bound by them unless they voluntarily submit themselves to such international restrictions.[150] If a particular proposal does not appear to further a state's national agenda, the state may leave the document unsigned and thereby free itself to pursue its goals at the expense of others.[151]

One possible method for dealing with countries that refuse to sign agreements is to exclude them from the international marketplace until they comply. An economic barrier might well force action when pleading the case of the global environment has not proven fruitful. If international market participants agree on a common value system of environmental compliance, the sovereignty of independent states is left intact.[152] Those states which do not choose to comply could behave as they wished, but they would be required to find a new market for their nonconforming products. Ideally, states would incorporate the standards established as an international code of conduct into their own national regulatory scheme. Failing formal compliance, however, the pressures of customary behavior within a particular

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[147] GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNITY OVER NATURAL RESOURCES 10 (1979).

[148] *Id.* at 5.

[149] WALDMANN, *supra* note 7, at 20-22.

[150] *Id.*

[151] *Id.*

[152] *Id.*

field would be brought to bear upon the nonconforming state.[153]

Another difficulty arises when a company incorporated in one country goes beyond its borders to establish operations in areas where environmental regulation is less stringent, if indeed it exists at all.[154] For the most part, the only U.S. law which has been given extraterritorial force is the National Environmental Policy Act, NEPA, and its application requires specifically that the action have federal funding.[155] As a general rule, companies that leave their sovereign's boundaries to pursue business ventures correspondingly free themselves from the incorporating country's environmental laws.[156] This issue finds its best illustration in the concept of "free trade." "Free trade" is a misnomer based upon an economic system that views cost entirely in terms of dollars and cents. Ultimately, however, any product placed in the stream of commerce costs the environment, exploits some precious resource (tangible or otherwise), and reduces the quality of life at some level. This fact must be addressed as a global issue in order to preserve a semblance of personal dignity and environmental integrity for the people of all nations.[157]

One illustration of the attempt at tariff reduction and the limitation of trade barriers is the General Agreement on Tariffs and Trade (GATT).[158] This scheme of regulatory agreements applies to the contracting parties in varying degrees, but the primary goal has been to reduce trade restriction and eliminate discrimination in international commerce.[159] Unfortunately, not every country plays by the rules, so the system's impact is considerably reduced. This experience should illustrate to the United Nations that states need to have more than a document detailing compliance before they will follow regulations.

The struggle to effect protection of the environment and human rights on a global scale raises numerous issues, the seminal consideration of which requires an answer for precisely how to infuse intangible values into a system which operates in terms of profits and losses on a balance sheet. The most obvious, and

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[153] *Id.*

[154] Joan R. Goldfarb, *Extraterritorial Compliance With NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543 (1991).

[155] *Id.*

[156] WALDMANN, *supra* note 7, at 20-21.

[157] Neff, *supra* note 81, at 478.

[158] GENTHER, *supra* note 2, at 124-25.

[159] *Id.* at 124-25 (providing a summary of objective).

likely the most effective means, to influence international environmental and social policy is to simply make it economically unsound to break the rules.

One proposal which has been suggested for protecting the environment is the implementation of a Foreign Environmental Practices Act.[160] Such an act would force companies which operate beyond the boundaries of the states in which they are incorporated to comply with the regulations of the originating state.[161] Unfortunately, however, the proposal applies to the United States and its corporations only.[162] While the logic behind such an act is fundamentally sound, a broader application on an international level would be necessary to make this regulation meaningful. Since most countries have not attempted environmental regulatory action on a scale even approaching that of the United States, some ground rules would be necessary in order to make the system effective.

An additional consideration which has come to the forefront in the United States is making internal cohesion a mainstay of industrial policy.[163] A national set of guidelines governing transplant operations which seek to set up shop would eliminate competition between states in manipulating their laws in order to be able to give the biggest incentive package.[164] There are no winners, for each state arguably gives up more in incentives than it can ever possibly regain with increased productivity.[165] Until the United States is able to look inward and guarantee its citizens that their land and labor will not be an international bargaining chip, any attempt at global policy by the U.S. will not ring true.

C. *Establishing a Code of Conduct*

The first rule must be a set of minimum international standards. Even in lesser-developed countries with no means of enforcing environmental and social laws, the United Nations should provide forces to police industrial behavior. For countries with more resources, more stringent environmental laws, and a

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[160] Neff, *supra* note 81, at 479-83.

[161] *Id.* at 478.

[162] *Id.* at 478-79.

[163] YANARELLA & GREEN, *supra* note 68, at 197-200 (focusing on the role of state governments in industrial policy).

[164] *Id.* at 200.

[165] *Id.* at 201.

more protectionist attitude toward their citizens, foreign corporations should be forced to comply with the stricter of either the laws of the host country or the state of incorporation.[166] The funding for this enforcement system should flow from slight taxes on items in international commerce and heavy fines against corporations which act in violation of the minimum standards required.

Next, because any manufacturing concern causes environmental degradation by its very nature, all foreign corporations should be required to pay a degradation tax, which would in turn fund projects to improve the host nation's environment and preserve its natural resources.[167] In addition, companies should be required to get involved in the social framework of the host country and contribute to the development of its people. Such a system would aid the host country that recognizes the benefits derived by the corporation from operating within its borders.

V. CONCLUSION: A LOOK TOWARD THE FUTURE

United States standards must follow U.S. citizens globally if this planet is to be preserved for another generation. But as Americans look out at the world, they must never ignore what goes on within their own borders. The U.S. must demand higher standards from foreign interests operating within its borders, lest the American landscape be defiled by a special breed of "maquiladora."[168]

Probably the most critical issue that faces a nation regarding environmental compliance is precisely what regulations are mandated by international environmental law. The vaguely defined standard is derived from Principle 21 of the Stockholm Declaration on Human Rights.[169] The essence of this conduct code is that international environmental law obligates the states to regulate internal activities to the degree necessary to prevent external harm.[170] Unfortunately, this sovereignty standard carries little weight because a state may still emit damaging pollutants as long as a neighboring state does not feel itself to be harmed.

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[166] Neff, *supra* note 81, at 516-21.
[167] *Id.*
[168] Gonzalez & Rodriquez, *supra* note 4.
[169] *U.N. Declaration*, *supra* note 8.
[170] *Id.*

The tragedy is that the commons are degraded by every act of pollution. The environment belongs to everyone, and eventually everyone is harmed by environmental damage. Although precise issues have been addressed by treaties and agreements, specific action has failed to achieve any real protection for the environment as a whole. While treaties regarding migratory birds, fishing rights, and even trade in endangered species have been quite successful, some type of regulatory framework that requires a specific code of conduct for all environmental issues is imperative.[171]

The argument for protecting human dignity is no less compelling. The work conditions and standards of treatment which are faced by the international labor force should never be dictated by the lowest common denominator. No group of individuals should ever have to decide that losing part of their autonomy is reasonable for the maintenance of their employment situation. Beginning within each country, uniform standards must be set. The time has come for each nation to monitor its domestic industrial policy to see that foreign corporations operating within its borders respect both the letter and spirit of the law. Each nation is its own worst enemy where its citizens and its environment are concerned, for outsiders will do as much damage as we will allow. The time has come at last to declare a truce.

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[171] Tinker, *supra* note 137, at 825-28.