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After the United States invaded and occupied Iraq in 2003 without approval from the United Nations, critics accused the United States of committing a “crime of aggression.” The International Criminal Court has jurisdiction to prosecute that crime, but hasn’t yet defined that term.

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China has faced major criticism from around the world as its foodstuffs were found to be contaminated with dangerous substances. These disclosures forced the Chinese government to address shortcomings in its food safety laws, and also exposed weaknesses in the U.S. system.

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An Australian law firm recently became the first publicly-held law firm in the world when its shares began trading on a securities exchange. Will this decision to go public have implications for the practice of law in other countries?

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Ethiopia is trying to protect the names of its coffee bean growing regions by applying for trademark protection around the world. Many companies, including coffee retailer Starbucks, had opposed this campaign. But others argue that Ethiopia has the legal right to do so.

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For decades, the United States has refused to sign and ratify the Law of the Sea Treaty, citing what it claims to be shortcomings in the treaty text. But the President recently announced that the U.S. Senate should now ratify it, arguing that it will help American economic and security interests.

INTERNATIONAL TREATY:

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After 15 years of negotiations, the European Union and the United States reached an agreement to promote competition in the civil aviation sector and possibly save consumers billions of dollars in travel costs. But some nations are opposed to the agreement and cite its shortcomings.

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Hedge funds: In need of international regulation?

“Some of the grandest names in the hedge fund world suffered last month after failing to anticipate the turmoil in the markets, which left many of them underperforming equities and failing to produce the absolute returns they promise investors.”

Financial Times, Sept. 10, 2007

In recent years, hedge funds have attracted the attention of policymakers and the public around the world. Some marvel at the high profits that some hedge funds have earned for their clients. Others point to the extraordinary fees collected by individual hedge fund managers, sometimes ranging in the hundreds of millions of dollars. Others believe that hedge funds may have an undue influence on financial markets, and worry that future hedge fund collapses could affect the economies of entire regions. Critics have called on governments to pass stronger regulations which would require these funds to divulge more information on their operations and investments. But others have argued that the current legal framework has helped to promote this growing sector of the economy, and that more regulations will not guard against unpredictable changes in market conditions which they say ultimately affect the success or failure of hedge fund investments. What are hedge funds? How are they regulated in the United States? Are current laws effective in overseeing the operation of hedge funds? And what kinds of suggestions have been proposed at the international level to regulate such funds?

Hedge funds: Growing in popularity and strength

A hedge fund is a particular kind of investment fund organized privately by an investment company or partnership whose primary goal is to generate high returns for its investors in a relatively short period of time. There is no single or even legal definition for “hedge fund.” (In fact, one financial expert pointed out that there are over 20 definitions for that term.) Still, analysts say that hedge funds share many broad characteristics. Hedge funds, for example, generally employ what are considered aggressive investment techniques such as short selling (selling a stock and acquiring it later, thus betting that it will decline in value), and leverage (taking on substantial debt in comparison to available capital) that could be considered too risky for inexperienced investors with limited funds. In addition, people who invest their monies with hedge funds have mostly been very wealthy individuals. But, in recent years, large institutions such as public and private pension plans, university endowments, foundations, and charitable organizations have relied on such funds to increase their investment returns. Furthermore, many hedge funds (when compared to other kinds of investment funds) typically pay their managers high performance fees, ranging anywhere from 20 percent to 50 percent of the returns for a particular year.

The term hedge fund itself can be misleading because such funds do not always utilize the traditional “hedging” strategy that is part of their namesake when making an investment. Under one variation of such a strategy, a fund manager makes

an investment in a particular company in order to “hedge” (or reduce the risk) of an investment made in another company within the same industry. The fund manager will invest in Company A because that company will soon release a new technology, which he believes, in turn, will lead to an increase in its stock price. But to reduce the risk in that investment, he will also bet against the stock price of a rival (Company B) within the same industry, meaning that he will actually make a return if the share price of Company B declines. If the new technology works as promised, the manager’s initial investment in Company A will naturally rise. But if the technology fails (and leads to a price decline in Company A stock), and there is also a downturn in the entire industry, the fund will still make money because it had made a bet that the share price for Company B stock would decline.

In the aftermath of the collapse of LTCM and other hedge funds in recent years, there were calls for more SEC oversight to prevent similar or even worse crises. Some financial analysts say that the consequences of a massive hedge fund failure in the future could easily ripple across the global economy.

Hedge funds now employ a wide variety of investment and trading strategies that go beyond hedging. Some funds, for instance, make investments based on their predictions of the direction of certain interest rates or even the outcome of particular world events such as political change in certain countries. Many hedge funds use options and derivatives. Others may concentrate on arbitrage. Still other funds focus their investments on a single sector of the economy, a particular industry, or even an entire geographic region.

Experts typically credit Alfred Winslow Jones with creating the first hedge fund in 1949, which invested in equities and employed traditional hedging techniques. Over the last twenty years, the hedge fund industry has grown rapidly. Analysts estimate that there are more than 9,000 hedge funds operating around the world today with assets of around \$1.4 trillion. (Some estimates reach as high as \$2 trillion.) Though hedge funds invest substantial sums of capital, they still pale in comparison to the capital held by mutual funds, which is another type of fund run by investment companies that invest in certain assets in accordance with particular objectives. Financial analysts believe

that mutual funds have five to six times the assets of hedge funds, and that, in many cases, the actual investments made by a hedge fund are not very different from those made by mutual funds. In fact, one investment expert said: “Hedge funds may have an aura of exoticism and modernism, but their goals are as old as the art of investing itself. They seek a positive annual return (the higher the better), limited swings in value, and, above all else, capital preservation.”

Who watches over hedge funds?

In comparison to mutual and other investment funds, some say that hedge funds are “loosely regulated” by the government. In fact, the media have defined a hedge fund as a “loosely-regulated investment pool,” implying that there are few existing regulations or perhaps that regulations have not kept up with the proliferation of hedge funds. But financial and even legal analysts say that it would be more accurate to say that hedge funds—if they satisfy certain legal criteria—are subject to fewer regulations than mutual funds with respect to the disclosure of information concerning their holdings, operations, and strategies.

Public v. private investment offerings:

To avoid the registration and disclosure requirements for public offerings of securities under the 1933 Act only private offerings

of their investments to particular types of investors. Under Section 4(2) of the 1933 Act, many disclosure requirements do not apply to “transactions by an issuer not involving any public offering.” In a private offering, a hedge fund will, for example, selectively approach only those potential individuals who would qualify financially to invest in a hedge fund. (Sometimes a hedge fund will use placement agents or “finders” who will selectively hand out information to potential clients). While hedge fund clients may be unable to obtain basic information such as the daily valuation of their investments and even the specific investments held by a hedge fund, the clients may willingly accept such lack of information in return for higher gains on their investments. But just as there are rules that govern public offerings of securities, there are also rules that regulate private offerings. For example, the 1933 Act requires a pre-existing substantive relationship (typically defined as more than 30 days) between, say, an issuer such as a hedge fund and an investor. Legal analysts say that this requirement will give an issuer and investor enough time to determine adequately whether an investor meets certain financial thresholds to invest in a hedge fund.

Exemptions from registration requirements: While the Securities and Exchange Commission (SEC) has rules requiring that investment companies register offerings of their securities, Regulation

D under the 1933 Act also allows several exemptions.

For example, according to Rule 506 of Regulation D, if a hedge fund is able to limit the number of investors to fewer than 100 “accredited investors” (which is an investor who, for instance, earns \$200,000 a year or who has \$1 million in assets), it does not have to register its securities with the SEC. A hedge fund may also sidestep SEC registration of its securities by requiring all investors to be “qualified purchasers,” which are investors who have more than \$5 million invested in other securities. But once a fund with qualified purchasers reaches 500 investors, it must register with the SEC.

While the SEC is the primary body that oversees hedge fund operations, other federal agencies also regulate hedge funds in particular situations. The U.S. Commodities Futures Trading Commission (CFTC), for instance, helps to oversee hedge funds when they operate in the futures market. Legal analysts note that the CFTC also allows exemptions from certain regulations. The U.S. Department of Treasury also plays a role in the regulation of hedge funds as part of monitoring offshore financial centers as well as the tax structure



of hedge funds. The Federal Reserve (the central bank of the United States) indirectly affects the operation of hedge funds as it oversees banks and bank holding companies.

Problems with hedge funds

Financial analysts say that some hedge funds have, indeed, earned large returns for their investors (sometimes in the double digits and ahead of various market indexes). But others point out that the hedge fund phenomenon is not without stories of massive losses that had the potential to ripple across and hurt the overall economy.

According to the SEC and other regulatory bodies, there is nothing to indicate that hedge funds are unduly susceptible to fraud or failure, or that the regulatory framework which oversees such funds has materially contributed to their downfall.

Critics say that some hedge funds rely too heavily on leverage whereby they borrow large sums of money and securities in the hope that using these assets will provide returns that exceed regular debt payments. But financial analysts say that relying too heavily on leverage could lead to enormous losses if market conditions move sharply and quickly against the financial assumptions that a hedge fund had anticipated. “Companies that are highly leveraged may be at risk of bankruptcy if they are unable to make payments on their debt,” said one expert. They usually cite a now-defunct hedge fund called Long Term Capital Management (LTCM) as a prime example of a hedge fund that failed because it had too heavily relied on leverage.

Founded in 1994, LTCM was producing consistent returns (sometimes as high as 20 percent) for its investors. While LTCM had \$4.8 billion in capital, it had also borrowed \$125 billion in assets from major and influential investment banks, including Goldman Sachs, Lehman Brothers, and Bear Stearns. Because it was highly leveraged (with a debt/asset ratio of about 25-to-1), analysts say that LTCM was vulnerable to unexpected financial shocks. In 1998, the firm had bet that the value of bonds issued by Western governments would decrease in value while those issued by emerging market economies would increase. But during this time, Russia was experiencing economic difficulties and decided to devalue the ruble, which caused emerging market bond prices to decrease (the exact opposite of what LTCM had anticipated). The firm then experienced massive losses. Its borrowed assets dropped to \$80 billion and the fund’s capital dropped to \$600 million. The Federal Reserve later organized a consortium of banks to take over the operations of LTCM because it feared that the losses suffered by that firm would affect

the banking industry, which, in turn, could lead to further losses across the entire economy if worried investors pulled their assets out of the market and into safer investments.

Since the LTCM crisis, other hedge funds have suffered substantial losses (and some of them don’t even exist today). The most notable recent collapse concerned Amaranth Advisors LLC in September 2006. The failure was not related to leverage. Although it had called itself a “multi-strategy fund,” analysts say that Amaranth shifted much of its \$9 billion in capital to energy trading (more specifically, in the natural gas market). In fact, a U.S. Senate subcommittee said that “Amaranth dominated trading in the U.S. natural gas financial markets.” Traders at the fund bet that natural gas prices would increase while fuel and heating oil would stay the same or fall. Instead, natural gas prices began to fall, and, as a result, Amaranth lost over \$6 billion during a one-week period. It closed its offices in early 2007. The CFTC later charged several former members of Amaranth with manipulating the price of natural gas futures.

Another recent example of a hedge fund failure includes Archeus Capital, which lost \$2.5 billion and liquidated its fund in late 2006. The founder of another hedge fund, International Management Associates, faces criminal charges related to the disappearance of \$150 million from that fund. Managers at Bayou Funds pled guilty to fraud and conspiracy charges relating to their cover-up of hundreds of millions of dollars in losses. And most recently, two hedge funds belonging to Bear Stearns lost billions of dollars by making bad bets in the sub-prime mortgage market.

Momentum for more regulation?

In the aftermath of the collapse of LTCM and other hedge funds in recent years, there were calls for more SEC oversight and regulatory controls to prevent similar or even worse crises. Some financial analysts say that although the majority of hedge funds are located in the United States and the United Kingdom, the consequences of a massive hedge fund failure in the future could easily ripple across the global economy simply because such funds are increasingly investing their capital in projects all over the world. Analysts who argue for more regulation say that other funds (so-called “fund of hedge funds,” which pool together money from varieties of investors) are indirectly placing their investors’ capital into hedge funds. They also note that pension plans—some of which hold tens of billions of dollars in funds for current and future retirees—are also investing in hedge funds indirectly, but that many of these investors don’t realize this or understand the risks involved.

A recent report which studied hedge funds noted that losses stemming from unfavorable market conditions (and not involving criminal or fraudulent activity) seemed to be the most common reason for the failure of such funds. “Some hedge funds simply made bad bets and paid the price,” said one analyst. But another study which analyzed 109 hedge fund defaults said that fraud is another potentially serious problem. It found that 54 percent of hedge fund failures between 1994 and 2005 involved fraud. Others argue that these data are unreliable and inconclusive because the sample size was very small, and also because it is difficult to obtain comprehensive information from hedge funds concerning their operations. But according to the SEC and other regulatory bodies, there is nothing to indicate that hedge funds



C.V. Starr Lecture

October 4, 2007

Reforming Legal Services in the United Kingdom



The Rt. Hon. The Lord
Kingsland QC, Shadow
Lord Chancellor

Legal professionals and their practices in the United Kingdom are overseen by what the British government has called a maze involving “a wide range of regulators with overlapping powers and responsibilities.” There have been concerns about whether the current system for regulating legal services has effectively served the general public. Last year, the British government presented to Parliament reform proposals in the Legal Services Bill. What is the status of the Legal Services Bill? What are some of the implications for legal practice in the United States and other countries? Lord Kingsland will discuss these and other questions.

Visit www.nyls.edu/CIL for more information and registration.

are unduly susceptible to fraud or failure, or that the regulatory framework which oversees such funds has materially contributed to their downfall. One official said that hedge funds are subject to the same scandals that affect mutual funds or other securities fraud involving insider trading, embezzlement, and money laundering.

A former chairman of the Federal Reserve believed that the best way to regulate hedge funds was to do so indirectly. He suggested that the government should place more restrictions on the kinds of investments that prime brokers (such as investment banks) are allowed to make in hedge funds. Some have called for limits on what a hedge fund may borrow. Other reform proposals have called on hedge funds to allow lenders and regulators to examine their investment strategies.

On the other hand, opponents of greater oversight question whether greater oversight is necessary if many hedge funds fail due to unforeseen economic conditions. They also say that reform proposals have been too vague. Others worry that overly stringent regulations could encourage hedge funds to leave the United States (taking their businesses with them) and set up operations in another country with a more accommodating regulatory climate. Some analysts note that with the availability of the Internet, many hedge funds have already been moving and setting up operations in off-shore facilities, and that the passage of more regulations could quicken the pace.

Regulation losing steam in the United States?

As concerns began to mount concerning the operation of hedge funds, the SEC, in 2004, proposed a rule which would require a large majority of hedge fund managers to register their operations under the Investment Advisers Act of 1940 (IAA). Under the registration process, a hedge fund would have to disclose, for instance, information about “the number of hedge funds managed by advisers, the amount of assets in hedge funds, the number of employees and types of other clients these advisers have, other business activities they conduct, and the identity of persons that control or are affiliated with the firm.” The SEC argued that compiling this census of advisers would allow them to respond better and more quickly to fraudulent or deceptive practices in a growing segment (i.e. the hedge fund industry) of the U.S. financial services market. Prior to this rule change, analysts say that the SEC did not have detailed information on hedge funds. “Neither we nor any other government agency has any reliable data on even the number of hedge funds or the amount of their assets. We must rely on third-party surveys and reports, which often conflict and may be unreliable,” said one official.

In order to compel hedge funds to register under the IAA, the SEC redefined the term “client.” Previously, SEC regulations allowed an investment advisor to label each hedge fund as a client—up to a maximum of 14 funds before having to register its operations under the IAA. (Analysts say that very few managers had operated more than 14 hedge funds.) The new rule, enacted in February 2006, defined the term client as a single investor in a hedge fund. Because most hedge funds had more than 14 individual investors, the rule change would have required thousands of hedge fund managers to register with the SEC. But in June 2006, a federal appeals court ruled (in *Phillip*

Goldstein, et al. v. Securities and Exchange Commission) that the SEC had overstepped its legal authority when it redefined the term client, and voided the rule. As a result, analysts say that most hedge fund advisers who had registered with the SEC withdrew their registration papers.

Since then, many reform efforts quickly lost momentum. In February 2007, the President's Working Group on Financial Markets (PWG)—comprising the heads of the Department of the Treasury, Federal Reserve, SEC, and the CFTC—publicly endorsed a “hands off” approach in regulating hedge funds. The PWG stated that “public policies that support market discipline, participant awareness of risk, and prudent risk management are the best means of protecting investors and limiting systemic risk.” The PWG also released a set of non-binding principles which are supposed to guide U.S. financial regulators in overseeing the growth of rapidly growing private investment pools such as hedge funds. While proponents of greater oversight of hedge funds expressed disappointed in these measures, they still note that—in the wake of recent massive hedge fund losses—investors have become more demanding in obtaining information concerning their investments. Others point out that the SEC is also discussing whether it should increase the requirements for qualifying as an accredited investor as well as whether it should support efforts to change the tax code to prohibit certain tax exemptions for hedge funds.

The international hedge fund debate

The operation and growing influence of hedge funds have also attracted the attention of many other countries. Though a majority of hedge funds are based in the United States, they also operate in other markets, primarily in countries that comprise the Group of Eight (G8)—the United States, Canada, United Kingdom, France, Germany, Italy, Russia, and Japan. In June 2007, Germany placed hedge fund operations on the agenda on the annual G8 meeting. Financial analysts say that Germany had been particularly vocal about implementing more stringent hedge fund regulations because of a 2005 incident where American and British hedge fund managers used their influence to force out the chief executive and board chairman of the Frankfurt Stock Exchange, which had expressed an interest in acquiring the London Stock Exchange.

German leaders proposed that the G8 nations should implement international rules requiring hedge funds to disclose, for example, how many shares they own in companies as well as shares they borrow and sell. France and Italy also supported Germany's push for an international regulatory body to monitor hedge funds. (There is no international treaty that regulates the operation of hedge funds. Instead, each G8 nation oversees its securities market under its own domestic laws.)


But analysts say that there is no clear consensus among international organizations about the best ways to regulate hedge funds. Some pointed out that an international group called the Financial Stability Forum had earlier released a report which recommended that each individual country regulate hedge funds using domestic regulations and voluntary measures such as encouraging stronger risk management by hedge funds, enhancing regulatory oversight of those providing credit to hedge funds, and building a stronger market infrastructure

to withstand a hedge fund failure. In May 2007 report, the Organization for Economic Cooperation and Development (OECD)—comprising of 29 economically-advanced countries—found that hedge funds and private equity firms can play a positive role in the corporate governance of publicly-held companies under certain circumstances. It also found that hedge funds did not seem to have had a negative impact on employment

Analysts say that there is no clear consensus among international organizations about the best ways to regulate hedge funds. One international group recommended that each individual country regulate hedge funds using domestic regulations and voluntary measures.

when they invested in a particular company, but that further research was still necessary. While the report also rejected the idea of a separate OECD governance code for hedge funds, it criticized such funds for not being more transparent with their operations.

The International Monetary Fund (IMF) has also expressed concern about hedge fund operations, particularly its lack of transparency: “We still do not know what we do not know about hedge funds, and efforts to improve our surveillance and understanding of their market activities should be supported,” said an IMF official. The IMF also noted that because hedge funds heavily dominate certain economic sectors (including fixed-income and convertible arbitrage markets), any unexpected sell-offs in those markets could “put a strain on the entire financial system.” Yet an IMF study noted that hedge funds may have helped some countries recover from the Asian financial crisis in 1998 by purchasing assets whose prices had fallen significantly.

At the end of the 2007 G8 meeting, Germany and its supporters had softened their stance concerning the hedge fund industry. Political analysts noted the president of the European Central Bank—who had himself called for greater intervention in the hedge fund sector—had refused to go as far as the German proposal for international regulations. Also, the Internal Market Commissioner of the European Commission opposed such efforts. Furthermore, the United States and the United Kingdom had instead argued that focusing on market discipline was the best way to counter hedge fund failures. After finding little support for its proposals, Germany called on national regulatory bodies to require more information from hedge funds. Experts believe that the G8 nations will continue their discussions concerning hedge funds during next year's G8 meeting in Japan. 

The U.S. Supreme Court and Global Warming: National and International Implications

In a major decision, the United States Supreme Court recently ruled that the Environmental Protection Agency (EPA)—which is the primary federal agency that implements and enforces the nation’s environmental laws—has the legal authority to regulate the emission of greenhouse gases emitted by new motor vehicles. Many environmental groups have hailed the decision, hoping that it could eventually push the United States—which currently emits more greenhouse gases (GHGs) than any other country in the world—to increase its efforts in addressing the effects of global warming. Analysts note that, during the past year, global warming has become one of the world’s most pressing concerns. But other analysts question whether the decision itself will actually help to address global warming. How did the Supreme Court decide this important case? What are the implications of this decision? Will it affect how the United States addresses global warming?

The Environmental Protection Agency: Keeping the nation clean

Since its creation in 1970, the EPA has implemented and enforced federal laws that protect the nation’s environment. Its Superfund program, for example, has helped to clean up hazardous waste sites around the country. Pursuant to the Clean Water Act, it also regulates the discharge of pollutants into rivers and lakes. Other laws regulate a variety of other environmental issues such as the removal of lead and asbestos contamination, the protection of endangered animal and plants species, and the use of pesticides and other poisons. The EPA is headed by its Administrator.

The EPA also enforces the nation’s clean air laws, primarily the Clean Air Act (CAA). The purpose of the CAA is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” It does so by giving legal authority to the EPA to set and enforce standards for the emission of air pollutants such as lead, particulate matter, and sulfur dioxide from various sources. The CAA has several titles and defines particular terms:

- Title I regulates stationary sources of air pollution such as emissions from factories and power plants.
- Title II regulates emissions from new motor vehicles and other mobile sources. More specifically, § 202(a)(1), 42 U.S.C. 7521(a)(1) states that the EPA Administrator “shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”
- § 302, 42 U.S.C. 7602(g) defines the term “air pollutant” as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance

or matter which is emitted into or otherwise enters the ambient [or surrounding] air.” § 302, 42 U.S.C. 7602(h) states that “effects on welfare” include, but are not limited to, “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, . . . as well as effects on economic values and on personal comfort and well-being.”

The CAA doesn’t explicitly give legal authority to the federal government to regulate the emission of carbon dioxide and other GHGs (80 percent of which are released into the atmosphere by the American industrial, transportation, and utility sectors of the economy). Experts point out that there is no single federal law that regulates the emission of greenhouse gases such as carbon dioxide, though some states—at their own initiative—are in the process of adopting and implementing such legislation.

Are greenhouse gases the new air pollutants?

In October 1999, a group called the International Center for Technology Assessment, along with other parties, submitted a petition to the EPA, asking the agency to set new rules and standards for the emission of four chemical and physical compounds—carbon dioxide, methane, nitrous oxides, and hydrofluorocarbons—released by new motor vehicles into the ambient air. The petition stated that § 202(a) required the EPA Administrator to set new rules regulating the emission of any air pollutant from any new vehicles that, in his judgment, endangered the public welfare. In its petition, the group argued that these four particular chemicals were “air pollutants” as defined by § 302, 42 U.S.C. 7602(g). “Any physical or chemical matter that is emitted into the ambient air is an ‘air pollutant’ under the Clean Air Act,” said the petition. They then argued that these air pollutants contributed and continue to contribute to global warming with natural effects that endanger the public welfare and that should, in turn, “trigger” the EPA to set standards in regulating such emissions. The petition noted that, under § 302, 42 U.S.C. 7602(h), the term “effects on welfare” include the effects on both “weather” and “climate.”

Many scientists say that the emission of air pollutants and industrial gases, including carbon dioxide—all of which are associated with human activity—trap heat in the atmosphere and cause temperatures to rise around the world in a “greenhouse effect,” which, they say, is affecting the world’s climate and weather. They claim that, without a sustained and coordinated international effort to reduce the emissions of these GHGs, temperatures could rise dramatically in the following decades and lead to catastrophic natural disasters such as rising ocean levels, stronger hurricanes, and the expansion of deserts. In the case of the petitioners (which included many states such as Massachusetts), they argued that the effects of global warming could harm them specifically by leading to what they described as “the flooding of public-owned coastal facilities and

infrastructure, frequent and intense storm surges, and diminishing water supplies due to a reduced snowpack.”

Skeptics argue that there is no conclusive proof that emissions resulting from human activities—such as those from new cars and even factories—are the main contributors to global warming. “Although scientists speculate that the increase use of fossil fuels is responsible for the warming trend, they cannot say how much carbon in the atmosphere is too much, or when that point was reached,” said one critic. Still others believe that global temperatures are rising naturally, and that, therefore, there is no need to regulate the emission of air pollutants and industrial gases. A minority viewpoint describes as a “hoax” the argument that emissions associated with human activity are the main contributors to global warming.

EPA: No authority in regulating emissions of greenhouse gases

In September 2003, the EPA denied the petition. In a notice explaining its decision, the EPA said that it did not have the legal authority under § 202(a)(1) to regulate GHG emissions from new motor vehicles. It argued that if Congress had intended the EPA to regulate GHGs specifically as air pollutants, it would have explicitly given that agency such authority in the CAA. It noted, for instance, that the CAA specifically addressed another “global atmospheric issue” (called ozone depletion), but that similar provisions did not exist specifically for GHGs. In addition, the notice said that Congress, in 1990, had enacted other legislation concerning global climate change separate from the CAA, but had also “declined to adopt other legislative proposals . . . to require [GHG] emissions reductions from stationary and mobile courses.” One commentator said: “In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it.”

The EPA then explained that, even if it did have the legal authority to regulate emissions associated with climate change, the CAA did not automatically require the EPA to undertake action immediately. More specifically, the EPA stated that the CAA conferred discretionary authority in deciding whether to deal with emissions from new cars, if at all. To support its reasoning, the EPA cited a previous

Supreme Court decision called *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, which it said “cautions agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues when Congress has specifically addressed those areas in other statutes.”

The EPA further stated that it would have refused to regulate emission from new motor vehicles even if it had such authority. It then gave several other reasons going beyond what the original petitioners called the “endangerment” trigger in § 202(a). The EPA argued that there was still scientific “uncertainty” surrounding the actual mechanics of global warming, its effects on human health and the environment, and what courses of action to take. Without more information concerning global warming, the EPA said that it would be improper to set emission standards for GHGs. In addition, the agency argued that setting new emission standards for new motor vehicles could undermine the efforts of other Executive branch agencies which are currently engaged in international talks focused on reducing emissions around the world. By independently setting new emission standards for new motor vehicles for the nation, the EPA worried that such an action would diminish any leverage that the United States would have over negotiations with developing countries, many of which are strongly opposed to more stringent standards because they fear harm to their economic growth.

The petitioners appealed the EPA’s decision to the United States Court of Appeals for the DC Circuit.

In August 2005, the appeals court, in a 2-1 ruling, denied to overturn the EPA’s ruling. But analysts note that each judge had given varying reasons in the respective opinions. For example, in voting to uphold the EPA’s decision, one judge largely agreed with that agency’s rationale. Another judge said that petitioners did not have standing (i.e. the legal right to initiate a lawsuit) in challenging the EPA’s decision. Legal analysts say that, in order to establish standing in a lawsuit, a party must show that (i) it suffered or will imminently suffer an actual injury; (ii) the injury can be traced to the defendant’s action; and (iii) a favorable decision will likely correct or make amends for the injury. In his ruling, the judge argued that while the phenomenon of global warming was “harmful to humanity at large,” he did not believe that the plaintiffs in particular had actually suffered a specific injury. But a third judge concluded that at least one party (the Commonwealth of



Massachusetts) had established standing to sue the EPA, and that the agency had erred in taking into account other policy considerations in making its decision.

Supreme Court: A question of standing and authority

The petitioners later asked the United States Supreme Court to overturn this decision. In June 2006, the Court agreed to review the lower court's decision by granting a writ of certiorari. In the case of *Commonwealth of Massachusetts v. Environmental Protection Agency*, the Supreme Court had to decide two questions. First, "whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under § 202(a)(1)," and second "whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in § 202(a)(1)."

The Court ruled that Massachusetts had, indeed, suffered and will continue to suffer injuries resulting from global climate change, and that a decision in its favor would likely redress injuries brought about, in part, by the EPA's refusal to issue emission standards for new motor vehicles.

In their brief, the petitioners asked the Supreme Court to reverse the ruling of the Court of Appeals and to remand the case back to the EPA "with directions to apply the correct legal standard to this matter." The petitioners argued the EPA had made two legal errors:

- The EPA had erred in concluding that it did not have the legal authority under § 202(a)(1) to regulate GHG emissions. First, they noted that the text of the CAA defines the term "air pollutant" in a comprehensive manner, and that this wide interpretation was reasonable because "the basic purpose of the Clean Air Act is to protect public health and welfare." The brief also noted that the CAA also defined the "effects of air pollution on welfare" in a wide manner, including, but not limited to, effects on weather and climate. Second, the brief said that the EPA had erred in finding that Congress had intended to forbid the EPA from regulating air pollutants associated with climate change by citing what the agency had called "indicia of congressional intent." The brief criticized this argument by saying that "EPA appears to think that subsequent *unenacted* legislation can amend prior *enacted* legislation," and that the Supreme Court, in previous decisions, had "repeatedly rejected such an approach." The plaintiffs also criticized the EPA for implying that it could not act on emissions associated with global warming as long as there

was scientific uncertainty concerning that natural phenomenon. The brief responded that, even with scientific uncertainty, "research and regulation walk hand in hand under the [CAA] Act." It cited an example where the EPA, in 1973, created new rules to reduce dramatically the lead content in gasoline "despite the Act's lack of an explicit reference to leaded gasoline."

- The EPA had also erred in concluding that it could refuse to regulate air pollutants associated with climate change on the basis of other factors not mentioned under § 202(a)(1). The petitioners said that the main purpose of the CAA was to "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Therefore, the petitioners argued, "the trigger for much of the regulatory action that occurs under the Act is the *endangerment* of public health and welfare," (added emphasis), and that "endangerment [was] the only factor mentioned in § 202(a)(1)." While the EPA may use other factors—such as economic and technological factors—when actually *implementing* new rules under § 202(a)(1), the brief argued that this "grab bag of considerations" could not be used in the "initial stimulus for regulatory action" because doing so would undermine the CAA's goal of "[promoting] the public health and welfare."

In their brief, the respondents argued that the EPA had properly denied the petitioners' request to set new rules for the regulation of emissions from new motor vehicles, and that the Supreme Court should either affirm the judgment of the appeals court or remand the case back to court of appeals with instructions to dismiss. It made three main arguments:

- The petitioners (such as Massachusetts) did not even have the legal right to initiate a lawsuit in federal court because they had failed to establish standing. More specifically, the EPA argued that the petitioners failed to show that the EPA's refusal to regulate emissions from new motor vehicles will—to a material extent—cause the anticipated or imminent injury resulting from global warming, particularly to the Commonwealth of Massachusetts. (That state argued that rising sea levels, for instance, resulting from global warming would lead to coastal land loss.) The brief stated that the regulation of emissions from new motor vehicles is unlikely "to affect climatic or environmental conditions in Massachusetts" because emissions from all automobiles in the United States constituted only 7 percent of total emissions. Also, emissions from new motor vehicles only—which would be affected by any new standards issued by the EPA—were even lower.
- Even if the petitioners had established standing in their lawsuit, the EPA had reasonably concluded that it did not have the legal authority under the CAA to regulate emissions associated with climate change. The EPA argued that regulating these emissions would have been inconsistent with Congress' recent actions—and even inaction—concerning global warming. It cited, for instance the U.S. Senate's refusal to consider the Kyoto Protocol (a treaty whose aim is to stabilize GHG emissions) for ratification. Also, the Solicitor General cited the *FDA v. Brown & Williamson Tobacco Corp.*

decision, arguing that regulating emissions from new motor vehicles would have involved “great economic and political significance.”

- Even if the EPA had the authority to regulate emissions associated with global warming from new motor vehicles, that agency had the discretion to decline that authority at the present time. While the petitioners argued that, under § 202(a)(1), the EPA had to determine whether emissions from new motor vehicles endangered public welfare on scientific evidence alone, the Solicitor General said that the EPA had correctly and reasonably used several other factors—including what it called the “uncertain nature of the scientific record” and potential implications on foreign policy—in deciding whether to regulate emissions from new motor vehicles.

Supreme Court decision: New authority for the EPA

In April 2007, in a 5-4 decision, the Supreme Court ruled in favor of the petitioners and remanded the case back to the appeals court for further proceedings. It first decided the issue of whether Massachusetts had standing to challenge the EPA’s decision in denying its rulemaking petition:

- The Supreme Court ruled that Massachusetts had such standing. “States are not normal litigants for the purposes of invoking federal jurisdiction,” reasoned the Court. “When a State enters the Union, it surrenders certain sovereign prerogatives [such as setting nationwide emission standards for new motor vehicles threatening public welfare or negotiating emission treaties with other countries].” Because that state “cannot invade Rhode Island to force reductions in greenhouse gas emissions, cannot negotiate an emissions treaty with China or India . . . ,” the only way for Massachusetts to protect its interests would be to challenge the EPA’s decision to deny the rulemaking petition. In fact, the Court believed that Congress—through 42 U.S.C. § 7521(a)(1)—had clearly ordered the EPA to protect Massachusetts (among other states) by creating a legal process whereby affected parties (including states) can petition (and, later, if necessary, challenge decisions issued by) the EPA.
- The Court then ruled that Massachusetts had, indeed, suffered and will continue to suffer injuries resulting from global climate change. “The harms associated with global climate change are serious and well recognized,” it said. The decision noted, for example, that the federal government did not even contest submissions presented by Massachusetts, which stated that climate change caused, in part, by gas emissions has led to a steady increase in sea levels over the last 100 years and which have “already begun to swallow Massachusetts’ coastal lands,” all of which can cost hundreds of millions of dollars to remediate.
- The majority opinion then linked the EPA’s refusal to create rules to regulate emissions from new motor vehicles to injuries sustained by Massachusetts caused by global climate change. It reasoned that because the EPA did “not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming,” that agency’s refusal to regulate such emissions, “at a minimum,” contributed to Massachusetts’ injuries.

- The Court also decided that a ruling in favor of the plaintiff would likely redress injuries suffered by Massachusetts due to the EPA’s refusal to issue new standards for emissions from new motor vehicles. It said that “while it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.”

The Court then decided whether the EPA Administrator had the legal authority to regulate carbon dioxide and other emissions associated with climate change under § 202(a)(1). “We have little trouble concluding that it does,” said the Court.

Skeptics argue that there is no conclusive proof that emissions resulting from human activities . . . are the main contributors to global warming. “Although scientists speculate that the increase use of fossil fuels is responsible for the warming trend, they cannot say how much carbon in the atmosphere is too much, or when that point was reached,” said one critic.

- It noted that that the statute’s text was “unambiguous” in this matter by pointing out that the CAA’s “sweeping definition of ‘air pollutant’” would include emissions of carbon dioxide from new motor vehicles.
 - It also described as “misplaced” the EPA’s reliance on *Brown and Williamson Tobacco Corp.* in refusing to regulate emissions as air pollutants. While the Court concluded in the *Brown* decision that Congress most likely did not intend for a government agency to undertake a sweeping interpretation of its regulatory powers which could lead to extreme measures such as banning tobacco products altogether, it held that EPA jurisdiction in this particular case “would lead to no such extreme measures . . . EPA would only regulate emissions,” and would not, for example, ban the production of cars and other motor vehicles.
- The Court then decided whether the EPA may decline to issue emission standards for motor vehicles based on considerations not listed in Section 202(a)(1).
- It concluded that the EPA’s refusal to accept the rulemaking petition was based on reasoning “divorced from the statutory text” and also on “impermissible considerations.” The Court argued that when the EPA makes a judgment as to whether or not the agency will exercise its particular authority to set new emissions standards for new motor vehicles, that judgment “must relate to whether an air pollutant cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

- Under the terms of the statute, said the Court, the EPA “can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation explaining as to why it cannot or will not exercise its discretion . . .” Instead, the Court concluded that the EPA “offered a laundry list of reasons not to regulate,” and that these reasons “[had] nothing to do with whether greenhouse gas emissions contribute to climate change.”

Supreme Court dissent: No standing in sight

The dissenting opinion said that Massachusetts did not have standing to bring a lawsuit against the EPA because that state did not suffer an injury that was “concrete and particularized,” and that any relief granted by a court must “directly and tangibly benefit [a party] in a manner distinct from its impact on the public at large.” It concluded that injuries resulting from global climate change simply did not meet the “particularized” injury requirement because global warming was a “phenomenon harmful to humanity at large, and the redress petitioners seek is focused no more on them than on the public generally.”

In addition, the dissent observed that the petitioners had failed to prove that Massachusetts had, in fact, suffered actual or imminent injury due to climate change caused by emissions from motor vehicles. The petitioners claimed in their declarations and exhibits that rising sea levels have “already begun to swallow Massachusetts’ coastal land.” But the dissent said that “there [was] no elaboration” of these contentions, and later described these assertions as “pure conjecture.” And while the petitioners claimed to have forecasted increasing sea levels during the next 100 years by using computer modeling programs, the dissent said that “accepting a century-long time horizon . . . renders requirements of imminence and immediacy utterly toothless.”

Furthermore, the dissent argued that the petitioners (in its view) had failed to show that the EPA’s refusal to establish new rules for emissions from new motor vehicles had actually led to the alleged erosion of Massachusetts’s coastal land. In essence, said the dissent, the plaintiffs argued that “without new vehicle standards, greenhouse gas emissions . . . have been higher than they otherwise would have been; once EPA changes course [by implementing new emission rules], the trend will be reversed.” It rejected this line of reasoning by saying that it ignores “the complexity of global warming.” Because implementing new emission rules for new motor vehicles would affect only four percent of total global emissions, “the connection [between the alleged damages suffered by Massachusetts and the failure of the EPA to implement emissions rules for new motor vehicles] is far too speculative to establish causation,” said the dissent.

A still uncertain future on global warming?

The Supreme Court remanded the case back to the appeals court “for further proceedings consistent with [its] opinion.” But it also added that “we need not and do not reach the question of whether, on remand, the EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.” During a recent hearing at the United States Senate, the EPA’s Administrator refused to give a timetable as to when that agency would take up the rule-making petition again.

Analysts say that there is a growing scientific and public consensus that emissions from human activities have been altering the world’s climate . . . One environmental advocate asked: “The world now broadly accepts that we have a problem, if not a crisis. So what is to be done?”

What are the domestic implications of this decision? Many say that, under the regulatory process, it could still take years for the EPA to decide whether to establish rules for emissions from new motor vehicles. And even if the EPA decided to set new rules, experts cautioned patience, citing “the slow pace of the nation’s regulatory machinery, the potential for congressional or legal challenges to future regulations, and the lead time industry would need to comply” with any new regulations. (In the meantime, the effects of global warming would continue to be felt around the world.) But environmental advocates are more optimistic. While the Supreme Court ruling itself concerned whether the EPA had the legal authority to regulate greenhouse gas emissions from new motor vehicles only, they note that its implications can easily extend to power plants and factories, all of which produce the same emissions.

Some analysts say that the American business community—which once opposed measures to cap greenhouse emissions—is generally promoting market-based approaches. “Business opposition to global-warming legislation is melting faster than the polar ice caps,” said one analyst. Also, because many corporate executives believe that legislation capping emissions of carbon dioxide will be inevitable, they want to set the terms of debate on future measures to control climate change, say political analysts. One market-based approach is carbon trading whereby the federal government would set specific gas emission limits for companies. If a particular company wanted to exceed that limit, it would have to buy a credit (or permit) to do so. A company that does not use all of its credits could then sell those excess credits to another company in carbon trading exchanges. While the federal government has not taken the lead in setting emissions caps, several state governments have already done so on their own initiative. California, for example, passed a bill in September 2006 which would set a mandatory cap on greenhouse gas emissions from that state. While groups such as automakers have challenged the legality of the new law, legal analysts say that the recent Supreme Court ruling has “largely shredded” the arguments forming the basis of these lawsuits.

What is happening on the world stage? Analysts say that there is a growing scientific and public consensus that emissions from human activities have been altering the world’s climate. In February 2007, the Intergovernmental Panel on Climate Change (IPCC)—which is an international network of hundreds of climate scientists operating under the aegis of the United

Nations—released an assessment concluding (with 90 percent certainty) that human activity has been the main cause of global warming since 1950. The IPCC reached these conclusions after examining hundreds of studies on climate shifts, various scientific observations, and results of computer modeling simulations over a three-year period. (In a previous assessment issued in 2001, the IPCC had made a similar conclusion with 66 percent certainty.) Critics, on the other hand, noted that the 2007 assessment had also backtracked on many previous (and dire) claims concerning climate change, and that computer model simulations examined by the IPCC are still “notoriously inaccurate.” Still, commentators note that, even in the United States, policymakers from opposite sides of the political spectrum have generally accepted these claims. “The science on this question has been settled,” said a high-ranking Democratic lawmaker who once dismissed global warming as a “theory.” One environmental advocate asked: “The world now broadly accepts that we have a problem, if not a crisis. So what is to be done?”

Governments around the world are trying to negotiate an extension of (and even try to strengthen measures in) the Kyoto Protocol, which is the only international treaty that sets legally-binding targets for the reduction of greenhouse gas emissions through a variety of measures such as burning less fossil fuel, using more fuel-efficient technologies, and promoting alternative energy sources such as nuclear power and wind power. Many analysts say that the primary purpose of these efforts is to *stabilize* the concentration of carbon dioxide emissions already in the atmosphere.

But analysts point to several factors which they say have undermined the effectiveness of the Kyoto Protocol. Although negotiations for the treaty concluded in 1997, it did not come into force for its signatory countries until 2005. (Signatory nations must begin the actual process of reducing their emissions in 2008.) Also, while the United States is the largest contributor of greenhouse gases, it refused to ratify the treaty. It noted that the protocol does not require any developing country, including China, to abide by any specific targets. The International Energy Agency predicted that China’s carbon dioxide emissions will exceed those of the United States in 2009. But China argued that, because industrialized countries such as the United States and those in Europe are primarily responsible for most of the build-up of emissions, it shouldn’t take the lead on any cuts, which could harm its economic growth. Moreover, analysts note that many current signatories have been unable to meet their pre-reduction targets which would help them keep on track in meeting future targets. They also point out that the protocol itself will expire in the year 2012, which doesn’t give countries sufficient time to make meaningful reductions in their emissions.

In May 2007, the United States proposed to convene a series of meetings this winter (with the 10 to 15 countries that produce the most GHG emissions) in order to reach an agreement establishing voluntary national targets for reducing these emissions over the next 20 years. (The top environmental advisor to the U.S. president described these targets as “aspirational.”) These talks would take place outside of the aegis of the Kyoto Protocol and would not result in any new international agreements on GHG emissions. But critics believe that the purpose of these talks is to derail multilateral negotiations that will also take place in December 2007 to extend the Kyoto Protocol or create a

new global agreement to reduce greenhouse gas emissions. (One environmental group derided the American idea as a “classic spoiler.”) Another analyst also said that the American proposal did not contain any new ideas to reduce GHG emissions.

In recent months, many experts have also been giving more attention to the connection between climate change and international conflict. One report issued by the Center for Naval Analyses in April 2007 said that the effects of global warming “could lead to large-scale migrations, increased border tensions, the spread of disease, and conflicts over food and water,” which could then lead to American military involvement. And in April 2007, the United Nations Security Council discussed, for the first time, the link between climate change and global conflict. One high-ranking diplomat stated that the Security Council—which is, under the UN Charter, responsible for maintaining international peace and security—should discuss such a link because of its serious implications for global security. “What makes wars start? Fights over water. Changing patterns of rainfall. Fights over food production, land use,” she said, all of which could get worse if the climate changes dramatically in the next few decades. But many developing countries, such as China, argued that UN environmental agencies should continue to take the lead in discussing climate change, and that the Security Council did not have “the professional competence” to handle such a matter. Due to these disagreements, the Security Council did not take any formal action or adopt any resolutions concerning climate change. 🌐

**C.V. Starr Lecture
October 16, 2007**

Jurisdiction to Decide Jurisdiction in Commercial Arbitration

**William W. Park, Professor of Law and
R. Gordon Butler Scholar in International Law,
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Universal jurisdiction: Prosecuting any crimes committed anywhere?

Should Japan be able to prosecute a French shoplifter who stole merchandise in a store in Paris and currently resides in France? Or should the police in Fiji bring charges against an Indian who drove while intoxicated in New Delhi and still lives in India? While it may seem highly unlikely for legal authorities in either country to pursue such cases (especially since both home countries already have a legal system in place to address such crimes), legal analysts note that many countries around the world have passed laws that would allow their courts to claim jurisdiction in prosecuting grave and serious crimes committed in other countries and where the crimes have absolutely no connection to the prosecuting country.

Proponents of countries that claim such “universal jurisdiction” say that doing so will prevent wrong-doers from escaping accountability. In fact, several countries around the world have successfully convicted and punished individuals who have committed serious crimes in other countries, yet have no ties to the prosecuting country. But opponents say that claiming such jurisdiction could lead to many problems and even undermine the sovereign authority of other nations.

Traditional scope of jurisdiction

Under international law, sovereign nations have *jurisdiction* (the legal authority) to investigate, prosecute, and punish individuals—including non-citizens and other residents—who have broken certain laws or have conspired to commit particular crimes within their respective territories. In such instances, a country would be exercising its *territorial jurisdiction*. The city of New York, for instance, would most likely prosecute a foreign tourist who incited a major riot in Times Square even though he was not an American citizen.

Many countries have also extended their authority to prosecute certain crimes committed by individuals located beyond their borders (known generally as *extraterritorial jurisdiction*). The United States, for example, has claimed jurisdiction to prosecute its citizens who commit certain illegal acts outside its territorial boundaries. In its efforts to help curb sexual abuse of minors worldwide, the United States passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, which allows the United States to prosecute U.S. citizens who travel in foreign commerce and commit illicit sexual conduct in other countries. In another aspect of extraterritorial jurisdiction, other nations have passed laws that would allow them to pursue foreign individuals who, while residing in other countries, engage in certain acts that affect the security interests of the prosecuting country. Under American laws, for example, the United States may prosecute foreign individuals located in other nations who have used a computer network to carry out certain cybercrimes within the United States (even though they were not physically within American borders when they had committed the alleged crime).

In all of these cases, a particular country had extended its criminal jurisdiction beyond its borders when a wanted individual had some connection to that prosecuting country. While some of these cases may be controversial because of concerns of violating another country’s sovereignty, legal experts say that extending a country’s criminal jurisdiction in certain instances has become accepted practices under international law.

Expanding the scope of jurisdiction

In recent decades, some countries have passed laws that give their courts and law enforcement authorities what has generally been called *universal jurisdiction*, which had allowed them to claim jurisdiction to investigate and prosecute an individual for alleged crimes committed anywhere in the world “regardless of the nationality of either the accused or the victim [and even] in the absence of any links to the [prosecuting] state.” Although the term itself seems to imply that a country has an ability to address all conceivable crimes (both grave and minor) taking place outside of its territorial borders, legal analysts point out that—in actual practice—countries that have claimed universal jurisdiction have done so to address only the most serious crimes such as war crimes, genocide, torture, and crimes against humanity. Some of those accused of these crimes have included actual heads-of-state and high-ranking officials.

Legal scholars and practitioners say that the idea of universal jurisdiction is not new. They point out that some international treaties require its signatory countries to try or transfer to other countries individuals accused of committing certain heinous acts, regardless of where they had taken place and also regardless of the nationalities of both the alleged perpetrators and victims. For example, one legal expert said that the UN Convention against Torture (or CAT) “requires states either to prosecute any suspected torturer found on their territory, regardless of where the torture took place, or to extradite the suspect to a country that will do so.” (For more information on CAT, read the article *The Outsourcing of Torture* on page 28.) Some also point out that the Geneva Conventions—which regulate the treatment of different classes of people such as civilians and prisoners-of-war during times of international conflict—require its signatory countries to “search for persons who have committed grave breaches of the conventions and to bring such persons, regardless of nationality, before its own courts.” But while the concept of universal jurisdiction is not new, legal experts note that several countries are going beyond their obligations under certain treaties and are now taking their own initiatives in granting universal jurisdiction to their legal authorities in investigating and prosecuting certain crimes.

The rationale behind universal jurisdiction

Proponents of universal jurisdiction provide a variety of reasons as to why a nation should exercise such jurisdiction even if an alleged crime (such as torture, genocide, and crimes against humanity)

did not occur in its territory or even involve any of its citizens. First, they say that these particular crimes—which have claimed the lives of tens of millions of people in the last century alone—are so heinous that any state (even those that have no connection to the crimes) should be able to prosecute the alleged perpetrators. Some argue that a state has “a responsibility to bring those responsible to justice.” Advocates say that, even today, many of these grave crimes still present a threat to the international community. They point out that global organizations such as the United Nations are currently investigating alleged cases of genocide taking place in countries such as Sudan where militias have allegedly attacked—and killed—tens of thousands of civilians in the Darfur region.

Second, supporters say that the ability to claim universal jurisdiction provides a potent back-up mechanism to prosecute wrong-doers. They point out that many of the countries where alleged atrocities were committed had recently gone through tremendous upheaval (in the form of a civil or international war) to the point where they have lost the capacity to investigate and prosecute, say, massive human rights violations. In some cases, domestic legal institutions may be in shambles. In others, the rulers of these nations may be preventing still-existing agencies from carrying out any kind of investigation into alleged crimes. In either situation, a leader could escape accountability for his alleged actions. But if that person travels to a country which exercises universal jurisdiction over certain crimes, legal analysts say that prosecutors could then take that person into custody, possibly to stand trial.

Third, proponents believe that as more and more countries claim universal jurisdiction in prosecuting serious human rights abuses and other grave crimes, the likelihood of national leaders committing or ordering them will decrease over time simply because there will be fewer places for them to hide. “Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable option . . . raising the possibility that would-be tyrants will begin to think twice before embarking on a barbarous path,” said one leading advocate.

Some analysts point out that a majority of countries already consider acts such as torture and war crimes to be the “gravest crimes under international law,” and that several existing international treaties require their signatory nations to prosecute individuals within their direct jurisdiction accused of engaging in such acts. (And many countries have, indeed, already implemented domestic laws giving their legal authorities

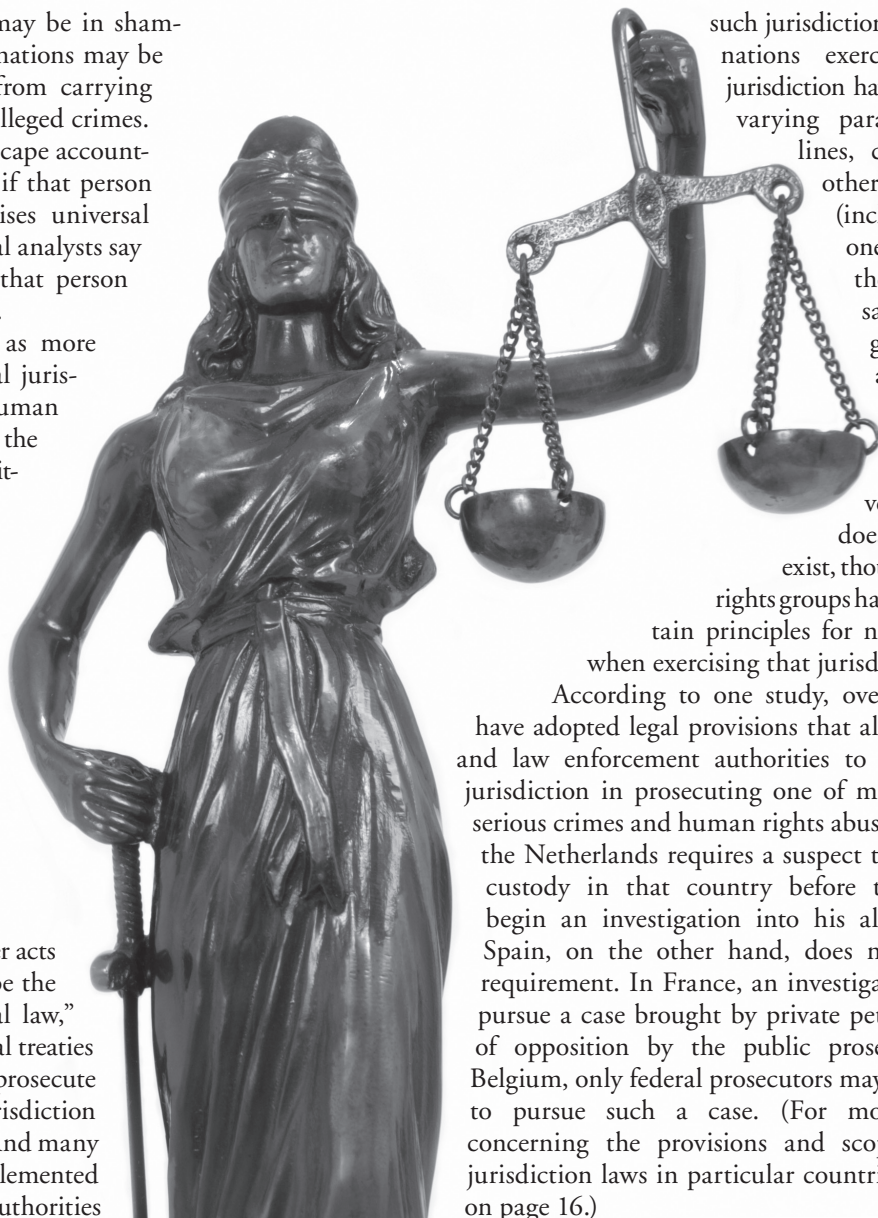
such jurisdiction.) But others note that still many more do not allow their authorities to claim universal jurisdiction in prosecuting individuals located outside of their immediate jurisdiction who are accused of committing such crimes, and that this is one of the reasons why some alleged perpetrators may escape any accountability. In addition, one human rights group points out that “there are no treaties requiring states to exercise universal jurisdiction” over the most heinous crimes.

Authorizing universal jurisdiction

The process of establishing universal jurisdiction is not a straightforward process. Legal experts say that there are no agreed upon global standards that a state follows when it crafts its own laws granting universal jurisdiction to its legal authorities. In addition, there is no single international treaty per se whose main purpose is to grant its signatory nations the ability to claim universal jurisdiction over certain heinous crimes. Instead, many countries have simply asserted the sovereign right to claim such authority, and then passed laws allowing their courts and law

enforcement authorities to exercise such jurisdiction. But even then, nations exercising universal jurisdiction have done so using varying parameters, guidelines, constraints, and other considerations (including political ones) set forth in their laws, analysts say. In fact, a general consensus among different nations on the scope and operation of universal jurisdiction does not seem to exist, though some human rights groups have developed certain principles for nations to follow when exercising that jurisdiction.

According to one study, over 125 countries have adopted legal provisions that allow their courts and law enforcement authorities to claim universal jurisdiction in prosecuting one of more of the most serious crimes and human rights abuses. For example, the Netherlands requires a suspect to be in physical custody in that country before the police even begin an investigation into his alleged atrocities. Spain, on the other hand, does not have such a requirement. In France, an investigative judge “may pursue a case brought by private petitioners in spite of opposition by the public prosecutor.” But in Belgium, only federal prosecutors may decide whether to pursue such a case. (For more information concerning the provisions and scope of universal jurisdiction laws in particular countries, see the table on page 16.)



Universal jurisdiction laws from around the world

Country	Name of law(s) authorizing universal jurisdiction	Provisions of universal jurisdiction law
Belgium	<p>Act concerning Punishment for Grave Breaches of International Humanitarian Law (later repealed)</p>	<ul style="list-style-type: none"> • This 1993 act once allowed anyone (including non-Belgian nationals) to initiate an investigation into whether another individual had carried out acts of genocide, crimes against humanity, and war crimes anywhere in the world—regardless of whether the crime occurred in Belgian territory, and regardless of whether Belgian nationals were involved (as perpetrators or victims). • After concluding that several subsequent plaintiffs had filed politically motivated complaints (many of which were later dismissed by the Belgian Supreme Court), Belgium amended its law by giving Belgian courts jurisdiction over crimes only if “the accused is Belgian or has his primary residence in Belgium, [or] if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed.” • In addition, a Belgian prosecutor now makes the sole decision about whether to investigate a particular complaint, but may also consult with an investigative judge and police. The prosecutor also has wide discretion to dismiss a complaint if he determines that that case “should be heard by the courts of the state where [the] crimes were committed or by an international [tribunal].” • Belgium repealed the act in 2003, but incorporated its provisions into the Belgian Criminal Code.
France	<p>French Code of Criminal Procedure (Article 689)</p>	<ul style="list-style-type: none"> • The code allows French courts to exercise universal jurisdiction “over offenses committed outside of France [only] when an international [treaty] gives jurisdiction to French courts to deal with this offense.” Analysts say that French courts had ruled that the Geneva Conventions [which prohibit war crimes, for instance] are not “directly applicable in national law.” As a result, they say that France does not exercise universal jurisdiction over war crimes. On the other hand, French courts have ruled that the UN Convention against Torture is subsumed by national law, and that France may exercise universal jurisdiction in suspected torture cases. • Private parties may initiate an investigation by filing a complaint directly with a prosecutor who may then exercise some discretion as to whether the complaint should be referred to an investigative judge. • Before authorities launch an investigation, the suspected wrong-doer must be present on French territory.
Germany	<p>German Code of Crimes against International Law</p>	<ul style="list-style-type: none"> • The code provides German authorities with universal jurisdiction over crimes against humanity, genocide, and war crimes regardless of the nationality of the perpetrator. It also states: “This Act shall apply to all criminal offenses against international law designated under this Act . . . even when the offence was committed abroad and bears no relation to Germany.” • Prosecutors have exclusive authority in deciding whether to investigate and prosecute an alleged case. • German prosecutors will exercise universal jurisdiction only in cases where authorities in a territory where the crime was committed or where the alleged perpetrators and victims are located do not carry out a “genuine investigation.” • They also have the discretion to refuse to open an investigation if the territory where perpetrators and victims are located has already begun exercising jurisdiction in the case. • A suspect does not have to be physically present in German territory for prosecutors to begin an investigation.

Universal jurisdiction laws from around the world (cont'd)

Country	Name of law(s) authorizing universal jurisdiction	Provisions of universal jurisdiction law
Netherlands	International Crimes Act	<ul style="list-style-type: none"> • Under the act, Dutch courts may exercise universal jurisdiction over cases of crimes of humanity, genocide, torture, and war crimes that occurred after October 2003—regardless of where the alleged crimes took place and of the nationalities of the perpetrators and victims. • Dutch courts will exercise universal jurisdiction only in cases where authorities in a territory where the crime was committed or where the alleged perpetrators and victims are located do not exercise jurisdiction. • Prosecutors have the primary authority in deciding whether to investigate a particular complaint. • The alleged perpetrator of the crimes must be physically present in the Netherlands.
Spain	Organic Law 6/1985	<ul style="list-style-type: none"> • This law gives Spanish courts universal jurisdiction over cases of genocide and “any offense that Spain is obliged to prosecute under international treaties, including the UN Convention on Torture and the Geneva Conventions” (which address heinous acts such as war crimes)—regardless of where the alleged crimes took place and of the nationalities of the perpetrators and victims. • The Constitutional Court of Spain ruled that other territorial courts (such as those where the alleged crimes took place) have “priority over Spanish courts exercising universal jurisdiction.” But it also concluded that Spanish courts may exercise such jurisdiction if the other courts “are unwilling or unable to effectively investigate and prosecute the crimes referred to in the complaint.” • Private parties may file complaints concerning alleged crimes directly to an investigative judge who must then determine the merits of the case. Prosecutors may also refer cases to an investigative judge. • After reviewing evidence collected by the judge, prosecutors have discretion in deciding whether to begin an actual prosecution. • A suspected individual does not have to be present in Spanish territory for a court to begin an investigation or prosecution of his alleged activities.
United Kingdom	Criminal Justice Act 1988 ; Geneva Conventions Act 1957 ; International Criminal Court Act 2001	<ul style="list-style-type: none"> • These three laws allow British courts to exercise universal jurisdiction in cases of torture, certain war crimes, and crimes against humanity and genocide, respectively—regardless of where the alleged crimes took place and of the nationalities of the perpetrators and victims. • A government agency called the Crown Prosecution Services (CPS) is responsible for the prosecution of universal jurisdiction crimes. While police are required to consult with CPS when embarking on an investigation, CPS officials are primarily responsible in deciding whether to prosecute a case. • CPS must take into account “the amount of reliable and admissible evidence available and whether it is in the public interest to prosecute,” among other factors. It must also have the consent of the attorney general to prosecute a crime. • The alleged perpetrator does not have to be physically present in British territory for the police to begin an investigation. But, if the police want to charge him, that person must “either be present or his presence anticipated” in British territory.

Source: Human Rights Watch

Putting universal jurisdiction into practice

Advocates also note that, beyond the implementation of laws that simply establish universal jurisdiction, the actual “fair and effective exercise of universal jurisdiction is far from easy.” According to one human rights group, cases involving universal jurisdiction “are more complex and resource-intensive than most ordinary [domestic] criminal cases.” One study noted that the witnesses and victims of alleged atrocities are usually dispersed across various countries, many of which are thousands of miles away from the prosecuting country and had also gone through tremendous upheaval after, say, a conflict which allowed the alleged criminal acts to take place. Others add that investigators and prosecutors are likely to be unaware of the “historical and political context of the alleged crime.”

Others note that some governments where the alleged perpetrators are located may refuse to cooperate with investigators. They point out that simply having a prosecuting country proclaim universal jurisdiction over a certain case will neither compel a person accused of committing a grave crime to surrender himself nor guarantee the cooperation of the country where he is residing. Instead, authorities must try different approaches such as requesting extradition whereby the wanted person is transferred to the prosecuting country in accordance with established procedures and safeguards.

Past and current cases

Despite some of these difficulties, several countries have asserted universal jurisdiction when they brought into custody several individuals who were accused of carrying out or ordering serious crimes in other countries. But, according to analysts, only a little more than a dozen have actually “conducted investigations, commenced prosecutions, and completed trials based on universal jurisdiction . . .” Some of these countries include Australia, Belgium, Canada, France, Israel, Mexico, Senegal, and the United States. For example:

- In what legal experts call a ground-breaking case in 1998, a Spanish magistrate invoking universal jurisdiction began an investigation into charges that former Chilean leader Augusto Pinochet had ordered the disappearances of several Spanish citizens in Chile during the 1970s. While the former leader was visiting the United Kingdom, the magistrate requested that Britain extradite him to face charges in Spain. The House of Lords (which also serves as that country’s highest court) later concluded that while there was enough evidence to extradite Mr. Pinochet, it declined to do so, citing his poor health to stand trial. In a separate case in 2005, Spain convicted and sentenced to prison an Argentinean army officer (Adolfo Scilingo) for attempted genocide. A higher court later increased his prison sentence to over a thousand years.
- In 2002, Belgian authorities invoked universal jurisdiction in arresting a Rwandan businessman (Etienne Nzabonimana) who, in 1994, was allegedly involved in genocide in Rwanda. He had later fled to Belgium. In 2005, a court sentenced him to 12 years in prison for participating in genocide.
- In 2005, France sentenced *in absentia* a Mauritanian army captain (Ely Ould Dah) to 10 years in prison for ordering the torture of black members of his country’s military. Invoking universal jurisdiction, French authorities arrested him while he was participating in a training program in France. But the

accused later slipped away to Mauritania where human rights experts say he receives the protection of the local government.

- In 2004, a district court in the Netherlands exercised universal jurisdiction in prosecuting a case against a Congolese national (Sebastien Nzapali) who was accused of leading death squads and of torturing people in the Congo. Dutch authorities arrested him while he was living in the Netherlands. He was later sentenced to 2½ years in prison.
- Great Britain exercised universal jurisdiction when authorities arrested a former commander (Faryadi Sarwar Zardad) who operated a check-point in Afghanistan in the early 1990s and had allegedly “terrorized, tortured, imprisoned blackmailed and killed civilians” who passed through his route. He had later sought asylum in Britain. In 2005, a jury found him guilty of torture and sentenced him to 20 years in prison.

Commentators note that recent cases concerning universal jurisdiction have attracted the public’s attention. To explain this phenomenon, one prominent human rights advocate said that what is new is “the willingness of some governments to fulfill [their duties in prosecuting] those in high places.” For example:

- Belgian authorities had issued an arrest warrant in 2005 for Hissène Habré (a former president of Chad) who is accused of ordering torture and committing crimes against humanity.
- Plaintiffs had also filed a complaint with German prosecutors in November 2006, asking them to exercise universal jurisdiction to investigate a case where high-ranking American officials (including the former Secretary of Defense, the former Attorney General, and the former Director of the Central Intelligence Agency, among others) had allegedly ordered the torture and abuse of prisoners inside an Iraqi prison in the aftermath of the United States’s invasion of Iraq. According to an American civil liberties group which had filed the complaint, the German Code of Crimes against International Law prohibits acts such as killing, torture, and cruel and inhumane treatment. Article 1 of the code also grants universal jurisdiction to German courts to investigate and prosecute these crimes. Analysts say that German prosecutors are now determining whether to take the case. They had, in fact, declined to do so in a previous filing in 2004 “on the grounds that they believed the United States would investigate the matter.” But the current complaint says that “Congress has failed to seriously investigate the abuses,” and that Germany should now reconsider its previous position.

The limits of universal jurisdiction

While many believe that allowing countries to claim universal jurisdiction over certain crimes could, for example, help to reduce the number of the most serious atrocities committed around the world today, others argue that claiming such jurisdiction could present many problems. For instance, they say that claiming universal jurisdiction:

- **Violates another country’s sovereignty:** Some legal analysts say that when a prosecuting country claims universal jurisdiction in cases where it has “no sovereign interest” (i.e., in cases where the alleged crime took place elsewhere and did not involve any individuals from the prosecuting country), it violates the authority of the country where the alleged crime had actually taken place. “The very idea that a totally disconnected country would bring the case is an offense to the jurisdictions that have the primary

responsibility to resolve” such matters, said one critic. Some legal scholars say that one of the defining hallmarks of a sovereign nation is not only the ability to create and enforce laws within its own territory, but also the ability to determine the extent to which it will carry out an investigation and prosecution without interference from other countries. They point out, for instance, that the Charter of the United Nations “is based on the principle of the sovereign equality of all its Members.” Other analysts note that a prosecuting country exercising universal jurisdiction could also, in essence, be imposing its own judgment and course of justice over those of a country where the alleged atrocities had taken place. One critic said: “Should any outside group dissatisfied with the reconciliation procedures of, say, South Africa [where authorities had once brutally enforced a system of racial segregation] be free to challenge them in their own national courts or those of third countries?” Another legal expert also believes that the concept of universal jurisdiction could lead to what he calls repetitive prosecutions by different countries all exercising different standards of justice. “There is no guarantee whatsoever against hounding an accused in one court after another until the victims are satisfied that justice has been done,” he said.

Some legal analysts say that when a prosecuting country claims universal jurisdiction in cases where it has “no sovereign interest,” it violates the authority of the country where the alleged crime had actually taken place.

- **Allows for political abuse:** There are no binding international treaties or broadly accepted principles that regulate how nations exercise their claims to universal jurisdiction and over what cases nations may pursue under such jurisdiction. As a result, critics worry that some states will claim universal jurisdiction simply to embarrass rival countries or individual opponents. When Belgium had passed its universal jurisdiction law in 1993, it allowed anyone without any ties to that country to file complaints of human rights abuses with Belgian authorities. But critics noted that some individuals had filed one-page complaints against certain world leaders without any supporting facts or evidence to back their claims. Another critic said that “when discretion on what crimes are subject to universal jurisdiction and to whom to prosecute is left to national prosecutors, the scope of arbitrariness is wide indeed.”
- **Is hindered by an inability to enforce a conviction:** Analysts point out that while some countries invoking universal jurisdiction have gathered enough evidence to bring individuals to trial for committing certain heinous acts, a country must usually have that person in physical custody to begin the trial (particularly in cases where the laws of the prosecuting country forbid trials *in absentia*). Not surprisingly, suspected human rights violators have not readily surrendered themselves to the prosecuting authorities. And even if they are tried *in absentia* and convicted of their alleged crimes, the prosecuting country cannot force the country where the wrong-doer is residing to enforce its decision. One legal analyst said: “This lack of an enforcement mechanism

is one of the biggest problems facing the exercise of universal jurisdiction.” But supporters argue that these convictions still serve “important symbolic, educational, and deterrent functions.”


Universal jurisdiction by other means?

Some commentators have suggested that, rather than exercising universal jurisdiction to prosecute alleged wrong-doers for certain crimes, states should place greater reliance on the work of ad hoc tribunals established by the United Nations, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. They have also pointed to the International Criminal Court (ICC), which is a permanent international tribunal based in The Hague with authority to prosecute individuals—including high-level government leaders—accused of genocide, war crimes, crimes against humanity, and crimes of aggression.

But others point out some shortcomings in relying on these tribunals in bringing alleged wrong-doers to justice. For example, the ICC has jurisdiction to investigate and prosecute grave crimes which occurred only after 2002 (the date in which the ICC treaty came into force) and only in those nations that ratified the treaty. Yet analysts note that many countries with poor human rights records (and where the gravest crimes are most likely to be committed) have refused to sign the treaty. In addition, others say that the ICC, with its limited resources, will devote its resources to “the most serious situations [of major human rights violations],” and that—in determining whether to pursue an investigation even where there is a reasonable basis to conclude that serious crimes had occurred—the ICC chief prosecutor has the discretion to include factors such as “the number of victims of particularly grave crimes.” Others add that ad hoc tribunals created by the UN have jurisdiction to investigate and prosecute crimes that have occurred in specific countries only.

Because of these limitations, some say that there will probably be many instances when a particular international criminal tribunal will be unable to investigate and prosecute violations of human rights, thus allowing alleged perpetrators to remain free. To reduce this likelihood, supporters of universal jurisdiction say that “a critical role remains for national courts” to exercise such jurisdiction or domestic laws that will allow them to do so.

Despite these problems, legal experts note that countries continue to pass laws that allow their courts to claim universal jurisdiction over certain crimes committed in other nations. For example, authorities in Canada are currently prosecuting its first case under its Crimes against Humanity and War Crimes Act (enacted in 2000) against Desire Munyaneza who is accused of carrying out acts of genocide, crimes against humanity, and war crimes in Rwanda in 1994. (Mr. Munyaneza had fled Rwanda and later claimed refugee status in Canada in 1997.)

Some legal experts say that while it is unlikely that the global community will reach a general consensus on exercising universal jurisdiction (and over which exact crimes), they believe countries will continue to claim such jurisdiction, especially in cases where alleged wrong-doers are residing within their borders. “International criminal jurisdiction, for all its failings, is going to compensate for some of the weaknesses of domestic criminal jurisdiction; it is going to act in some cases where local social and political forces prevent a domestic prosecution,” concluded one expert. 

Is the WTO Providing More Access to Essential Medicines?

Some critics say that the World Trade Organization (WTO) promotes trade ahead of environmental protection. Others argue that the global body should do more in protecting labor rights. Still others assert that the WTO supports the protection of intellectual property over public health and safety. After critics accused the WTO of preventing poor and developing countries from obtaining low-cost medicines to use during public health crises, that organization announced that it would amend and clarify its rules to ensure that these countries would have access to such medicines. But critics say that some countries may be taking advantage of these changes. Others argue that the WTO is not responsible for the pricing of needed medicines, and that critics should instead concentrate their efforts on the pharmaceutical industry.

The WTO and the protection of intellectual property

The mandate of the WTO is to liberalize trade and eliminate unnecessary barriers to trade. The WTO administers (among other agreements) the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (known by the acronym TRIPS), which deals with trade in goods, services, and intellectual property, respectively. Every two years, the WTO hosts a high-level ministerial conference where its 150 member nations negotiate agreements to liberalize trade further and also to review existing agreements. The current round of trade negotiations is called the Doha Round, which began in 2001 and continues today.

The World Trade Organization affirmed that its intellectual property rights agreement should not stand in the way of a member nation's actions to protect public health. It also declared that widespread HIV and AIDS infections qualified as a public health crisis.

The TRIPS agreement requires all WTO members to establish a minimum level of intellectual property protection in their domestic legal systems (through, for instance, the use of patents and copyrights) within a certain timeframe. At the time the TRIPS agreement came into force, different countries provided varying levels of intellectual property protection, ranging from comprehensive and sophisticated legal systems in the United States and the European Union to weak or even non-existent legal systems in least developed countries.

The timeframe in which nations must adhere to these minimum protections vary according to their levels of development and also the extent to which they already protected intellectual property. For example, India—which is officially classified as a developing country—was given until 2000 to codify minimum intellectual property protections in its legal system and also until 2005 to codify a pharmaceutical patent system. A least developed country which joined the WTO without preexisting intellectual property protections has until 2016 to implement minimum intellectual property standards.

TRIPS, patents, and medicines

The TRIPS agreement also sets minimum standards for patent protection which all WTO members must eventually implement through their domestic laws. A patent is a property right granted to an inventor which allows it to exclude others from using its invention without permission for a limited period of time. Pharmaceutical companies, for example, file and obtain patents to prevent other companies from copying and then selling their medicines without proper authorization. Under Article 28 of the TRIPS agreement, patents must prevent those not having the owner's consent from "using, offering for sale, selling, or importing" the patented product. Article 33 also requires patent protection that lasts 20 years from the date the patent is filed. Furthermore, under Article 27, patents must be available for any invention, limited by typical tests of novelty, inventiveness, and industrial applicability.

While requiring a patent system for all member countries, the TRIPS agreement also allows certain exceptions (referred to as "flexibilities") to patent protection. For example, under Article 27, individual WTO members may pass laws to prevent an individual from patenting "diagnostic, therapeutic and surgical methods for the treatment of humans or animals." Article 31 allows governments and third parties authorized by a government to manufacture a patented product without authorization from the patent holder. Legal experts say that, in practice, this would involve a compulsory license. Issued by a WTO member government, a compulsory license suspends patent protection for a particular product and allows the government or a third party to manufacture that product themselves, often at lower cost. If a government issues a compulsory license, Article 31(h) requires that government to pay the patent holder "adequate remuneration," which, in practice, is a small royalty fee.

But the TRIPS agreement also imposes restrictions on the use of compulsory licenses. For example, it restricts drugs produced under compulsory licenses to domestic distribution only. Article 31(f) states that "any such use [of a drug manufactured using a compulsory license] shall be authorized predominantly for the supply of the domestic market." The TRIPS agreement does not allow the export of such generic drugs to other countries. Legal analysts say that these provisions would prevent governments

from using compulsory licenses as a cover to establish a domestic pharmaceutical industry and export its products to markets abroad where drugs are generally more expensive.

Under the TRIPS agreement, a government may issue a compulsory license for a particular product only after it has tried to “obtain authorization from the right holder on reasonable commercial terms . . . and that such efforts have not been successful within a reasonable period of time.” But it also authorizes a WTO member government to skip such negotiations with a patent holder and simply issue a compulsory license in the event of a “national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.” For pharmaceutical products, the exceptions to patent protection could allow a WTO member nation—in the event of, say, a public health crisis—to acquire drugs not readily accessible or affordable within its healthcare system.

But legal analysts point out that the text of the TRIPS agreement does not provide specific definitions or examples of situations that would genuinely merit a compulsory license. So it remained largely up to each individual nation to define a “national emergency” or “case of extreme urgency” when trying to determine whether it should directly issue a compulsory license. The TRIPS agreement also does not specify, for example, which diseases (communicable or non-communicable, life threatening or not) would merit a compulsory license.

Problems with TRIPS and patent protection for drugs

Although the TRIPS agreement provided exceptions to patent protection, analysts say that many countries did not use them even for genuine public health purposes. In fact, several developing and least developed countries—the very countries that Article 31 was designed to help—had even pledged to codify even more rigorous intellectual property protections while brokering separate trade agreements with, for example, the United States. Legal experts cite two reasons for this development.

First, because several terms and phrases in the TRIPS agreement were vaguely worded (such as “circumstances of extreme urgency”) and also did not list specific instances under which they may issue a compulsory license, many developing and least-developed countries feared that issuing such licenses would bring reprisals on the part of large pharmaceutical companies and also the key trading partners which have established pharmaceutical industries. (A compulsory license issued to a third party to make generic—and cheaper—versions of brand name drugs could threaten the profits of the patent holder.)

Second, analysts say that even if the government of a least-developed country issued a compulsory license to a domestic third party to make a generic drug, the country itself would not even have the actual capacity to do so. (Analysts say that many poor countries must usually import certain drugs from other countries.) Furthermore, if that government instead granted a license to a third party in another country with the ability to make a generic



version of a patented drug, Article 31(f) prohibited the export of that drug. Looking at these reasons in their totality, health advocates and other critics say that many countries that could have issued compulsory licenses to obtain drugs needed for public health emergencies did not do so.

Fixing the problem

After public health advocates and even human rights organizations began to publicize the problems faced by poorer countries in obtaining needed drugs, WTO members began to address this issue during its Doha ministerial conference in 2001. The WTO then released several public statements concerning the TRIPS agreement and its relationship to public health concerns. It affirmed, for example, that the TRIPS agreement should not stand in the way of a member nation’s actions to protect public health. It also declared that widespread HIV and AIDS infections qualified as a public health crisis. Furthermore, to assuage concerns that use of a compulsory license for a public health crisis would automatically provoke a backlash against the government that had issued the license, the WTO Director-General released a statement that said “The WTO’s TRIPS Agreement . . . strikes a carefully-negotiated balance between providing intellectual property protection—which is essential if new medicines and treatments are to be developed—and allowing countries the flexibility to ensure that treatments reach the world’s poorest and most vulnerable people. Countries must feel secure that they can use this flexibility.”

In 2003, the WTO *temporarily* amended the TRIPS agreement to address the domestic manufacturing restriction that effectively barred countries without a pharmaceutical industry from issuing a compulsory license to a third party in another country to manufacture a needed drug protected by a patent.

- Under these changes, the importing country facing a public health crisis would issue a compulsory license to a third party (presumably a pharmaceutical company) located in another country. That third party would obtain a second compulsory license allowing it to export its generic (and cheaper) version of the patented drug.
- The importing country would also have to notify the WTO of this special arrangement, specify the patent and quantity of drugs being sought, and confirm that there is insufficient manufacturing capability in its country, among other requirements.

- When producing the drugs through a compulsory license, the exporting country must produce only the amount needed by the importing country, and also package them in distinguishing labels, colors, and shapes.
- Before shipping its drug, the exporting nation must post a notification of the upcoming delivery to a special WTO website.

Critics have said that Thailand's issuance of compulsory licenses in breaking certain drug patents was unjustified and did not constitute emergency action carried out on behalf of a needy population. Drawing the most scorn was the licensing of a drug used to treat heart disease.

The 2003 agreement came alongside a statement saying that WTO members were to use the new leeway in breaking patents only in good faith and in order to deal with public health problems (and not to pursue industrial or commercial policy objectives). Thirty-three developed countries—including the United States, the European Union, and Japan—have pledged not to use compulsory licenses to import drugs, helping to assuage the pharmaceutical industries within these states who feared that such an arrangement would weaken protection over their intellectual property (i.e. their drug products). Eleven other countries—including China, Israel, Korea, Mexico, Qatar, and Turkey—have pledged to use the new procedures only in situations of national emergency or extreme urgency, which effectively removed the possibility of importing drugs under a compulsory license for public non-commercial use.

In 2005, the WTO said that these export provisions would become permanent upon agreement by two-thirds of the 150 members by December 1, 2007. But as of June 2007, only seven WTO members—El Salvador, India, Norway, Philippines, South Korea, Switzerland, and the United States—have indicated their support to make these changes permanent. Analysts also note that, in the meantime, the WTO has been holding workshops to educate delegates from developing countries on how to use the public health flexibilities in the TRIPS agreement.

Taking advantage of compulsory licenses?

Only one country has issued compulsory licenses under the provisional measures adopted by the WTO in 2003. Thailand—through the government-controlled Government Pharmaceutical Organization (GPO)—issued compulsory licenses for drugs it couldn't produce at all or in adequate amounts for domestic use. In November 2006, the GPO issued a compulsory license for the drug Efavirenz made by Merck, and then, in January

2007, it issued licenses for Kaletra and Plavix made by Abbott Laboratories. Efavirenz and Kaletra are used to treat HIV/AIDS. Plavix is a blood thinner used to treat people at risk for a heart attack or stroke. Thailand has already started to import Efavirenz from a generic drug company in India (for half the price of the name brand version) and is also working to build up its own manufacturing capacity for that drug. While the GPO also issued compulsory licenses for Kaletra and Plavix, no company has yet started to manufacture those drugs for export to Thailand.

Abbott, in response, claimed that Thailand was abusing its compulsory licensing options and was also “using HIV as an excuse” to issue those licenses, although it didn't elaborate on these statements. Merck officials said that the company was already selling Efavirenz at cost (and without profit) on the Thai market. Drawing the most scorn was the licensing of Plavix, which treats a non-communicable disease not considered by many critics as a genuine public emergency or health crisis. As a result, some media commentators have asserted that Thailand's actions violated both the letter and the spirit of the TRIPS agreement. One commentator said that Thailand's actions go “against every principle of intellectual property protection under the World Trade Organization,” and that only “anti-patent hooligans” would support Thailand.

Other critics have said that the GPO's issuance of compulsory licenses was unjustified under the WTO provisional agreement and did not constitute emergency action carried out on behalf of a needy population. Economists generally consider Thailand a middle-income, developing nation. Its HIV infection rate stands at 1.5 percent of the total population. On the other hand, analysts point out that least developed nations such as neighboring Cambodia or even countries in Sub-Saharan Africa have adult HIV infection rates topping 30 percent. Critics also note that while Thailand, in 2004, pledged to provide HIV/AIDS medicines to its roughly 500,000 infected citizens, these plans faltered in the face of high drug prices. Thailand's GPO has also been charged with making ineffective HIV/AIDS drugs not meeting World Health Organization standards. Furthermore, critics point out that the military government began to shift government funding away from healthcare and toward military spending after its September 2006 coup.

Despite the uproar, many legal experts, non-governmental organizations, and even the Office of the United States Trade Representative agreed that Thailand's actions were legal under the TRIPS agreement. The Thai government had issued the licenses for public non-commercial use and provided notification to the pharmaceutical patent holders of their actions, fulfilling all its requirements under the TRIPS agreement. (Again, under Article 31(b), a WTO member nation may waive negotiations concerning the breaking of a patent in cases of public non-commercial use.) Thailand also defended its use of compulsory licensing, arguing that its decision to issue the licenses was not made lightly, and that the government had held deliberations for nearly two years. In addition, the government said that as healthcare costs have soared in the last two decades, Thailand had allocated an additional seven percent of its budget for this expense, but that “this increase [couldn't] keep pace with the prices of certain life-saving drugs.”

After Thailand had issued its compulsory licenses, Merck and Abbott Laboratories began to offer large price concessions for some of its drugs to other developing and least developed nations. (In Thailand, though, these price concessions hinge on the revocation of its compulsory licenses.) Analysts say that these companies have calculated that the long-term financial harm posed by nations issuing compulsory licenses could easily outweigh any financial losses incurred through price concessions. They also fear that other developing countries could follow Thailand's lead and issue their own compulsory licenses for a variety of drugs. In fact, Brazil is already in the process of issuing a compulsory license for Merck's Efavirenz, though it has not yet done so. The governments of Indonesia, India, and Kenya have also indicated that they are contemplating similar actions for other drugs, though some analysts suspect that they are using Thailand's example as a way to gain leverage in any future negotiations with pharmaceutical companies.

Not taking into account the economics of drug pricing?

Many health advocates hoped that the WTO's provisional agreement concerning compulsory licenses would not only help developing and least developed countries gain better access to expensive drugs, but that it would even lower drug prices in general. While Thailand was able to supply a portion of its population with a generic (and less expensive) version of an expensive AIDS drug, economists note that prices for these particular drugs are still generally very high in most other countries around the world. But they also point out that the WTO is not responsible for the pricing of these drugs, and that the 2003 provisional agreement did not even attempt to address drug pricing.

Instead, economists say that the pricing of drugs is still largely set by the pharmaceutical industry and market forces. They note, for instance, that differences in the drug markets in developed

and developing countries have translated into different prices for the same drugs. A drug company may charge a high price for a particular drug in an industrialized country simply because it believes the population is more affluent and will be able to afford market prices. On the other hand, that very same drug may cost less in a developing country because its population is less well-off. As a result, some analysts predict that more and more countries will view compulsory licenses as a bargaining chip to get lower prices (but only for particular high-priced drugs). They doubt that such licenses will affect the pricing of drugs in general only because, under the WTO agreement, a country must (in good faith) issue compulsory licenses in particular situations only.

In the case of least developed countries, public health analysts say that compulsory licenses may not even help them obtain needed medicines. They say that drug companies will generally carry out research and development only for drugs that will be profitable across different markets. While diseases such as AIDS have afflicted least developed countries, experts say that other diseases—including cholera, dengue fever, malaria, and tuberculosis—kill tens of millions more people every year, but that drug companies are no longer funding research for vaccines to treat such diseases, and, in many cases, are no longer even manufacturing such vaccines. They note that such diseases have been largely eradicated in industrialized countries, and that, as a result, the demand for such medicines is very low. In addition, drug companies may also believe that the costs of producing medicines to treat such diseases (which are predominantly prevalent in very poor countries) will outweigh any financial benefits because many poor countries will not be able to afford the costs of such medicines in the first place. While some point out that many drug companies offer free drugs for particular diseases to the poorest countries, they doubt such programs will encourage those companies to undertake additional research to develop better treatments. 🌐

Center newsletter wins prestigious award



The International Review was awarded the 2007 Gold Award for “Best Edited Organization Newsletter” by the publisher of

The Newsletter on Newsletters (NL/NL), which Time magazine

described as “the bible of the [newsletter] industry.” A distinguished panel of judges based its decision on several criteria, including whether the newsletter met the goals and needs of its readers.

The International Review began publication in the spring of 1999. The first issue was six pages in length. This issue is 48 pages long. Here are a few things that make our publication noteworthy:

- It is the only academic newsletter published by an ABA-accredited law school that reports on a wide range of contemporary international and comparative law issues.
- Most of our stories are written in plain English, yet still provide information that is legally accurate. This makes the newsletter's content accessible to non-specialists in international law and even to non-lawyers and the general public.
- Our stories try to provide sufficient background so that the reader can place the issues in a broader context.
- A subscription to *The International Review* is free, and its subscribers include every law professor and administrator in the United States who teaches or has an interest in international and comparative law.

KORUS: A trade agreement binding the United States and Korea?

In April 2007, the United States and South Korea concluded bilateral negotiations on a text for the world's broadest free trade agreement since the North American Free Trade Agreement went into force in 1994. Analysts say that the KORUS (or Korea-United States) free trade agreement, if implemented, would reduce trade barriers across a wide spectrum of goods and services in both countries, including the tightly closed legal services market in Korea. But analysts note that particular provisions in the KORUS agreement—and even free trade agreements in general—face domestic opposition in both countries. Some also point out that Congress now has the ability to amend the carefully crafted agreement, which could prevent its final passage in both countries. What is the status of the KORUS agreement, and what are its prospects for passage?

KORUS: Leading to a stronger trade relationship?

In June 2006, the United States and South Korea started their first round of talks on a KORUS agreement and concluded negotiations only 10 months later. South Korea—with a gross domestic product of nearly \$1 trillion in 2005—is currently the world's 10th largest economy and third largest in Asia, behind Japan and China. In 2005, it was the world's seventh largest exporter (\$278 billion) and importer (\$248 billion) of goods. Also, South Korea was the world's largest services exporter (\$40 billion) and sixth largest services importer (\$50 billion) in 2004.

Even before the conclusion of KORUS negotiations, South Korea and the United States were already major trading partners. In 2006, trade between the two countries was valued at nearly \$72 billion. South Korea is the United States's seventh largest trading partner. Major U.S. exports to South Korea include semiconductor chips, manufacturing equipment, aircraft, corn and wheat, and plastic, among other products. South Korea, on the other hand, is more economically dependent on the United States. In 2005, the United States was Korea's third largest trading partner (\$69.4 billion), second largest export market (\$43.2 billion), third largest source of imports (\$26.2 billion), and its largest supplier of foreign direct investment (\$3.75 billion).

Despite these strong economic ties, Korea and the United States still have in place major trade barriers which have protected certain sectors of their economies for decades, sometimes creating tensions in both countries. (Political analysts say that the two countries had quietly worked out some of these disagreements in order to present a unified front against North Korea.) While the KORUS negotiations failed to remove some of these long-standing barriers to trade, analysts say that the final agreement will substantially reduce other trade barriers and tariffs (also known as duties, which are essentially taxes imposed by a government on imports). But they also believe that the interpretation of many provisions in the agreement is still up for debate and could cause trade tensions in the future.

If KORUS takes effect, some economists predict that South Korea's economic growth will increase by 0.6 percent annually over the next 10 years. They also predict that KORUS will create 34,000 jobs due to a rise in trade volume and foreign investment, but that some 1,000 jobs will disappear in the agricultural industry. Korean consumers could also see savings benefits that some believe will exceed \$20 billion because of a fall in the prices of manufacturing, agricultural, and fisheries products. Analysts believe that low-income Koreans will be able to save money on food when the beef, pork, vegetables, and fruit markets gradually open to inexpensive, mass-produced U.S. food. At the same time, American citizens will be able to buy tariff-free (and lower-priced) Korean apparel, cars, appliances, and electronics.

Studies have estimated that potential gains to the United States economy would range from \$17 billion to \$43 billion. They also predict that the United States will export more to South Korea than it will import from that country. U.S. exports to South Korea are expected to rise by 54 percent, and U.S. imports from South Korea by 21 percent. KORUS will affect many different sectors in the economies of both countries. The following are only some examples.

Consumer Products and Industrial Goods

Under KORUS, nearly 95 percent of bilateral trade in consumer and industrial products will become duty-free within three years. Most remaining tariffs will be eliminated within five to 10 years. Once these tariffs are eliminated, the price of American almonds, for example, would decrease from \$4.29 to \$3.95; a 703-liter GE refrigerator from \$2,200 to \$2,000; and the bestselling American wine from \$80 to \$65 per bottle. Tariffs on most daily necessities such as toothpaste, perfume, and cosmetics will also be lifted within three years while those imposed on golf clubs, lobsters, and electric shavers will be eliminated completely within five years. For its part, the United States will remove (within five years) its duties imposed on South Korean liquid crystal display panels, computer monitors, and digital televisions.

Agriculture

The Office of the United States Trade Representative (USTR) pointed out that South Korea is one of the most protected agricultural markets in the world. But, once KORUS comes into force, over \$1 billion in U.S. farm exports to South Korea will become duty-free immediately. Currently, South Korea is the United States's fourth largest export market for agricultural products, including wheat, cotton, whiskey, and orange juice. USTR also said that most remaining tariffs and quotas will be phased out over the first 10 years of the agreement and create new export opportunities for American farmers and ranchers. However, certain products will continue to receive some degree of protection in South Korea. On oranges, the current tariff rate of 50 percent will be maintained during harvesting seasons.

During the other months, a 30 percent tariff will be levied for seven years. South Korea will also preserve current tariffs and quotas on beans and potatoes.

American officials also agreed to exclude rice from the final agreement. Korean negotiators worried that if the KORUS talks included commitments for greater market access for rice, then the country's politically influential (and heavily protected) farmers would oppose the entire agreement. Analysts note that rice is South Korea's biggest agricultural crop (and a basic food staple).

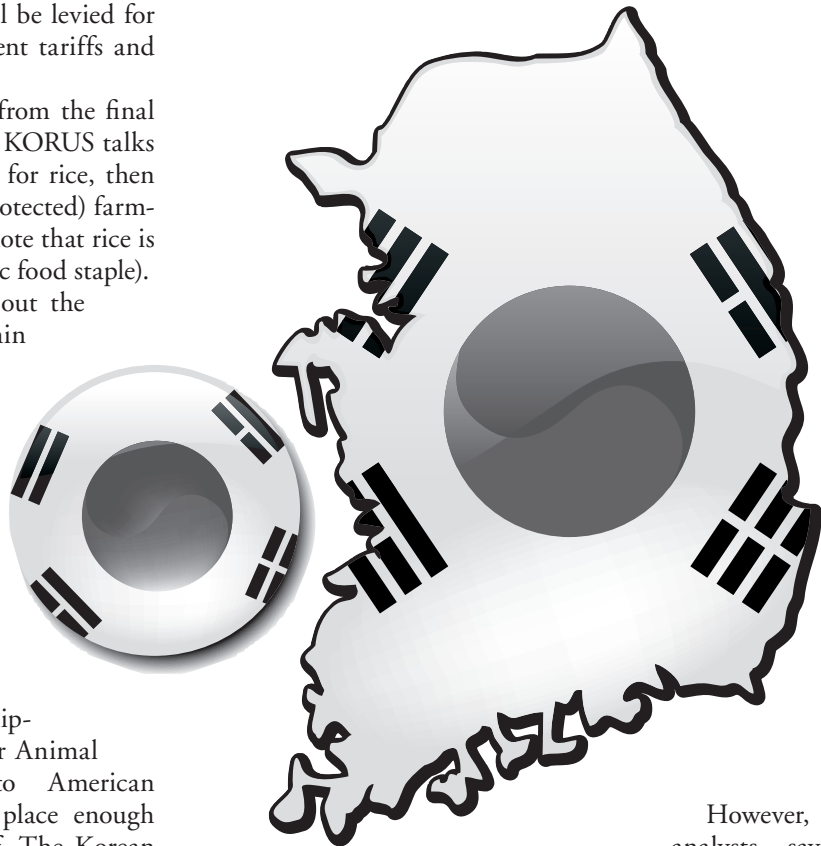
In return, South Korea will gradually phase out the current 40 percent tariff on American beef within 15 years. In 2003, that country imported \$790 million in American beef (about 10 percent of its overall food imports), making South Korea the third largest export market for U.S. producers. However, Korea banned American beef imports in December 2003 after cases of "mad cow" disease (which is carried in cow bone) were found in the United States. Korea temporarily allowed U.S. boneless beef imports to resume in 2006, but closed the market again after health officials found small bone fragments in beef shipments. In May 2007, the World Organization for Animal Health gave a "controlled-risk" status to American beef, meaning that the United States had in place enough safeguards to prevent the export of tainted beef. The Korean government later announced that it would soon resume U.S. beef imports.

Automobiles

During the KORUS talks, U.S. negotiators expressed concern about the large trade imbalance in bilateral automotive trade. While South Korean manufacturers sold nearly 800,000 cars in the U.S. market, U.S. companies sold only 5,000 cars in South Korea. Analysts say that this lopsided balance contributed to South Korea's \$13 billion trade surplus with the United States in 2006.

If the two countries approve KORUS, South Korea will immediately eliminate an eight percent tariff on U.S. cars, including non-American brands made in the United States. According to automotive experts, prices for American cars will decrease by around seven percent. The price of a Chrysler Sebring convertible, for instance, will drop to \$32,450 from \$35,450. The Ford Five Hundred will drop to \$39,740 from \$42,970. Non-U.S. brand cars made in the United States will get the same benefits as U.S. cars under KORUS. For example, prices for German cars made in the United States will decrease from between \$6,000 and \$7,000 depending on the specific model. A Toyota Camry or Honda Accord made in the United States will fall below \$30,000, almost eliminating the price difference with equivalent Korean cars.

Korea will also reduce special consumption taxes imposed on larger U.S. cars. In return, the United States will remove immediately a 2.5 percent tariff on Korean cars with small engines, and also phase out tariffs on larger engines over three years. In addition, the United States will lift a 25 percent tariff on Korean-made pickups and commercial vehicles within 10 years. Lastly, both countries will immediately remove duties on auto parts.



However, some analysts say that even if KORUS opens up the South Korean automotive market, U.S. companies may still face other obstacles. They believe that strong national sentiments will curb sales of American vehicles. Another hurdle is an image problem. Analysts say that wealthy Korean consumers have long preferred cars manufactured by so-called "prestigious" companies, including Mercedes-Benz, BMW, and Lexus. But most of all, many point out that American cars are too big for South Korea's congested traffic and narrower roads, and that high gasoline prices will make ownership of American cars (with its larger gasoline tank capacity) more expensive. (Gasoline is heavily taxed in South Korea and costs about \$9 per gallon.) On the other hand, analysts believe that smaller Japanese cars made in the U.S. will likely see a rise in sales due to the KORUS agreement. U.S. lawmakers also believe that non-tariff barriers (such as other taxes and fees) will still pose problems for American cars in the Korean market.

The agreement also includes a separate and expedited dispute settlement process specifically for auto-related measures, and even a separate "autos working group," which will alert the United States to any changes made by the Korean government concerning safety and environmental standards affecting the auto industry.

Kaesong Industrial Complex

As part of South Korea's "sunshine policy" (an approach taken by that government which seeks to reunify the divided Korean peninsula through market-driven strategies), South Korean companies have built factories in a North Korean city called Kaesong, which mainly employs North Korean workers. But talks concerning the classification of goods made in Kaesong became contentious.

South Korea wanted the United States to classify Kaesong-made goods as South Korean-made products. But the United States—which strongly opposes North Korea’s oppressive regime and its nuclear weapons program—argued that it did not want to support North Korea indirectly by purchasing products made in Kaesong or by giving that government any favorable trade preferences. Rather, it continues to favor an approach where North Korea would receive certain benefits only in return for making certain concessions, for example, on its nuclear weapons program.

The two sides decided to postpone resolving the Kaesong issue “at a later stage,” and, in the agreement, called for the creation of a “committee on outward processing zones in the Korean peninsula.” The committee would designate zones outside South Korea that could receive preferential treatment under KORUS, which could possibly include items made in Kaesong. In the meantime, while South Korea announced that Kaesong products could, “in principle,” be classified as being made in South Korea, the United States still insists that North Korean products would not make their way into American markets.

Korean Legal Service Market

Analysts say that, under current regulations, foreign law firms are prohibited from establishing offices in the Korean legal services market. But if KORUS comes into force, South Korea will open its legal market during a five-year phase. During the first phase (lasting the first two years), U.S. law firms will be able to open branch offices in Korea to provide advice only on U.S. and international law (and not domestic Korean law). During the second phase (the following two years), U.S. firms will be able to work on individual cases directly with their Korean counterparts and divide profits and fees. In the final phase (the fifth year), American firms will be able to form partnerships or joint ventures with Korean firms and hire local counsel who have passed the Korean bar exam. However, one Korean trade negotiator said that U.S. law firms are likely to face a 49 percent cap on joint ventures, hence preventing them from taking over management rights of Korean law firms.

In addition, under KORUS, American-licensed lawyers will be allowed to provide “legal advisory services regarding the laws of the jurisdiction in which they are licensed and public international law.” Currently, under the Korean Attorney-At-Law Act, foreign lawyers are not allowed to practice even the laws of their jurisdiction in South Korea unless they pass the Korean bar exam (which is given only in the Korean language) and then register with the Korean Bar Association. As a result, many foreign lawyers—who are in high demand in Korea, but are not fluent in that country’s language—work as “foreign legal consultants” rather than actual lawyers in Korean law firms. One analyst said that these foreign lawyers essentially practice the laws of their home jurisdictions, but that final transactions are completed or approved by Korean counsel.

Legal experts believe that such rules are designed to prevent more competition in the Korean legal services market, which has approximately 8,000 Korean lawyers, and where the largest firms employ around 300 people. Analysts say that large American law firms—some of which employ over 3,000 people and have extensive global experience in mergers and acquisitions, capital

markets, and cross-border transactions—will be able to lure away not only their clients operating in Korea (which include multinational corporations, financial institutions, and industrial conglomerates), but even Korean lawyers who may want to work for a U.S. firm. In fact, in a recent survey, 80 percent of Korea’s 30 largest companies said that, if the legal market fully opened up to foreign competition, they would hire a foreign law firm for certain transactions. Frequently cited reasons included unsatisfactory service rendered and expensive fees charged by Korean law firms.

If the United States and South Korea approve the KORUS agreement, some analysts predict that mid-sized Korean law firms will partner with their American counterparts in order to expand their presence in the legal market. In contrast, they believe that large Korean law firms will merge with other large Korean firms. However, some believe that any opening of the Korean legal market will not result in dramatic changes. They say that American law firms, if they decide to establish offices in Korea, are unlikely to establish expensive affiliations or joint ventures in the immediate future without first determining whether such partnerships are likely to be profitable.

Dispute settlement procedures

The Dispute Settlement Provision section of the KORUS agreement outlines how the United States and South Korea will resolve disputes concerning the interpretation or application of the agreement itself and in cases where one party believes that the other party’s action is inconsistent with its obligations under the agreement.

- The complaining party must first request “consultations” with the other party in which they will try to work out a mutually-agreeable solution to their dispute. If the parties fail to resolve the matter within 60 days, either party may refer the matter to a “Joint Committee.”
- If the matters are not resolved at the Joint Committee level, an actual dispute settlement panel will adjudicate the case. Within 180 days, the panel must present an initial report containing its findings and decisions. Each party may submit comments regarding the initial report. The panel may then modify its report, if necessary.
- The panel then presents a “final report,” which essentially is a ruling. Even at this point, the parties to a dispute may agree on a mutually acceptable solution.
- The panel may conduct a “compliance review” to determine whether the losing side to a dispute had complied with the panel’s ruling.

KORUS: The context of the proposed agreement

Economic experts say that if the United States does not implement the KORUS agreement, it could find itself at a competitive disadvantage in the Korean market in relation to other countries. They note that South Korea has already implemented free trade agreements with Chile and Singapore, and is currently pursuing negotiations with Japan and the European Union (EU). But other experts point out that South Korea is also under pressure to boost its national competitiveness. They note, for instance, the rapid aging of the South Korean workforce in addition to growing competition from the towering economies of China and Japan. In fact, say other analysts, South Korea’s president had

initiated the KORUS talks two years ago in order to jump-start South Korea's slowing economy. A KORUS agreement would also help South Korea stand out from its neighbors by becoming one of the first countries in the region to remove a wide spectrum of significant trade barriers with the United States. Furthermore, a successful deal with the United States could strengthen South Korea's negotiating position in free trade talks with the EU, Japan, and other countries in the region.


Although KORUS is primarily an economic agreement, political considerations pushed the two countries to pursue stronger trade ties. For example, one analyst said that the United States wants to use the KORUS agreement to help maintain its national security alliance with South Korea and also to influence that country's dealings with North Korea. The two countries have markedly different approaches in managing relations with North Korea, which recently declared that it possessed nuclear weapons. More specifically, while South Korea's has employed a "sunshine policy," the current U.S. policy seeks to isolate North Korea in order to discourage its nuclear projects, which many military analysts say could trigger an arms race in East Asia.

Other experts believe that the KORUS agreement will help the United States not only maintain an institutional presence in Korea, but also balance China's growing economic and political strength in East Asia. China has, for instance, already surpassed the United States as the most important export market for South Korea. China is also trying to establish stronger ties with the 10-member Association of Southeast Asian Nations (ASEAN) by trying to form an ASEAN+3 (China, Japan, and South Korea) arrangement, from which the United States would be excluded. Other commentators believe that South Korea—anticipating that the United States would begin to take much tougher trade stances against East Asia due to a huge trade imbalance with that region of the world—wanted to create better relations through a KORUS agreement. And some hope that a successful KORUS agreement could create a "domino effect" that leads other countries, including Japan, to form similar agreements with the United States.

Political analysts point out that the United States and Korea completed negotiations on a KORUS agreement in only 10 months because the United States was under pressure to complete at least one significant free trade agreement before the expiration of the president's trade promotion authority (also popularly known as "fast-track" authority) on July 1, 2007. This allows the president to negotiate trade agreements and submit them for an up-or-down vote to Congress without any amendments. Many believe that, without the 10-month window, negotiations would still be going on today. In fact, other bilateral free trade agreements have taken years to negotiate.

Analysts say that President Bush faces an uphill battle in convincing U.S. congressional leaders to approve the KORUS agreement. Lawmakers from states representing the auto industry, beef exporters, and some agricultural producers are already opposing the pact. One member of the House of Representatives cited Korea's refusal to open fully its auto and rice markets. A high-ranking member of the Senate said that he will vote against the trade agreement unless Korea completely lifts its ban on U.S. beef. Others believe that KORUS will lead to higher trade deficits, a loss of American jobs, and hurt an already-weak U.S. auto industry. Political analysts also note that many lawmakers—

especially those representing manufacturing states—have close ties to trade unions opposed to trade liberalization. They point out that, with the presidential elections around the corner, Congress is unlikely to vote for the KORUS agreement or even renew the president's fast-track authority. In fact, some presidential candidates have recently announced that they will oppose passage of the KORUS agreement.

South Korea faces identical problems. Political analysts note that because South Korea will hold its presidential election in December 2007, Korean lawmakers are more sensitive to the concerns of influential voters such as farmers and trade unions generally opposed to free trade agreements. As a result, they are largely taking passive stances on the KORUS agreement, even though 58.5 percent of all Koreans support its passage, according to a recent poll. 

C.V. Starr Lecture

November 7, 2007

New York v. the United Nations: The Implications of Unpaid Property Taxes



John J.P. Howley '89,
Partner, Kaye Scholer
LLP

In 2003, the City of New York initiated a lawsuit against the Permanent Missions of India and Mongolia to the United Nations to collect unpaid property taxes. Both nations said that American courts did not have the jurisdiction to review such cases. In June 2007, the U.S. Supreme Court decided that federal courts did have such jurisdiction. What are the implications of this decision? Will it allow the City to move forward with its lawsuit against India and Mongolia? John J.P. Howley '89—who argued on behalf of the Permanent Missions of India and Mongolia at the Supreme Court—will analyze the Court's majority and dissenting opinions, and discuss these and other questions.

Visit www.nyls.edu/CIL for more information and registration.

The Outsourcing of Torture: “Extraordinary rendition” still shrouded in secrecy

In recent years, human rights groups have claimed that, in order to obtain intelligence information, the United States knowingly transferred suspected terrorist detainees to allied countries which employ torture during interrogations. They have also claimed that certain international treaties and even American domestic law prohibit this practice, which is generally called “extraordinary rendition.” (One commentator derisively referred to it as “the outsourcing of torture.”) But administration officials, who have acknowledged the existence of such a program, say that they do not condone torture. They also argue that federal and international law does not prohibit outright the transfer of individuals (such as suspected terrorists) to other countries for harsh interrogation, which they assert does not constitute torture. While human rights groups have demanded that the government reveal more information about (and eventually curtail) extraordinary renditions, legal experts say that a recent court decision and the secretive nature of the “war on terror” have hampered efforts to shed light on this controversial practice.

Different renditions of renditions

Law enforcement officials from various countries have long engaged in a practice called rendition whereby a country surrenders or transfers an individual (such as a criminal or fugitive) within its jurisdiction to the custody of another country.

Extradition: One form of rendition is called extradition, which is a formal legal process of transferring an individual to another country so that he can specifically answer certain charges against him or stand trial. Currently, there is no single international treaty that provides nations with guidelines in carrying out extraditions. Instead, many nations have negotiated bilateral extradition treaties, which establish certain procedures and safeguards for this transfer process. Some treaties allow, for instance, extradition only for crimes specifically listed in the treaty or for crimes that are punishable in both countries. Others allow courts to review an extradition and also give opportunities to individuals to challenge their transfers. Many countries (including those in Europe) will block an extradition if the detained individual may be subject to the death penalty in the requesting country. According to one legal expert: “Extradition treaties became the predominant means of permitting the transfer of persons from one State to another to answer [for instance] charges against them.”

The United States has signed bilateral extradition treaties with over 100 nations. Under American laws, a judge must convene a hearing to determine whether an extradition complies with the terms of an extradition treaty between the United States and the country requesting the extradition. As of 2007, it has not established extradition treaties with China, Russia, most countries in Africa, and many countries in the Middle East. In the absence of a formal extradition treaty, the United States has instead signed other bilateral agreements which, analysts say, facilitate the transfer of criminals from one jurisdiction to another.

Some have alleged that, in order to obtain intelligence information, the CIA has intentionally been transferring and continues to transfer suspected terrorists in its custody to certain allied countries . . . to face interrogation using techniques (such as torture) which would violate federal and international standards.

Extraordinary rendition: In addition to extradition, countries have also used another form of rendition called extraordinary rendition whereby a government carries out a transfer of an individual without using established procedures and safeguards set out, for example, in an extradition treaty. (Legal analysts say that the term “extraordinary rendition” does not appear in any federal law, but has been used informally for many years.) One legal expert said that people “subject to this type of rendition typically have no access to the judicial system.” According to some analysts, the United States has engaged in extraordinary renditions since the 1980s, and this practice soon became a part of American counterterrorism efforts in the 1990s. A former director of the United States Central Intelligence Agency (CIA) testified that his agency had “rendered 70 terrorists to justice around the world” even before the terrorist attacks on September 11, 2001.

Controversy behind extraordinary rendition

CIA renditions have recently generated controversy and heated debate because some have alleged that, in order to obtain intelligence information, the CIA has intentionally been transferring and continues to transfer suspected terrorists in its custody to certain allied countries—including Afghanistan, Egypt, Iraq, and Jordan—not for the purpose of standing trial or answering certain charges, but to face interrogation using techniques (such as torture) which would violate federal and international standards. (U.S. laws prohibit Americans from employing torture and harsh techniques during interrogations.) In June 2005, Italy issued arrest warrants for 13 American intelligence operatives for allegedly transferring a Muslim cleric from Italy to Egypt (a U.S. ally in the “war on terror”) without the permission of Italian authorities.

While some U.S. officials have acknowledged that the United States had continued and continues to carry out extraordinary renditions in the years following the September 11 terrorist attacks, they adamantly claim that the receiving countries had given

sufficient assurances that transferred individuals would not be subject to torture. Legal experts say that there is little publicly available information on the actual practice of and procedures behind extraordinary rendition or even the identities of individuals who are or had been subject to this controversial procedure.

Extraordinary rendition is different from another practice informally known as “secret detention” whereby the CIA itself detains and interrogates suspected terrorist detainees in secret locations around the world, and does not acknowledge whether it even has certain individuals in custody. (The United States, in September 2006, acknowledged that the CIA is operating such a program. Human rights groups have described the secret detention program as “enforced disappearances.” (See *Enforced disappearances convention: A casualty of the war on terror?* on page 32 for more information.) But as in the case of extraordinary renditions, there is little public information concerning the actual operations of the secret detention program and the individuals who are or were in its custody. U.S. officials claim that these detentions are being carried out in accordance with federal law, and that revealing the names of these detained individuals could alert terrorists around the world, which could then harm national security.

Legal experts say that there is no international treaty whose specific purpose is to govern the actual practice of extraordinary rendition. Instead, they say that certain provisions in existing international treaties and domestic laws may constrain certain aspects of extraordinary rendition (the most salient of which might have involved the possible torture of suspected terrorist detainees after they had been transferred to another country).

Deterring extraordinary detentions: Convention against Torture

The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (or CAT) seems to “impose the primary legal restrictions on the transfer of persons to countries where they would face torture.” Entering into force in 1987, the overall purpose of the CAT is to prohibit its State Parties from inflicting torture. More specifically, Article 2 says that each State Party “shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.” (It defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . .”) Article 16 also obligates State Parties to “prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment, which do not amount to torture.” In addition, Article 2 says that its State Parties may not invoke any exceptional circumstances whatsoever to justify torture, including “a state of war or a threat of war, internal political instability, or other public emergency.” Furthermore, the CAT requires authorities to criminalize all acts of, participation in, or attempts to carry out torture within its jurisdiction.

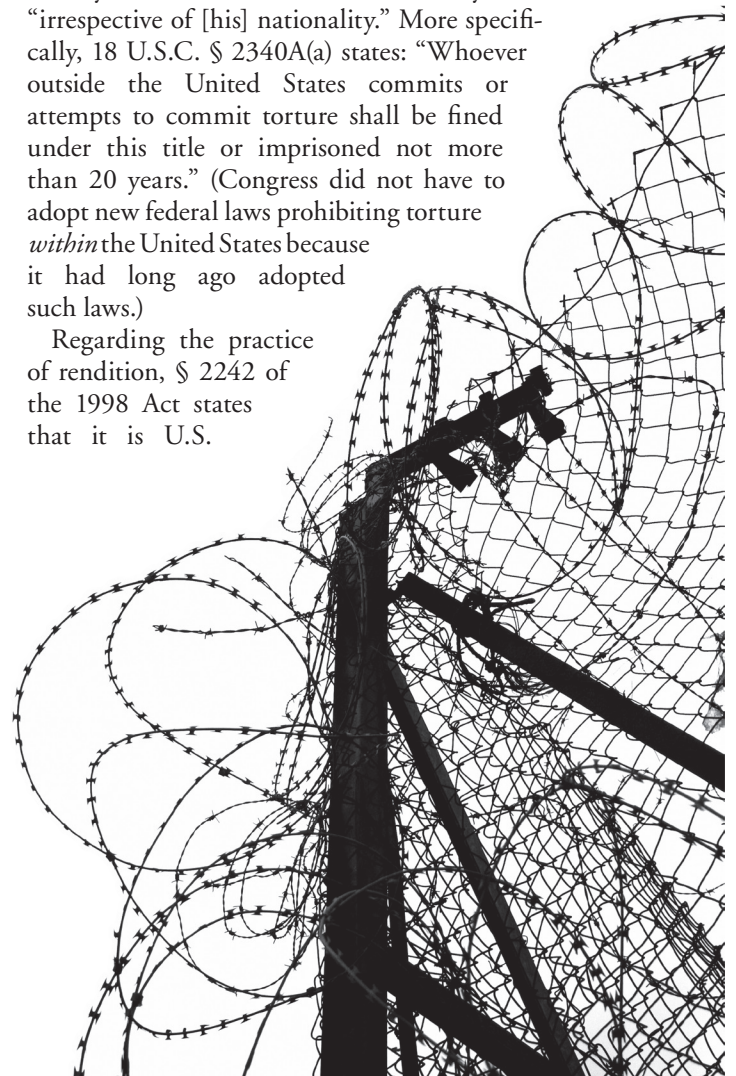
As of June 2007, over 70 countries had ratified (and are thus legally bound to comply with the terms of) the CAT. The United States ratified the treaty in 1994. Every country in the Middle East and neighboring areas has also ratified the CAT except India, Iran, Oman, Pakistan (an American ally in the “war

on terror”), Sudan, and the United Arab Emirates (another U.S. ally). But political analysts believe that many State Parties to the CAT are not faithfully carrying out their obligations under the treaty whose only monitoring mechanism is the submission of compliance reports by the State Parties themselves. The administrators of the treaty do not have the power to enforce its terms.

While the purpose of the CAT is not to regulate directly the various forms of rendition, the treaty does contain language which could affect the actual implementation of these practices. For instance, Article 3 states: “No State Party shall expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” In order to determine whether there are grounds for believing that an individual would be subject to torture, the CAT says that a State Party must take into account “relevant” considerations such as another country’s human rights practices before rendering an individual abroad.

In order to implement the CAT and carry out its various obligations under the treaty, the United States enacted the Foreign Affairs Reform and Restructuring Act in 1998 (or the 1998 Act), which created new domestic regulations that would prohibit and criminalize the use of torture *outside* of the United States in territories under its control when such acts are carried out by an American national on any victim “irrespective of [his] nationality.” More specifically, 18 U.S.C. § 2340A(a) states: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years.” (Congress did not have to adopt new federal laws prohibiting torture *within* the United States because it had long ago adopted such laws.)

Regarding the practice of rendition, § 2242 of the 1998 Act states that it is U.S.



policy “not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” The 1998 Act also requires all “relevant federal agencies”—which experts say would presumably include the CIA—to adopt their own regulations to comply with the act.

Loopholes in the CAT?

While human rights groups have long applauded the CAT (and what seems to be its absolute prohibition on torture and other harsh techniques), critics say that some language in certain provisions seem to provide loopholes. “The plain language of certain CAT provisions may . . . permit parties in limited circumstances to transfer person to countries where they would likely face torture,” said one expert, thus possibly enabling them to carry out an extraordinary rendition.

The debate concerning the legality of the extraordinary rendition program continues today. But experts say that information concerning the actual workings of the program still remains secret. They also note that a recent court decision could continue to shroud that program in secrecy.

CAT Article 3, for example, prohibits the transfer of a person to another country where there are “substantial grounds” for believing that he would be subject to torture. But in order to determine whether such ground exists, a country must take into account “all relevant considerations,” including a country’s human rights practices. Yet the treaty does not provide any further information. “Article 3 does not provide guidelines for how these considerations should be weighed in determining whether substantial grounds exist to believe a person would be tortured in the proposed State,” said a legal analyst. In a similar fashion, in deciding whether to transfer an individual to another country, U.S. regulations (such as 8 C.F.R. 208.18) allow authorities to take into account “assurances” that are deemed “sufficiently reliable” from a receiving country that an individual will not be subject to torture. But, as in the case of Article 3, these regulations don’t provide specific guidelines on how to weigh these assurances, which critics believe could open the door for countries to carry out their treaty obligations in bad faith, especially in cases where authorities believe that a detained suspected terrorist may, for instance, have critical information on pending attacks.

In addition, analysts note that while Article 3 clearly prohibits a State Party from extraditing a person to another country which may practice torture, it does not explicitly prohibit sending that person to a country that uses interrogation techniques that fall

short of torture. Critics point out that CAT does not define terms such as “cruel, inhuman, or degrading treatment or punishment” (acts which are prohibited in Article 16), and that State Parties could be tempted to violate the spirit of the treaty. What kinds of regulations do the CIA and its agents follow when carrying out that agency’s renditions? Legal scholars say that, because these regulations are not publicly available, they cannot determine the extent of the CIA’s compliance with the CAT and the 1998 Act.

Deterring extraordinary detentions: The Geneva Conventions

Other analysts say that provisions in other existing treaties may also constrain the transfer of people to countries where they are more likely than not to be tortured. For example, the four Geneva Conventions, completed in 1949, remain the most comprehensive set of laws governing the treatment of certain classes of people such as prisoners-of-war and civilians during times of conflict or in “post-conflict occupied territory.” (It does not specifically mention groups such as terrorist organizations.) Under Common Article 3 of each convention, signatories are prohibited from carrying out “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and also “outrages upon personal dignity, in particular, humiliating and degrading treatment” on detainees. Article 31 of the Fourth Geneva Convention (which governs the treatment of civilians during times of war) says that “no physical or moral coercion shall be exercised against [civilians], in particular to obtain information from them or from third parties.” Article 49 of that convention also prohibits the forcible transfer of civilians to another country regardless of the motive. Violations of some of these provisions could be considered war crimes punishable by prison terms or even death.

In recent years, government officials and human rights groups have debated whether the protections under the Geneva Conventions are applicable to terrorist detainees captured by U.S. authorities. In a 2006 ground-breaking decision called *Hamdan v. Rumsfeld*, the United States Supreme Court decided that Common Article 3 of the Geneva Conventions did provide certain (yet limited) rights to terrorist detainees captured during combat that can be enforced by American courts. Analysts say that this could potentially open the United States to charges that it had violated certain provisions of Common Article 3 by rendering a person to another country where he could be tortured.

Lifting the veil covering extraordinary rendition?

The debate concerning the legality of the extraordinary rendition program continues today. But experts say that information concerning the actual workings of the program still remains secret. And analysts note that a recent decision in a lawsuit concerning the extraordinary rendition program continues to shroud that program in secrecy. According to Khaled El-Masri, who is a German citizen of Lebanese descent, authorities in Macedonia had detained and interrogated him in December 2003 about supposed ties to terrorist groups, which he denied. Mr. Masri then alleged that members of a CIA “black renditions” team had flown him from Macedonia to a CIA-run facility in Afghanistan to interrogate him further. He claimed that his interrogators had beaten him. Later, after realizing that they may have abducted the wrong person, Mr. Masri’s captors released him in Albania in May 2004.

In December 2005, Mr. Masri filed a civil complaint (*Khaled El-Masri v. George Tenet, et. al.*) in a U.S. district court against the former director of the CIA, certain unknown CIA agents, and several corporations and contractors for their alleged participation in what he now believes to be the CIA's extraordinary rendition program. Mr. Masri alleged that, by knowing that he would be treated harshly under that program, the CIA director and his unidentified agents had violated the Due Process Clause under the Fifth Amendment of the U.S. Constitution, which prohibits individuals acting on behalf of the government from depriving "any person of liberty in the absence of legal process," and also subjecting "any person held in U.S. custody to treatment that 'shocks the conscience.'" Mr. Masri also filed his lawsuit against the defendants under the Alien Tort Statute (codified at 28 U.S.C. § 1350), which says that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations of a treaty of the United States." He claimed that his treatment in the extraordinary rendition program had violated "international legal norms prohibiting cruel, inhuman, or degrading treatment." (He did not claim that the United States had violated its obligations under the CAT.)

In March 2006, the United States asked the district court to dismiss the lawsuit (without reviewing the merits of or arguments behind the case) by invoking a doctrine called the "state secrets privilege," an action whereby the government may—with the permission of a court—block access to what it believes to be secret information which, "if disclosed, would adversely affect national security," and would also result in the "impairment of the nation's defense capabilities, and disclosure of intelligence-gathering methods or capabilities," among other possible injuries. In the current case, the government argued that Mr. Masri's lawsuit involved "allegations of a clandestine intelligence program" (including its means and methods, and also the alleged participation of other foreign intelligence agencies and countries). If the court allowed the lawsuit to proceed, the government would have to admit or deny various claims (for example, during discovery), which could then hurt national security by alerting enemies about the actual workings of the extraordinary rendition program.


When the government invokes the state secrets privilege, a court must first determine whether that assertion of privilege is valid. "Courts must not blindly accept the Executive Branch's assertion of [the state secrets privilege] but must instead independently and carefully determine whether . . . the claimed secrets deserve the protection of the privilege," said one court. If the claim is not valid, a court will simply deny the government's motion for dismissal. On the other hand, if the court finds that the government does have a valid claim, it must then determine whether that privilege requires the outright dismissal of the case or whether it can proceed using safeguards to protect the state secrets at hand.

Analysts say that invoking the state secrets privilege has long aroused concern in legal circles. While they say that there certainly is a need for a state secrets privilege to prevent the release of information that could damage national security, experts also note that the frequent invocation of that doctrine could hurt the administration of justice and undermine public confidence in the judicial system by preventing a court from even weighing the claims of a lawsuit where the government is a defendant. Because of

concerns that the government could abuse this doctrine to hide, for example, embarrassing or damaging information not related to national security, the Supreme Court (in a 1953 case, *United States v. Reynolds*) created rules on how a court must determine the validity of a government's claim in asserting the state secrets privilege. During his lawsuit, Mr. Masri said that the government could not claim the state secrets privilege in trying to restrict access to information concerning the extraordinary rendition program for use in the case. He argued that the existence of such a program was already public knowledge and widely reported by the media, and that even the government had acknowledged its existence. Therefore, information concerning the extraordinary rendition program could not qualify as a state secret deserving of protection.

In May 2006, a United States district court granted the government's motion to dismiss Mr. Masri's case without examining the underlying claims. Using the rules established in the *Reynolds* case, the court determined that the government did validly claim the state secrets privilege. It said the government adequately showed—in a classified document labeled "Judge's Eyes Only"—that disclosing information concerning the extraordinary rendition program would hurt national security. The court acknowledged that while the public generally knew of the existence of an extraordinary rendition program, the intimate workings of such a program (including its procedures, regulations, budget, staffing, and participation of other countries) were still government secrets. "A general admission [of the program] provides no details to the means and methods employed in these renditions . . . Instead, the government seeks to protect from disclosure the operational details of the extraordinary rendition program, and these details are [in the court's opinion] validly claimed as state secrets," said the district court.

After it concluded that the government had validly claimed the state secrets privilege, the court then determined whether it should dismiss the case to prevent disclosure of information concerning the program or whether the parties would be able to litigate the case by adopting safeguards to protect the sensitive evidence. The court ruled that because "the very subject of the litigation is itself a state secret," it had no choice but to dismiss the case. In other words, because the case itself was about Mr. Masri's alleged treatment in the extraordinary rendition program, any litigation would require the government to answer specific questions about the actual workings of that program, and such disclosures would then hurt national security. The court also said that special safeguards to protect such information "are plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets." It then concluded: "El-Masri's private interests must give way to the national interest in preserving state secrets. The United States' motion to dismiss must therefore be granted."

But keeping in mind that it had not addressed Mr. Masri's alleged claim of abusive treatment in the extraordinary rendition program, the court wrote that its decision "is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations." It also added that if his allegations were essentially true, then "all fair-minded people . . . must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy." In March 2007, an appeals court upheld the district court's decision. 

“Enforced disappearances” convention: A casualty of the war on terror?

For several decades, human rights advocates have urged governments around the world to stop a practice where their agents and supporters would arrest and secretly detain political opponents, and then later refuse to disclose any information concerning their fates and whereabouts. These so-called acts of “enforced disappearances” have claimed what analysts believe are tens of thousands of victims all over the world, and still continue to this very day. Recently, the United Nations has been urging its member states to sign and ratify a global treaty which would prohibit governments from carrying out enforced disappearances. While many hope that this treaty will help to curb this long-running practice, others fear that the current global war against terror will dampen wider support.

Without a trace?

According to human rights groups, an enforced disappearance occurs when a person is arrested, abducted, or detained by state actors (such as government security forces) or organized groups (including paramilitary groups and even private individuals) who are acting on behalf of or with the support of the government. These state actors and groups then refuse to “disclose the fate or whereabouts of the persons concerned,” and, in many instances, even deny or refuse to acknowledge that it has someone in custody—all in an effort to deny that person access to any legal protections.

Critics say that governments and their supporters have carried out (and continue to carry out) enforced disappearances against political opponents and other individuals whom they consider threats to the interests of the state. Human rights groups say that victims are usually detained and sometimes tortured for months (or even years) in undisclosed locations within a particular country. In many cases, government agents kill those in custody and later dispose of the bodies and other evidence, which then allow them to deny that they had ever held a particular person in question. Individuals who are not killed, but are later released, usually suffer from long-term physical and psychological damage, according to human rights advocates. They also note that those who “disappear” are, in many cases, the head of a household, and that their absences not only create mental anguish for their families and relatives, but also economic hardship. Opponents of enforced disappearances say that many governments have carried out such acts because doing so creates a climate of fear, which, in turn, discourages domestic protest and unrest.

Analysts say that enforced disappearances also deny their victims many basic legal rights because these acts are undertaken “outside the protection of the law.” They note that those who are detained cannot, for example, contest any charges against them or ask a court to review their detention because a government may simply deny that it even has a particular person in custody. As a result, those subject to enforced disappearances are “subject to the whim of their captors” and are placed “in a situation of complete defenselessness,” said one legal expert. In addition, these

acts usually involve torture and other coercive acts, which then violate a person’s right not to be subjected to cruel, unusual, and degrading treatment, according to many existing human rights treaties. In fact, one analyst said that enforced disappearances have historically “been a gateway to abuse.”

Enforced disappearances deny their victims many basic legal rights because these acts are undertaken “outside the protection of the law.” Those who are detained cannot contest any charges against them because a government may simply deny that it has a particular person in custody.

The consequences of carrying out enforced disappearances are considered so harsh that human rights groups and international legal experts consider such acts to be crimes against humanity (under certain circumstances), bringing them to the same level as other grave crimes, including war crimes, genocide, and torture.

Political analysts say that Operation Condor—where the military governments of several countries in South America (most notably Argentina, Brazil, Chile, and Uruguay) carried out a coordinated campaign during the 1970s and early 1980s against political opponents—has become one of the most well-known episodes of nations carrying out enforced disappearances. Human rights groups say that, during this campaign, these military governments had arrested, tortured, and then killed tens of thousands of victims, and that their bodies and whereabouts have yet to be determined. Other analysts have documented many other instances where governments (and their supporters) had carried out (or continue to carry out) enforced disappearances in locations such as Northern Ireland, Algeria, Egypt, and Iran. Historians also say that enforced disappearances took place extensively in Nazi Germany and the former Soviet Union.

Past efforts against enforced disappearances

Legal experts note that there has long been much activity at the global level to confront the practice of enforced disappearances. For example, in 1992, the United Nations passed its Declaration of the Protection of All Persons from Enforced Disappearances, which views enforced disappearances as an “offense to human dignity,” and calls on all UN member nations to prohibit such acts. The United Nations had also established a Working Group on Enforced or Involuntary Disappearances in 1980 whose main



goal is to “assist relatives of disappeared persons to ascertain the fate and whereabouts of their missing family members.” After collecting information from these families, the working group transmits a report to the government in question and requests an investigation into the matter. The Inter-American Convention on Forced Disappearance of Persons, which entered into force in 1991, also calls on its signatory countries to prohibit acts of enforced disappearances. Article 7 of the Rome Statute of the International Criminal Tribunal states that the tribunal has jurisdiction to prosecute “enforced disappearance of persons” as a crime against humanity when these acts are “committed as part of a widespread or systematic attack directed against any civilian population.”

But critics note that, in practice, these agreements have not been very effective in stopping these acts. They note that, for example, the UN Working Group does not have any special powers to compel a government to carry out an investigation into alleged cases of enforced disappearances. The UN itself said “despite various efforts by the Working Group to remind Governments of their obligations to implement the provisions of the Declaration . . . very little progress has been made in practice.” Others point out that the 1992 UN declaration is not a legally-binding treaty, but, instead, an aspirational document that calls on its members to work toward eliminating acts of enforced disappearances. Still others note that the scope of the Rome Statute covers only those countries that have voluntarily agreed to abide by the provisions of that agreement, but that many dictatorial countries have refused to sign it. The same limits apply to Inter-American Convention, which applies only to those countries in Central and South America that have signed the treaty.

Analysts say that while there were existing treaties that addressed certain practices carried out during an enforced disappearance, there weren’t (until recently) any treaties that addressed the practice of enforced disappearances itself or spelled out the explicit obligation of states regarding this act. The United Nations Convention against Torture, for example, prohibits only the use of torture, which is a practice that is usually carried out during an enforced disappearance. In addition, the International Covenant on Civil and Political Rights states that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release,” though it did not address this right within the context of an enforced disappearance.

A new treaty to curb disappearances

In 2001, the member states of the UN began talks on a global treaty specifically to address enforced disappearances. The General Assembly, in December 2006, unanimously adopted a text for an agreement called the International Convention for the Protection of All Persons from Enforced Disappearances, and opened it for signature in February 2007. (When the UN adopts a text for a certain treaty, it simply shows that the member states have reached agreement on the actual wording of its main provisions. It does not commit a signatory country to carry out those provisions. When a legislature in a signatory formally ratifies a treaty, it promises to abide by the treaty’s provisions.) The convention’s main provisions include the following:

- Article 1 of the treaty states that “no one shall be subjected to enforced disappearance,” and that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”
- Article 4 requires a State Party to pass domestic laws that criminalize these acts.
- Under Article 17, a country must “guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty.” It also requires a State Party to maintain up-to-date information on detained individuals, including the identity of the person, the date, time, and place where the person was deprived of liberty; the authority that ordered the deprivation of liberty; and the place where the individual is being held.
- Under Article 26, State Parties must create a Committee on Enforced Disappearances—whose members shall consist of “ten experts of high moral character and recognized competence in the field of human rights”—to carry out the functions of the convention. State parties must also submit reports to the committee describing what measures it had undertaken to comply with its obligations under the convention.
- Private parties may request that the committee seek more information from a particular State Party concerning the situation of a disappeared person. While the committee doesn’t have any special powers to compel any information from a State Party, the convention says that “the committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved.”

While 57 countries have signed the treaty as of September 2007, no country has yet ratified it. It will come into force when it is ratified by at least 20 countries. Some legal analysts have voiced doubts about the potential of the convention to stop enforced disappearances. They note that it does not include an enforcement mechanism (i.e., a way to compel a country to abide by its provisions). But supporters believe that when enough countries ratify the convention, it will create a momentum where prohibitions against enforced disappearances will become generally accepted in practice in the international community.

Will the “war on terror” hinder the convention?


Still, others believe that support for the convention faces a major obstacle in the form of the “war on terror,” which does not include a single enemy located in a particular country and where fighting does not take place on a traditional battlefield, but, instead, could occur in civilian centers anywhere. Analysts note that several countries involved in the war on terror—including Britain, Germany, Italy, and Spain—have refused to sign the convention. They also point out that the United States had also declined to sign the treaty, saying that the final wording of the text “did not meet [its] expectations.”

Political commentators believe that the United States did not sign the convention because doing so could undermine its current policy of holding terrorist suspects in secret detention centers currently operated by the Central Intelligence Agency (CIA). (Article 17 of the convention states that “no one shall be held in secret detention.”) In 2006, the United States announced that it was, indeed, holding terrorist suspects around the world

Political commentators believe that the United States did not sign the convention [banning enforced disappearances] because doing so could undermine its current policy of holding terrorist suspects in secret CIA detention centers.

(some for as long as four years), but refused to give out any further information on their identities and whereabouts, or even if had certain people in custody. Officials argued that doing so would undermine counterterrorism efforts. In defending the CIA detention program, others say that, during times of war, the United States may hold and interrogate detainees during the entire length of the conflict. Opponents of the treaty have also argued that the strict prohibition on enforced disappearances should include exceptional circumstances such as times of war (including what they say is a war against terrorists), but note that Article 1 of the convention does not include any exceptions.

Critics of the United States say that its secret detention of suspected terrorists (which they say are essentially enforced disappearances) would violate the terms of the convention if the United States was a party to that agreement. They also believe that the CIA program also violates many terms of the Geneva Conventions, which are a series of treaties that provide certain protections for different classes of people (such as prisoners-of-war and civilians) during times of conflict. For example, critics note that the Third and Fourth Geneva Conventions say that organizations such as the International Committee of the Red Cross “shall have permission to go to all places where prisoners-of-war [or civilians] may be, particularly to places of internment, imprisonment and labor, and shall have access to all premises occupied by prisoners-of-war [or civilians].” But analysts note that the United States have refused such requests, citing national security reasons.

Civil libertarians and human rights advocates have voiced strong doubts about whether the United States has provided these detainees with any legal protections, though government officials have insisted that the detentions have complied with international law. But various news sources have reported that suspected terrorists held in the CIA prisons—allegedly located in areas across Eastern Europe—have been subjected to techniques that could constitute torture. While a report by the United States Senate said that the CIA detention program “has led to the identification of terrorists and the disruption of terrorist plots,” it recommended that the United States “continue to evaluate whether having a separate CIA detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interests” of the country. As of September 2007, the United States and many of its allies have refused to sign the convention. (For more information on the CIA’s other activities, see “*The Outsourcing of Torture*” on page 28.) 

International Law News Roundup

INTERNATIONAL CRIMINAL COURT:

A better definition for “crime of aggression”?

How precise does a definition have to be in the practice of law? Legal scholars say that the wording for a definition can have wide policy implications, especially in the field of international law. In many instances, different parties come to agree on a definition for specific terms, but only after several rounds of negotiations. After the United States and its coalition allies invaded Iraq in March 2003 without obtaining explicit approval from the United Nations Security Council, many critics accused the United States of committing a “crime of aggression.” But what exactly does this term signify?

For the past several decades, politicians and policymakers have used the term “aggression” in varying contexts and for different reasons, but could not reach a consensus on a single definition. In 1974, the United Nations General Assembly passed Resolution 3314 (XXIX), which defined aggression as “the use of armed forces by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” It also stated that “no consideration of whatever nature—whether political, economic, military, or otherwise—may serve as a justification for aggression.” Furthermore, Resolution 3314 listed certain acts which (under relevant circumstances) may qualify as aggression, though the list is not exhaustive and could include other acts in the future:

- “The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from invasion or attack;
- “Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- “The blockade of the ports or coasts of a State by the armed forces of another State;
- “The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.”

But experts point out that the resolution itself only tries to define the term aggression, and did not explicitly criminalize acts of aggression or impose sanctions to punish a nation that carries out such acts. They also say that because this definition was vaguely worded, it did not have immediate implications in the practice of international law. In the following years, human rights groups began a campaign to encourage nations to agree on a more specific definition for aggression, and also to criminalize and punish these acts under certain circumstances.

These efforts came closer to reality when, in July 2002, the Rome Statute of the International Criminal Court came into force and created (as the treaty title suggests) the International Criminal Court (ICC), which is the world’s first permanent tribunal with the legal authority to prosecute only “the most serious crimes of concern to the international community as a whole,” including genocide, crimes against humanity, and war crimes.

Article 6 of the Rome Statute defines genocide as those acts committed with the “intent to destroy or harm, in part or in whole, a national, ethnical, racial or religious group.” Article 7 defines crimes against humanity as certain acts—include murder, extermination, enslavement, torture, rape, slavery, or persecution—committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” War crimes, as defined in Article 8, are grave breaches of the Geneva Conventions and “other serious violations of the laws and customs applicable in international armed conflict.”

For the past several decades, politicians and policymakers have used the term “aggression” in varying contexts and for different reasons, but could not reach a consensus on a single definition. The International Criminal Court is currently drafting a working definition for that term.


The ICC also has jurisdiction to prosecute “the crime of aggression.” But the Rome Statute does not define this term. Political observers believe that the States Parties were unable to include a specific definition at the time they adopted the Rome Statute in 2002 because it was (and remains) a controversial term, and attempts to reach agreement would have delayed the adoption of the entire treaty. (Some feared, for instance, that a broad and vaguely worded definition could allow politically-motivated prosecutions, and that further negotiations were necessary to avoid such potential problems.) Instead, Article 5(2) says that “the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” (Articles 121 and 123 list the procedures to amend and review the Rome Statute, respectively.) When antiwar and human rights groups, in February 2006, formally called on the ICC to investigate whether the United States had committed a crime of aggression when it invaded Iraq in 2003 without approval from the Security Council, the ICC Chief Prosecutor rebuffed their efforts and concluded that, because the Rome Statute had not yet defined the term “crime of aggression,” he could not exercise jurisdiction over the invasion.

In 2002, the States Parties created a “Special Working Group on the Crime of Aggression” (which consists of representatives from parties to the Rome Statute), and have met since that time to craft a definition for that term. Analysts say that the working group has already agreed that the crime of aggression will be a “leadership crime” where actual people “who are in a position effectively to exercise control over or to direct the political or military action of a State” may be held responsible for ordering or carrying out such an act. In addition, the working group is currently trying to determine whether a crime of aggression should be defined generically or in terms of specific acts. Observers say that the working group will most likely include “a generic description of the act of aggression and a non-exhaustive, illustrative list of specific acts of aggression.” (They note that the acts listed in Resolution 3314 are broadly worded and could even encompass

a wide range of legitimate activities carried out by nations.) Furthermore, members of the working group are trying to determine whether they should make reference to Resolution 3314. While some have said that the resolution should be used to guide negotiations, others believe that the resolution “does not apply to the [ICC], and, therefore, should not be referenced in the definition . . . given [in their opinion] that the resolution was intended [only] as a recommendatory guideline.”

Legal experts also point out that the working group must do more than just simply define the term crime of aggression. They must, for instance, also decide who will make a determination as to whether such an act had occurred in the first place. Some argue that Resolution 3314 strongly implies that the UN Security Council must determine whether an act of aggression had occurred, and that the ICC should not commence an investigation or prosecution absent such a determination. They point out, for instance, that Article 39 of the UN Charter states that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.” But other analysts have argued that because the Security Council is a highly politicized decision-making body, the ICC alone should decide whether an act of aggression had occurred. Still others say that the Security Council should have “primary but not exclusive authority” in making such a determination, and that the ICC should still be able to proceed with a particular case in the event the Security Council cannot make a decision. Observers believe that the working group will try to strike a balance which considers “the independence of the Court as a judicial body and the fundamental role of the Security Council in maintaining peace and security under the UN Charter.”

Officials say that the working group must also set some threshold for determining whether the ICC should commence an investigation and prosecution of an alleged act of aggression. In creating such a threshold, the working group will most likely take into account the seriousness and scale of the alleged act. Many believe that the working group will set a high threshold so that the work of the ICC and the UN will not be burdened with minor cases. For example, Resolution 3314 currently says that “bombardment by the armed forces of a State against the territory of another State” could qualify as a crime of aggression. But analysts doubt that the ICC—with its limited resources—would want to open an investigation in a case where a warplane of one state may have dropped a single explosive on the territory of another state without causing any injuries or property damage.

Members of the working group met in the United States in June 2007 to continue their negotiations, and will meet again in November and December of this year. Analysts believe that the working group will then submit its proposals for a definition of crime of aggression to a review conference of the Rome Statute in 2009. 

COMPARATIVE LAW:

Food safety: Weaknesses abroad and at home

In recent months, China has faced major criticism from consumer groups and government officials in the United States and other countries as some of its exported goods were found to have been contaminated with dangerous substances. They point

out that tainted foodstuffs and other products have hurt (and even killed) many people. While the Chinese government has announced that it will reform its regulatory system to prevent such incidents from occurring again, legal analysts say that this episode has also exposed weaknesses in the U.S. regulatory system for detecting tainted foods. They also argue that the lack of international standards concerning food safety has contributed to those problems and could even lead to trade disputes.

Beginning in March 2007, thousands of American consumers reported that their pets (mostly cats and dogs) became sick after eating pet food manufactured mostly by in a single company in China. The United States recalled over three million cans and foil packages of these products from store shelves. Canada and several European countries soon followed suit. In the following months, officials discovered more instances of contamination involving other edible consumer goods. (See the chart on page 37 for more information.)

In addition to edible goods, retailers in the United States began a recall of many other products made in China. Analysts say that, this year, all 24 toy recalls in the United States involved Chinese-made goods. (Around 80 percent of all toys sold in the United States are made in China.) In June 2007, the Consumer Product Safety Commission instituted a voluntary recall of toy trains made in China that were allegedly coated with paint containing excessive levels of lead, which can damage brain cells, especially in children. In that same month, the federal government also recalled 450,000 tires made in China due to certain defects. The commission reported that, in the last five years, the number of Chinese products being recalled had doubled. Just last year, the commission recorded 467 recalls involving goods made in China, a record for that country.

While the media have focused attention on foodstuffs made in China, others point out that the U.S. Federal Drug Administration (FDA)—from July 2006 to June 2007—had rejected more food imported from other nations. It had rejected a total of 1,763 items from India (more than any country), including spices, seeds, and shrimp contaminated with salmonella. Next followed Mexico with 1,480 rejected items such as candy, chilies, juice, seafood, and cheese due to filth, and then China with 1,368 items, including produce, seafood, bean curd, and noodles due to filth. Other countries included the Dominican Republic, Denmark, and Vietnam.

Analysts are trying to determine how these tainted products had initially escaped detection. Many are pointing to China’s regulatory system. There is currently no single international treaty or even global institution that sets minimum standards for food and drug safety. Instead, most countries use their own regulatory systems in this particular area of governance. But their effectiveness varies widely among different jurisdictions. For example, analysts say that China does not have a central regulatory agency that handles food and drug safety issues. Rather, more than 17 departments—including the State Food and Drug Administration, the Health Ministry, the Agriculture Ministry, the Commerce Ministry, the State Administration of Industry and Commerce, and the General Administration of Quality Supervision Inspection and Quarantine, among others—currently have overlapping roles in overseeing food and drug safety.

Recent incidents with Chinese food products

Product	Problems and Comments
Pet food	<ul style="list-style-type: none"> • In March 2007, federal regulatory authorities discovered that tainted pet food made in China contained melamine, an inexpensive industrial substance that some unscrupulous companies use in place of more expensive wheat gluten (a protein) because its chemical composition can be mistaken for protein. • Regulators confirmed the deaths of 14 cats and dogs, but also received more than 14,000 reports of pets sickened by the tainted pet food. • The FDA banned imports of pet foods containing wheat gluten from China. It has opened a criminal investigation and also visited that country to conduct inspections of food preparation facilities.
Seafood	<ul style="list-style-type: none"> • In June 2007, FDA testing found that five major types of farm-raised seafood from China were contaminated with residues of carcinogens and antibiotics. The FDA did not issue a recall of products already in United States because the levels of residues were very low, although it did note that prolonged consumption could cause health problems. • Instead, the FDA issued a broader import control of all farm-raised catfish, basa, shrimp, dace, and eel from China, meaning that these products would be approved for sale in the United States only if testing proves that they are safe for consumption. • The United States imports 81 percent of its seafood, and China accounts for 21 percent of that total. It is also the third-largest export market for Chinese seafood.
Toothpastes	<ul style="list-style-type: none"> • Officials in Costa Rica, the Dominican Republic, and Nicaragua said that Chinese manufacturers had used diethylene glycol (a thickening agent found in antifreeze) in their toothpastes. • While U.S. officials say that there is no evidence that the tainted product had entered the American market, the FDA urged consumers to throw away toothpastes made in China, and also blocked all such shipments from that country as a precautionary measure until testing showed that they were safe. • Analysts note that most major brands of American toothpastes are made domestically.
Sweeteners	<ul style="list-style-type: none"> • Officials say that counterfeiters in China had labeled diethylene glycol (a poisonous substance) as 99.5 percent pure glycerin, which is a sweetener used in drugs, food, and toothpastes. Glycerin is more expensive than diethylene glycol. • After manufacturers in Panama mixed diethylene glycol into 260,000 bottles of cold medicine, officials say that it led to the deaths of over 100 children. • The FDA warned drug makers and suppliers in the United States to be “especially vigilant” in watching for diethylene glycol. The agency also tested all glycerin shipments from China for diethylene glycol.

Legal experts believe that this decentralized system has led to communication problems, shifting responsibilities, and blurred lines of authority among these different agencies. In a recent press release, China’s State Food and Drug Administration admitted that “this lack of clearly assigned responsibility leads to a situation where no agency or authority can be properly held accountable for their action or inaction.” Others note that many food safety laws in China are also vaguely written and difficult to find. All of these legal shortcomings—combined with rampant bribery and corruption—have allowed many businesses in China to undertake questionable activities, all in the name of reaping high profits, say analysts. For example, American regulators now believe that Chinese exporters were able to ship the tainted pet foods into the U.S. market because they had labeled those goods as a “non-food product” through a third-party Chinese textile company. Other analysts note that because China’s agricultural industry comprises hundreds of thousands of one-acre farms, regulatory authorities are unable to monitor the extent to which farmers may be overusing fertilizers, pesticides and antibiotics.

Analysts also suspect that China’s government may be deliberately ignoring food safety violations so that its economy can continue to grow.

However, not all of China’s problems with tainted foods are linked to its weak regulatory system or questionable business practices. A major consulting firm pointed to China’s lack of cold storage facilities and a poor logistical system. The firm said that because of China’s increasing agricultural output, that country will need to invest \$100 billion over the next 10 years to upgrade its logistics and cold storage capabilities. (The study reported that China has about 30,000 cold storage trucks whereas the United States has 280,000.) Without such upgrades, some worry that Chinese food products will be even more susceptible to contamination.

When news of tainted food products began to circulate quickly, the Chinese government had first accused the United States of exaggerating these incidents. But as other countries began to report their own problems with Chinese goods, China undertook a series of actions which critics say was uncharacteristic of

a totalitarian government that had, in the past, refused to acknowledge public health problems (such as the widespread outbreak of severe acute respiratory syndrome in 2002). China closed down what it had called 180 “errant” plants, and also banned the use of diethylene glycol in toothpaste, and melamine in food. It also announced plans to introduce draft legislation for a national food-recall system by the end of the year. Analysts say that there is currently no clear recall policy in place, and that it had been five years since China had acknowledged the need for such a system. Furthermore, only two months after he had been convicted of taking bribes from eight pharmaceutical companies and approving fake drugs, China executed the former head of its State Food and Drug Administration.

There is currently no single international treaty or even global institution that sets minimum standards for food and drug safety. Instead, most countries use their own regulatory systems in this particular area of governance. But their effectiveness varies widely among different jurisdictions.

Financial analysts say that China took such swift action in order to protect its “Made in China” label. They point out that China’s economy depends heavily on its exports (it is, for instance, the third largest food exporter and also grows half of the world’s vegetables), and that any further incidents concerning the safety of its food and products could damage China’s reputation in the minds of American consumers. In the first quarter of this year, China shipped more than \$95 billion of goods (or about 20 percent of its total exports) to the United States. About 15 percent of the U.S. food supply came from overseas in 2005, compared with 11 percent in 1995.

Critics say that these actions are highly symbolic in nature, and have expressed doubt as to whether they will actually improve China’s food safety standards.

Observers note that deficiencies in the Chinese regulatory system concerning food safety had also exposed shortcomings in the U.S. system, which allowed the contaminated food to enter American markets. Somewhat similar to the current system in place in China, 12 different federal agencies in the United States—including the FDA, the Department of Agriculture, the National Institutes of Health, the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry—are responsible for implementing 35 primary food safety laws. While all of these agencies are, in turn, overseen by the Department of Health and Human Services, some analysts believe that the agencies don’t always coordinate their work, and that there is overlap in many areas of responsibility.


Critics also believe that the FDA is seriously understaffed and underfinanced. Last year, FDA inspectors sampled only 20,662 shipments out of more than 8.9 million that arrived in American ports from all over the world. They say that China had sent 199,000 shipments to the United States, and that inspectors had sampled less than two percent of them. Yet despite current problems with tainted food from other countries, the FDA announced that it intends to close seven out of its 13 laboratories that test for contamination.

Analysts also point to what they believe are other deficiencies in the U.S. food safety system. Food importers, they note, are allowed to submit their products to private testing laboratories (even those that are not approved by the FDA). Once a private lab certifies that it had not found any instances of food violations after five consecutive tests, the food exporter no longer needs to submit its goods for testing. Other critics also say that food exporters often go “port shopping” for laboratories where they have a greater chance to pass inspection. Some fish imports, for instance, are sent to Las Vegas to avoid the laboratory in San Francisco where its staff is apparently known for their analytical skills.

In response to recent food safety incidents, many lawmakers are calling for the creation of a single, united federal agency to govern all food inspections. The FDA is also proposing a shift to “risk analysis” where its inspectors would focus on shipments posing the biggest potential hazards. In order to carry out such analyses, the agency would collect more “life-cycle” data (i.e., information concerning a food’s production and packaging process, and its means of transportation) from exporting countries. And, in July 2007, the United States announced the formation of a panel called the Interagency Working Group on Import Safety which will search for ways to reduce the dangers from food and other products shipped to the United States.

Commentators say that because different nations have in place widely different food safety regulations (each with its own strengths and deficiencies), there will probably be many more food contamination cases in the future. In order to address these problems, some have suggested the creation of a global food safety agency (equivalent to the World Health Organization) which would have the power to set minimum safety standards, inspect food factories in any nation, and impose sanctions on countries that don’t comply with its measures. But others have expressed doubt on implementing such proposals, arguing that it will be difficult for developing and least-developing countries to meet standards that will most likely reflect the preferences of industrial nations who already have a much better capacity to process, store, and transport food.

Supporters say that, in addition to protecting public safety, the creation a global agency on food safety could also reduce the chances of trade fights among different nations. As barriers to trade (such as high tariffs and quotas) have fallen and continue to fall across the world, the study said that nations may use safety and quality standards as a guise to keep out more competitively-priced food imports. In fact, one study noted that differences in food safety regulations in individual countries have led to actual trade disputes. For example, the European Union (EU) had passed regulations blocking the import of American beef treated with growth hormones, arguing that its consumption can pose long-term health threats. But U.S. officials have argued otherwise, and believe that the EU is using food safety as a cover for protectionism. Analysts point out that under the Agreement on the Application of Sanitary and Phytosanitary Measures (which is a treaty administered by the World Trade Organization), nations may block certain imports to protect animal, plant, and human health, but only if the restrictions are based on strong scientific evidence. Even with such treaties in place, however, legal experts believe that (without a single safety

standard) cases of food contamination will continue and that nations may exploit differences in their regulatory systems to their advantage. 

COMPARATIVE LAW:

The world's first publicly-held law firm: Opportunities and dilemmas

In recent decades, many privately owned companies have made the decision to sell their shares to the general public in order to raise more funds and expand their operations. Some of these businesses have traditionally included investments banks, insurance firms, newspaper publishers, large retailers, and technology companies. In May 2007, a law firm in Australia—Slater & Gordon—joined the ranks of public companies by becoming the first of its kind to sell and trade its shares on a stock exchange, a move which has raised eyebrows among legal observers. Will other law firms follow Slater & Gordon in a legal marketplace which is becoming increasingly competitive? What are some of the implications of this decision for the practice of law?

Slater & Gordon was founded in 1935 and operates in most of Australia's territories. It is considered a "niche" firm. Its key practice areas include asbestos and commercial litigation. One commentator said that the firm is best known for several high profile personal injury cases. Analysts say that Slater & Gordon is not one of Australia's biggest firms (it has some 140 lawyers), and believe that its decision to go public was motivated, in part, to become more competitive with larger firms in the country. The firm itself said that it wanted to expand into non-litigious legal services, including commercial transactions and advisory services, and that the funds it had raised through the public stock offering would help it accomplish its goals.

Slater & Gordon's public offering totaled 35 million shares at AU\$1 per share. (It raised AU\$35 million or approximately US\$29 million.) Some 72 million shares are held by existing shareholders of the firm and its employees. Outside shareholders who bought the stock at the public offering control approximately 32 percent of the firm. The stock was listed and began trading on the Australian Securities Exchange in May 2007, under the ticker-code SGH. It is currently trading at AU\$1.85 (approximately US\$1.54), and had reached a high of AU\$1.90 in August 2007.

In a privately-held law firm, ownership interests are held by the partners and are not publicly traded on a stock exchange. These firms do not have to disclose financial information to the Securities and Exchange Commission (SEC) or its equivalent, or to the public. But in order to expand its operations or undertake any capital-intensive projects, a privately held firm may discover that it has inadequate financial resources and also find it difficult to raise sufficient funding from financial institutions on agreeable terms. Nevertheless, the public stock offering for Slater & Gordon raised eyebrows because the practice of law and rendering of legal services are subject to special regulations and strict ethical considerations. As a result, legal analysts say that a publicly-held law firm could find itself facing several problems which are mostly unique to legal practice.

Some analysts, for example, believe that lawyers working in a publicly-held firm could have greater difficulty in protecting

their attorney-client relationships. Though standards vary from state to state (and among different countries), a lawyer generally has a "fiduciary duty" to his client, meaning that he "cannot take any position in conflict with the client." In addition, a lawyer generally cannot disclose information that a client wants to keep confidential. Furthermore, lawyers have a duty to "exercise reasonable care and competence in the performance of their duties during representation."


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In order to protect this relationship, the United States, for instance, generally prohibits lawyers and non-lawyers from forming business partnerships. Rule 5.4 of the ABA Model Rules of Professional Conduct states that "a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Furthermore, it states that "a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a non-lawyer owns any interest therein . . ." or if a "non-lawyer has the right to direct or control the professional judgment of a lawyer." The ABA says that the reasons for these restrictions "are to protect the lawyer's professional independence of judgment." While these ABA model rules are non-binding, legal experts point out that most state bar associations in the United States have included them in their regulations.

Some analysts fear that, in a publicly-traded law firm, shareholder or regulatory pressure will make it harder for lawyers to protect the attorney-client relationship. They point out that activist shareholders may demand more transparency concerning the operations of a law firm, including information about legal strategies for ongoing cases. One commentator said that current clients and even the general public may lose their trust in the legal community if a firm revealed such confidential information.

Others say that lawyers working for publicly-held law firms could also face more conflicts of interest, which is a situation where a lawyer may have difficulty in fulfilling his fiduciary obligations to a client because of other competing interests. For example, outside investors might pressure lawyers in a publicly-held law firm to meet certain financial targets rather than completely fulfill their fiduciary duties to their clients. In another scenario, a publicly-held law firm could find itself in a situation where it is defending a client against an outside shareholder of the firm or where the law firm is defending a particular outside shareholder against a current client. In order to address these concerns, Slater & Gordon has already stated to all of its outside shareholders that "lawyers have a primary duty to the courts and a secondary duty to their clients," and that "there could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of Shareholder or short-term profitability of the Company."

Legal observers say that the situation could change because of legal developments taking place in the United Kingdom. They note that the British Parliament is currently debating a Legal Services Bill which (if passed in its current version) will allow

lawyers and non-lawyers to work together. The question thus arises: if multidisciplinary practices prove successful, would the legal profession in the United States and other countries allow similar practices in order to stay competitive in the international legal services market? 

INTERNATIONAL INTELLECTUAL PROPERTY:

Ethiopia v. Starbucks: A brewing trademark dispute

As coffee becomes increasingly popular, some companies have been trying to distinguish their particular brands by drawing attention to the coffee beans they use to brew this ubiquitous beverage. While coffee beans used in the United States have come mainly from South America, coffee companies have started to use beans grown in Africa, Asia, and elsewhere. In a recent development, Ethiopia has been trying to protect the name of its coffee bean growing regions (and increase the market value of those beans) by applying for trademarks in various countries. Legal analysts note that large trade associations have opposed these efforts. But groups supporting Ethiopia's efforts have launched a campaign to help that country. What is the status of Ethiopia's trademark campaign?

In 2004, the Ethiopian government's intellectual property office (EIPO) launched the Ethiopian Coffee Trademarking and Licensing Initiative whose goal is to register the names of its coffee-growing regions as trademarks in other nations. There currently is no international registry where a person, business, or even government may simply submit a single trademark application which would be enforceable all countries. As a result, a person or company seeking such protection must follow the trademark registration procedures set out in each individual country.

A trademark is an intellectual property right that protects a combination of words, names, symbols, sounds, or colors used by a certain enterprise to distinguish its products from similar goods. For example, the golden arches logo used by the McDonald's Corporation is also one of the most widely-recognized trademarks in the world today. Another well-known trademark is the green-colored lettering and mermaid logo for the Starbucks Coffee Company. Once approved, a trademark gives the owner the ability to exclude others from using the distinctive mark or symbol without permission, which can be granted through, for example, a licensing agreement. In the United States, a person or company applies for trademark protection by filing an application with the United States Patent and Trademark Office (USPTO).

EIPO has undertaken a campaign to trademark the names of three coffee bean growing regions in Ethiopia—Sidamo, Harar, and Yirgacheffe—in order to address widespread poverty among Ethiopian farmers. The United Nations classifies Ethiopia as a least-developed country and says that agricultural production accounts for over half of that country's gross national product. Analysts point out that coffee bean crops are "critical to the Ethiopian economy," and that, in 2006, Ethiopia had exported \$350 million in coffee beans. Under standard trade practices, unprocessed coffee beans are simply traded as commodities on the world market. Coffee farming cooperatives in Ethiopia then

usually receive less than 10 percent of the final retail value for their beans. But as is the case of prices for other commodities such as metals and oil, prices for coffee beans are susceptible to sharp market fluctuations. In the last decade, coffee bean prices have decreased due to price deregulation and also an increase in the supply of coffee beans, among other factors. And these varying prices for coffee beans have resulted in hardship for many Ethiopian coffee cooperatives.

Ethiopia expects that trademark protection will insulate its coffee bean prices from market fluctuations while also boosting the country's revenues. With trademark protection, Ethiopia can control when, where, and how others use its regional names by granting (or denying) licenses. (It may also collect licensing fees or royalties.) Also, with a trademark, Ethiopia will not have to certify that coffee beans labeled as Sidamo, Harar, or Yirgacheffe had actually come from those regions.

Once Ethiopia controls the trademarks for these regional names, analysts say that it can then start building a stronger brand identity for these particular coffee beans. EIPO is hoping that coffee importers, distributors, retailers, and coffee drinkers themselves will view the exotic Sidamo, Harar, or Yirgacheffe names as a gourmet brand having certain desirable characteristics associated only with those three Ethiopian regions. (Financial analysts note that the gourmet and specialty coffee market is growing, especially in nations such as the United States.) In turn, marketing experts argue that the demand (and then prices) for Sidamo, Harar, and Yirgacheffe coffee beans will increase and become less vulnerable to price fluctuations.

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Legal analysts say that Ethiopia also could have tried to register the names of their coffee growing regions as certification marks, which are words, names, or symbols used to identify products certified as meeting particular standards. A group that owns a certification mark authorizes its use by others as long as those certain goods meet standards set out in the certification mark application. For example, Roquefort is a certification mark that is registered in the United States and owned by the Community of Roquefort in France. Any cheeses labeled "Roquefort" must be made from sheep's milk and then cured in the natural caves found in the Roquefort region of France. The Idaho Potato Commission uses the "Idaho" and "Made in Idaho" certification marks to ensure that potatoes packaged with those words were actually grown in the state of Idaho.

Legal experts say that by using certification marks to protect the Sidamo, Harar, or Yirgacheffe names, Ethiopia could then assert quality control standards over the coffee beans labeled with those names. (In the United States, it is not possible to register the same word, name, or symbol as a trademark and also as a certification mark.) But Ethiopia chose not to file for certification marks. Some point out that, by using certification marks,



Ethiopia would not have direct control (through, say, a licensing program) in deciding who may use the names Sidamo, Harar, and Yirgacheffe on their coffee labels. As long as a retailer certifies that it had met the standards required under the certification mark, it may use those names on its packaging.

Others note the high administrative costs involved in managing a certification mark. After granting a certification mark, a government will not monitor whether its coffee retailers are correctly labeling their coffee beans or complying with the standards set out in a certification mark. Instead, Ethiopia would have to undertake this monitoring by itself, and some say that it is highly unlikely that Ethiopia has the funding to monitor potentially thousands of retailers using the Sidamo, Harar, and Yirgacheffe names. In fact, according to one agency advising EIPO, Ethiopia had shied away from using certification marks precisely because of the potential costs involved in their enforcement.

While Ethiopia has the legal right to apply for trademarks to protect the names of its coffee growing regions, most other producers of coffees, cheeses, and other food products have obtained protection (in the United States) through certification marks. For example, in the United States, the name Jamaican Blue Mountain Coffee is protected by a certification mark which certifies that the coffee beans were grown in the Blue Mountain region of Jamaica and processed in a plant certified by Jamaican coffee industry regulations. Analysts say that retailers prefer that coffee bean growers use certification marks to protect their products because doing so would be less onerous for the retailers. (Under trademark protection, they would have to enter into a licensing agreement with the trademark owner.) One

analyst said that Ethiopia was the first country to submit a trademark application in the United States to protect the names of its coffee-growing regions.

The Government of Ethiopia, in March 2005, filed an application with the USPTO to trademark the names Sidamo, Harar, and Yirgacheffe. In August 2006, the USPTO awarded Ethiopia a trademark for Yirgacheffe only. Analysts note that the Starbucks Coffee Company, in June 2004, had sought trademark protection for its Shirkina Sun-Dried Sidamo coffee beans, which used one of the names sought by Ethiopia for trademark protection. Also, in a separate action, the National Coffee Association (NCA)—which is the trade association for U.S. coffee companies—later filed an objection to the trademark applications for both Sidamo and Harar. Analysts say that the USPTO did not provide trademark protection for the name Sidamo because it was too similar to Shirkina Sun-Dried Sidamo, and also because of the objection filed by NCA.

While Starbucks itself did not file an objection with the USPTO (and experts believe that the company did not ask NCA to object to Ethiopia's trademark application on behalf of the company), it nevertheless opposed the entire trademark initiative because it saw the licensing agreement as "legally onerous" (i.e., Starbucks would not be able to promote Sidamo, Harar, and Yirgacheffe coffees without first obtaining permission from the EIPO, an action it considered an administrative burden). Instead, the company said that the best way to increase the brand values of Sidamo, Harar, and Yirgacheffe was by unfettered promotions throughout its 13,000 worldwide retail stores.

Starbucks and the NCA also argued that using certification marks was more “appropriate” for protecting the names of Ethiopian coffee beans. They pointed to Jamaica’s certification mark awarded by the USPTO as a successful example in protecting and building the name brand of Jamaican Blue Mountain Coffee beans. Starbucks also pointed to other nations such as Guatemala and Colombia, which have successfully used certification marks to assure quality control for their coffee beans without placing an additional administrative burden on coffee distributors and retailers. The company also noted that—even without trademark protection for Ethiopian coffee beans—it currently paid a 37 percent markup over current coffee bean prices listed on commodity exchanges.

Even though several of its applications are under scrutiny by trademark authorities in various countries, Ethiopia is now asking coffee companies to sign licensing agreements that acknowledge Ethiopia’s ownership of the names of its coffee bean growing regions.

Currently, legal analysts say that neither Starbucks nor Ethiopia has trademark rights to Sidamo or Harar in the United States. Ethiopia is still working to obtain such protection, but NCA’s objection to Ethiopia’s application is still an obstacle. Even so, Ethiopia has successfully registered the three names as trademarks in the European Union, and is applying for trademark protection in Australia, Brazil, Canada, China, India, Saudi Arabia, and South Africa. It also submitted its registration forms in Japan, but is facing opposition on two of the names in that country.

Even though several of its applications are under scrutiny by trademark authorities in various countries, Ethiopia is now asking coffee companies around the world to sign licensing agreements that acknowledge Ethiopia’s ownership of the names Sidamo, Harar, and Yirgacheffe. Several American companies—including Green Mountain Coffee Roasters and Dean’s Beans Organic Coffee Company—have already signed the agreement, which requires them to advertise, market, and promote these coffee names and also includes quality control provisions created by Ethiopian authorities. Starbucks had refused to sign any agreement.


A coalition of organizations—including Oxfam, which is a civil society group that supports developing countries—launched a well-organized media campaign in support of Ethiopia’s trademark initiative, which they said would address “price volatility, unfair trade rules, and issues of supply chain reform in the coffee industry.” This group also claimed to have enlisted over 96,000 people worldwide to campaign against Starbucks’ refusal to sign Ethiopia’s licensing agreement. More specifically, Oxfam charged that retail coffee roasters (including Starbucks) “can charge consumers more for these [specialty] coffee [beans] because they are considered among the finest in the world.” It said that if Ethiopia owned the trademarks to its regional coffee names, coffee companies would pay a higher price for coffee beans, which would then allow Ethiopian coffee bean farmers to “invest in growing high-quality coffees.”

Some say that Starbucks had become an unlikely target in this campaign. Analysts note that only two percent of Starbucks’ beans come from Ethiopia, and that the company does not “dominate the world coffee market.” Instead, it ranks fourth in the world after Kraft Foods (maker of the Maxwell House brand), Nestle, Proctor & Gamble (Folgers), and Sara Lee (Chock Full O’Nuts). But political commentators note that because Starbucks had, in the past, touted its support for coffee bean growers and fair trade initiatives (as a way to distinguish itself from other coffee companies), any action that seemed to undercut support for coffee growers (such as refusing to sign licensing agreements with Ethiopia) would tarnish the company’s reputation in the eye of the public.

Under pressure in the media as well as from institutional investors, Starbucks negotiated terms for a separate trademark recognition agreement with Ethiopia. It also withdrew its application for Shirkina Sun-Dried Sidamo and marketed the coffee instead under the label Shirkina Sun-Dried. In June 2007, Starbucks and Ethiopia came to an agreement on licensing that applies not just to coffees from the Sidamo, Harar, and Yirgacheffe regions but to all Ethiopian coffees, even those with names that have not been trademarked. The agreement requires Starbucks to promote Ethiopian coffees in its retail stores while also working with Ethiopian farming cooperatives to improve coffee quality. No licensing fee is being charged, but Ethiopia continues to see the agreement as leading to higher coffee revenues for farmers in the future.

Legal experts note that global organizations that help to regulate intellectual property rights—such as the World Trade Organization (WTO)—did not play any direct role in Ethiopia’s effort to secure trademark protection for the names of its coffee growing regions. They note that one treaty administered by the WTO (the Agreement on Trade Related Aspects of Intellectual Property Rights or TRIPS) requires its member nations to establish minimum standards of intellectual property protection in their domestic laws, including minimum standards for trademark protection. Under TRIPS, a WTO member nation must pass laws that prevent people from using a trademark without obtaining permission from its owner, and also allow trademark owners to grant licenses for trademark use. Ethiopia applied for membership to the WTO in 2003, and approval for its application is still pending. According to analysts, Ethiopia noted in its application that it is codifying intellectual property rights in its domestic laws.

Some analysts believe that even if Ethiopia was already a WTO member nation, it would not have affected that country’s trademark initiative. They note that there was nothing in its initiative that seemed to violate WTO intellectual property rules. Ethiopia had simply applied for trademark protection for the names of its coffee growing regions according to procedures set by domestic trademark laws in individual nations. Even if there were questions about whether Ethiopia’s trademark initiative complied with WTO rules, legal experts point out that private companies cannot bring suit against Ethiopia. The WTO only mediates disputes among its member governments. In this particular case, Starbucks or the NCA would have to convince the United States government that Ethiopia’s trademark initiative violated some provisions in the TRIPS agreement, which, at this point, does

not seem to be the case. While both Starbucks and the NCA believe that Ethiopia should apply for certification marks in protecting the names of its coffee bean growing regions, legal analysts say that, at least in the United States, Ethiopia's decision to apply for trademark protection is legal. 

INTERNATIONAL INVESTMENT:

Hitting the pocketbooks of human rights abusers?

In recent years, many human rights organizations, political activists, and community groups in various countries have said that their national governments have not taken enough forceful action against countries engaged in human rights atrocities or those supporting policies which they say destabilize international security. They point out that, despite increasing global outrage, the government of Sudan continues to support militias that have attacked and killed tens of thousands of civilians in its Darfur region, and that other countries such as Iran are still allegedly supporting terrorist activities. As a result, these critics have lobbied their state legislatures and local municipalities to pass laws that would hurt these offending countries economically. What is the status of these bills? Have they come under legal scrutiny? And are they effective in stopping human rights abuses?

During the 1990s, several state governments passed regulations (called “selective purchasing laws”) prohibiting local agencies from purchasing goods and services from companies doing business in certain nations. California, New Jersey, and New York City, for instance, passed laws restricting their officials from doing business with Swiss banks because of the banks’ handling of accounts belonging to Holocaust survivors. Dade County, Florida, enacted a selective purchasing law against the communist regime in Cuba. The city of Oakland, California, targeted its law against Nigeria, which has been accused of violating human rights.

In 1996, Massachusetts passed its “Massachusetts Burma Law,” which prohibited government agencies in that state from purchasing goods and services from companies doing business with nations on a so-called “restricted purchase list,” which included Myanmar (formerly known as Burma) whose military government has been accused of carrying out political repression and extensive human rights violations. On the other hand, many groups—including the National Foreign Trade Council (NFTC), which represents businesses engaged in international trade—had challenged the legality of these regulations in federal court.

In June 2000, the U.S. Supreme Court ruled—in *Crosby v. National Foreign Trade Council*—that the Massachusetts law was unconstitutional, arguing that (under the Supremacy Clause of the U.S. Constitution) an existing federal law that restricted new investments in Myanmar had pre-empted the Massachusetts Burma Law. One justice wrote: “The [Massachusetts Burma Law] is at odds with the President’s intended authority to speak with one voice for the United States . . . in developing a comprehensive, multilateral strategy to bring democracy . . . to Burma.” But commentators noted that the decision did not bar states and municipalities from passing such laws in the future: “[The Court] did not say that the Constitution forbids all

such laws. Instead, it said that states . . . may not pass laws that conflict with measures enacted by Congress.”

In the last few years, state legislatures began to pass laws requiring entities such as state pension funds to divest (or sell) their stock holdings of companies and investment funds doing business with certain nations, and, instead, invest their capital in businesses and funds that have been certified as “terror-free,” “responsible,” and “ethical.” They say that this is a twist on the strategy of economically hurting those countries that carry out human rights violations or engage in repression. Political analysts point out that many groups in the United States and around the world had supported a divestment campaign against South Africa in the 1980s to pressure that country to end its policy of apartheid (or forced segregation). Financial analysts note that while many pension funds do not deliberately invest their capital in rogue nations, they may have done so indirectly (and unknowingly) by investing in foreign companies that do business with these nations. Legal experts say that foreign companies are generally not constrained by U.S. sanctions against particular nations such as Sudan.

In the last few years, state legislatures began to pass laws requiring entities such as state pension funds to divest (or sell) their stock holdings of companies and investment funds doing business with certain nations with poor human rights records.

But critics of these divestment campaigns have questioned their usefulness. That believe that a more effective approach would be for the largest state pension funds (which collectively hold over \$1 trillion in capital) to lobby companies with investments in the targeted nations to invest their capital in other projects. Others believe that divestment campaigns only attract media attention that quickly fades away. Furthermore, pension fund operators argue that the administrative costs of divesting their funds of certain stock can cost millions of dollars. Despite these criticisms, many state legislatures are still enacting or considering divestment laws that target certain nations. (See table on page 44.)

In 2005, the Illinois general assembly passed the Illinois Sudan Act, which prohibits the Illinois Treasurer from investing state monies in companies with business interests in that country. The law also created a divestment schedule which required all public pension funds to shed their investments in companies doing business in Sudan by July 2007.

The NFTC, along with the boards of trustees of several public pension funds in Illinois, challenged the legality of the law in district court. The plaintiffs argued that the Illinois law was unconstitutional because it violated the U.S. Constitution’s Foreign Commerce Clause by burdening foreign commerce. They added that the U.S. Constitution gave the federal government, and not the states, exclusive control of foreign policy. Plaintiffs also argued that the Illinois Sudan Act violated the Supremacy Clause by interfering with action already taken by the federal government against Sudan, and that, in the face of such conflict, state law must give way to federal law. In February 2007, the court ruled that the Illinois Sudan Act

State laws that require divestment of certain investments

State (Legislation)	Target Nation(s)	Legislation Summary	Date passed or status
California (AB 2179)	Sudan	<ul style="list-style-type: none"> Prohibits the California Public Employees' and Teachers' Retirement Systems from investing public employee retirement funds in companies with business operations in the Sudan. Protects the University of California Regents and other state officials from lawsuits after carrying out divestments in companies with Sudanese holdings 	Signed into law in September 2006
Colorado (HB 1184)	Sudan	<ul style="list-style-type: none"> Requires public funds to engage in discussions with companies in their portfolios that do business with Sudan. Encourages such companies to divest themselves of such ties. Calls for public funds to divest their portfolios of those companies' stocks if state lobbying fails after 90 days. 	Signed into law in April 2007
Illinois (SB 23)	Sudan	<ul style="list-style-type: none"> Prohibits the state treasurer from investing in or transacting any business with financial institutions doing business with Sudan. Puts state pension funds on a divestment schedule to shed investments with companies doing business in Sudan. 	Declared unconstitutional by U.S. district court in February 2007
Missouri (HCR 32)	States sponsoring terrorism, including Iran	<ul style="list-style-type: none"> Requires public retirement funds to divest their investments in companies that have a direct financial relationship with state sponsors of terrorism, as designated by the U.S. Department of State. 	Signed into law in April 2007
Ohio (HB 151)	Iran, Sudan	<ul style="list-style-type: none"> Requires divestment by public funds of investments in companies with positions in the Iranian or Sudanese energy sectors. 	Compromise reached with managers of public funds; bill shelved

Source: National Conference of State Legislatures

violated the Supremacy Clause, the foreign policy powers of the federal government, and the Foreign Commerce Clause, and issued a permanent injunction to prevent Illinois from enforcing the act.

In early 2007, the Ohio state legislature introduced a law which would require public funds in that state (including retirement funds for teacher unions, and fire and police personnel) to divest shares of companies doing business in Iran. A later version of the bill targeted Iranian energy interests only while expanding the proposed divestment to energy interests in Sudan. Opponents of the bill included Ohio's Chamber of Commerce (which argued that the bill's passage would politicize investment decisions) and the Ohio State Teachers Retirement System (which said that the divestment measures would harm their retirement and health-care funds). In a compromise, managers of Ohio's public pension funds agreed to divest half of Iranian energy-related holdings voluntarily within six months.

Although these state measures are coming under legal scrutiny, some members of the U.S. Congress are supporting federal legislation which will give legal protection to states and local governments that prohibit investments in certain nations that

are currently subject to federal sanctions. For example, in July 2007, the U.S. House of Representatives passed a bill (by a vote of 408-6) which would give "safe harbor from lawsuits to managers of mutual funds and pension funds who divest funds from companies that invest more than \$20 million in Iran's energy sector." A similar measure concerning divestment in Sudan's energy sector passed by a vote of 418-1. Under both bills, the federal government must also create and maintain a list of companies that undertake business in Sudan or Iran's energy sector. Related bills in the U.S. Senate would also protect public fund managers from shareholder lawsuits resulting from divestment activities.

Still, many critics point out that governments such as Sudan and Iran are continuing their current policies. While Sudan has agreed provisionally to allow UN peacekeepers into Darfur, analysts note that the government still denies that militias have attacked civilians. Others point out that Iran has refused to stop enriching uranium which it says will be used for energy development and other peaceful purposes, notwithstanding widespread fears that Iran is secretly running a nuclear weapons program. 🌐

Law of the Sea Treaty: Sink or swim?

During the summer of 2007, different countries began to assert claims over large areas of the world's oceans and passageways. Russia, for instance, planted its flag on the seabed floor of the geographic North Pole, proclaiming that the region (approximately the size of Western Europe) was a continuation of its landmass and, therefore, under its control. "The Arctic is ours and we should manifest our presence," said a Russian explorer. Canada reasserted its claim over the so-called Northwest Passage, a frozen sea route in the Arctic that can provide much quicker transit from the Pacific to the Atlantic Ocean. Its prime minister said: "Canada has a choice when it comes to defending our sovereignty over the Arctic. We either use it or lose it . . . this government intends to use it." Although they are not legally enforceable under international law, these claims have brought more attention to the United Nations Convention on the Law of the Sea (or the Law of the Sea Treaty), and the fact that the United States remains one of the handful of nations that has not yet signed it. What is the Law of the Sea Treaty? Where does it stand today? And how will it help to resolve these kinds of disputes?

The Law of the Sea Treaty is the most comprehensive international agreement that governs various aspects of the use of the world's oceans. The treaty, for example, establishes a country's offshore territorial limits that affect navigation rights. More specifically, it allows a country to exercise its sovereignty (such as enforcing its laws and regulations) within a 12-mile limit from its shores. But, within these limits, it also gives foreign vessels (such as commercial and personal vessels) the right of "innocent passage." Article 19 states that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." The treaty also grants military vessels "transit passage," meaning that a country cannot stop and inspect a warship sailing through its territorial waters if it has no reason to do so. In fact, Article 32 states that "nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes," though there are a few exceptions.

In addition, the treaty sets offshore territorial limits that affect commercial rights. It allows a country to establish a 200-mile Exclusive Economic Zone (EEZ) from its shores where it has the sole right to exploit, develop, manage, and conserve all resources, including fish, oil, natural gas, and minerals found on the ocean floor. The United Nations said that this provision "is one of the most revolutionary features of the Convention," and could benefit countries with long coastlines, including the United States. Furthermore, the treaty gives countries the sole right to search for minerals and non-living materials on its continental shelf (which is the natural extension of a country's land mass into the ocean), but places a limit of 350 miles from the shore.

The treaty also created an independent organization called the International Seabed Authority (ISA) to help govern and administer the exploitation of deep seabeds which are beyond the reach of the territorial waters of a particular country or any EEZs. Advocates of the treaty say that this arrangement could help countries resolve claims over vast areas of ocean without

resorting to military force. It requires countries to share with the ISA a small portion of revenue derived from deep seabed mining, which are then distributed among state parties to the treaty. (The UN itself will not disburse these funds.) But according to a UN report, no country has yet developed any reliable technology to carry out long-term deep seabed mining. The treaty also established the Commission on the Limits of the Continental Shelf, which determines the validity of a country's claim over what it believes to be its continental shelf.

The treaty also establishes comprehensive rules to protect maritime resources. It requires, for instance, signatory countries to enact measures to prevent marine pollution from various sources. Finally, Part XV of the treaty outlines the procedures that signatory nations must follow in order to resolve disputes among different parties concerning the interpretation of any provisions of the treaty. If direct talks fail, the treaty allows the parties to resolve their disputes through the International Tribunal for the Law of the Sea, the International Court of Justice, binding international arbitration, or special arbitration tribunals with expertise in specific types of disputes.

Prior to the treaty, the governance of the oceans was subject to the "freedom-of-the-seas" doctrine, which limited a nation's rights to the seas off its immediate coastline. The rest of the seas were considered "free to all and belonging to none." However, as more and more nations began to use the sea for transporting fuel, catching fish, and exploring seabeds for minerals, and also began to confront related problems like oil spills, declining fish stocks, and disputes over navigational passage, officials feared that the oceans would, in the words of one analyst, "became another battleground of conflict and instability." As a result, the member states of the United Nations began negotiations on the Law of the Sea Treaty and adopted a text in 1982. It came into force in 1994.

According to the UN, 155 nations have ratified the convention (and are now legally bound to comply with its provisions). Notable exceptions include the United States, Iran, Israel, Peru, and Turkey. The United States did sign the treaty in 1994 (after the United Nations amended several sections) and is also a provisional member of the ISA. While there seems to be broad support for the treaty in the United States (including support from the U.S. Navy, the U.S. Coast Guard, business groups, trade associations, and the Departments of Defense, Homeland Security, and State), political analysts believe that its final ratification is being held up in the U.S. Senate by a vocal minority who cite what they believe are many shortcomings.

For example, opponents say that the treaty will give the United Nations complete control of all seas and oceans (and their natural resources). They point out that Article 2 of the treaty states that "the sovereignty over the territorial seas is exercised subject to this convention." But supporters say that the treaty will enhance national sovereignty by defining strict limits to national waters. It points out that, under the treaty, state parties have complete jurisdiction over all coastal resources up to and including their continental shelves. For areas that are beyond the territorial control of any country, the treaty sets up a mechanism through the ISA to administer activities such as deep seabed mining, which supporters say is preferable to a system where a country may arbitrarily claim vast areas of ocean through sheer military force, which could then increase the chances of actual conflict.




Others argue that the treaty will prevent the United States from fighting terrorism. They cite Article 95 which states that “warships on the high seas have complete immunity from the jurisdiction of any state.” They worry that terrorists may hijack a military craft, use it to carry out a terrorist attack, and that other countries would be unable to stop the attack simply because the treaty gives the warship immunity. Legal scholars say that this scenario is far-fetched, and that the United States will have the power to stop such a ship. Supporters also point out that the treaty formally gives seafaring craft (including military vessels and even aircraft) the right of innocent passage through strategic waterways, which will allow the United States to pursue terrorist suspects without having to receive approval from other nations.

Many opponents also claim that the ISA will be allowed to tax all ocean activities (such as fishing and deep seabed mining) regardless of where they are taking place, and that these revenues could be distributed to dictatorial governments. Proponents respond that the ISA deals with deep seabed mining only (and not other activities such as fishing) that takes place beyond the

territorial jurisdiction of any country. Moreover, the ISA does not have the authority to levy taxes. Instead, the treaty contains only revenue sharing provisions for gas and oil activities after the first five years of production and certain fees for deep seabed mining. Supporters calculate that American contributions to the ISA could reach \$1.3 million a year, and that this total amount is less than what the United States pays each year for membership in the United States-Canada Great Lakes Fish Commission. Furthermore, the benefits of ratifying the treaty could easily outweigh the loss of any revenues given to the ISA. Analysts point out that American claims to the continental shelf (and its natural resources) off its west coast could be larger than the land mass of the state of California.

President Bush urged the U.S. Senate to ratify the Law of the Sea Treaty this year, noting that the treaty would “ensure the movement of American naval forces around the world in the war on terror and secure U.S. rights over seabeds containing valuable natural resources.”

Supporters also say that the United Nations amended the treaty in 1994 in order to address previous provisions that called for mandatory technology transfers from industrialized countries to poorer nations. The amendments also included provisions allowing deep seabed mining activities to take place on a first-come, first-served basis. Political analysts say that opponents had cited such provisions when they first voiced opposition to the treaty over two decades ago.

What is the current status of the treaty? In a statement released in May 2007, President Bush urged the U.S. Senate to ratify the Law of the Sea Treaty this year. He noted that the treaty would “ensure the movement of American naval forces around the world in the war on terror, secure U.S. rights over seabeds containing valuable natural resources, and also protect marine resources.” An official said that the U.S. Senate is expected to schedule hearings on the treaty over the next few months, but that final passage is not yet guaranteed. Some political analysts worry that the current administration may not have the political will to push the treaty forward because of difficulties concerning the war in Iraq. They also believe that opponents will continue to repeat their previous objections. Still, one prominent American think tank said that “as the world’s leading maritime power, with the longest coastline of any country, and some of the earth’s richest waters, the United States stands to benefit more than any other country from the protections provided by the Law of the Sea Treaty.” 

INTERNATIONAL TREATY:

Flying in more competitive skies? The Open Skies Agreement

After 15 years of negotiations, the European Union (EU) and the United States reached an agreement which reforms many aspects of civil aviation and air travel between them. Analysts say that once this so-called “open skies” agreement comes into force, there will be more competition between different national airlines, which could lead to cost sav-

ings for consumers. But others note that several countries are opposed to the new agreement. What is the open skies agreement? How did it develop over the last few decades? And what are some of its potential ramifications?

In 1944, the United States and several other nations gathered in Chicago to sign a treaty known as the Convention on International Civil Aviation. The convention formalized rules on traveling over another country's airspace, and also created regulations for aircraft registration and safety standards. The parties to the convention agreed that every country would have complete sovereignty over the airspace above its territory, and that commercial aircraft would have the general right to fly over another country without having to land. The treaty, which came into force in 1947, also created the International Civil Aviation Organization to carry out its administration. Over 190 countries are now parties to the convention.

While the convention established the broad rules concerning civil aviation, the parties to the agreement had to negotiate separate bilateral agreements regarding, for instance, matters concerning competition. Over the past several decades, the United States negotiated many "open skies" agreements with other countries that regulate the extent to which a carrier may gain access to another country's airspace and domestic aviation market. Legal analysts point out that these agreements generally require a foreign carrier to begin its flight from its home country and then land at one point within, say, the United States. It prohibits this particular flight from picking up additional passengers within the United States for domestic flights between different American cities. (This right to transport passengers between two points within the same country is known as "cabotage," and is given mainly to domestic airline carriers only. Observers note that many countries generally do not grant cabotage rights to foreign airliners.) These open skies agreements also require foreign airlines (when they enter another country's airspace) to follow that country's air traffic control rules, ground services, and sanitation and environmental regulations.

Legal analysts say that open skies agreements are not considered international treaties. Instead, they are executive agreements which are negotiated between a particular nation and the U.S. Executive branch only, and do not need Congressional approval so long as the provisions of the agreement do not conflict with existing federal law. Analysts say that executive agreements are much easier to negotiate and can be updated quickly to respond to changing circumstances.

In 1992, the United States Department of Transportation (DOT) announced an initiative where it would try to update its various open skies agreements with other countries in order to reform the civil aviation industry. More specifically, the DOT wanted to promote competition among airlines by reducing regulatory hurdles; expand international air transport opportunities; and increase safety and security in international air transportation. Analysts note that, since the signing of the 1944 Convention, the states parties to that agreement had not made significant changes to its provisions in light of developments in civil aviation, including increased competition among airliners and advances in technology.


Pursuant to its 1992 initiative, the DOT did not update all of its open skies agreements. Instead, it mainly focused on revising

various agreements with certain European countries, beginning with the Netherlands in 1992, and followed by several other countries soon afterward. The format of these negotiations changed in 1993 after the Maastricht Treaty came into force and created the European Union (EU), which is now a political and economic alliance of 25 European countries. Common institutions, including the European Commission, manage certain economic and political areas of mutual concern on behalf of the EU member states. The European Commission announced that it would negotiate a single open skies agreement with the United States, arguing that such a format would give European countries more leverage during actual negotiations.

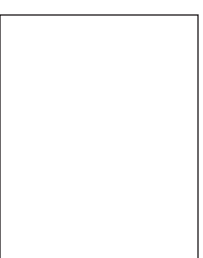
The new open skies agreements would also permit American and EU airlines to determine the number of flights, their routes, and fares according to market demand.

The EU and the United States had reached a draft open skies agreement in 2005, which eased restrictions on foreign cabotage in the United States and also rules concerning foreign ownership of American carriers, among other proposals. (The EU argued that the United States had long enjoyed quasi-cabotage rights in the EU through a network of other agreements, and also pointed out that certain EU rules allowed U.S. citizens to have greater ownership rights of European carriers.) But several domestic groups, including labor unions and many members of Congress, opposed these measures, worrying that the open skies agreement would lead to job losses in the United States.

In March 2007, the EU and the United States reached an agreement which they believe will gain broad support within the United States. Rather than requiring European airlines to originate their flights in their respective EU home countries, the agreement allows, for example, various airlines to fly from other European cities to the United States. The new open skies agreements would also permit American and EU airlines to determine the number of flights, their routes, and fares according to market demand. Legal analysts note that the agreement—which will come into force in March 2008—does not deal with foreign ownership or cabotage issues, which have been left to a second round of negotiations. One study predicts that, over the next five years, the agreement could lead to the creation of 80,000 new jobs and increase passenger traffic by more than 25 million people. It also estimates more than \$20 billion in cost savings for consumers.

Italy and Britain have voiced the most opposition to the recently concluded open skies agreement. Italy is concerned whether it will be able to stabilize the finances of its struggling national airline (Alitalia) before the agreement comes into force. Britain is worried about the effects of a greater liberalization of civil aviation in Europe. Two of its national carriers—British Air and Virgin Atlantic—currently have privileged access to Heathrow Airport near London (one of the busiest in the world), and observers note that the new agreement could expose both carriers to unprecedented competition. However, these airlines say that they oppose the agreement in its current form because its provisions do not go far enough on issues such as foreign ownership and cabotage rights in the United States. 

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UPCOMING EVENTS

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**Jurisdiction to Decide Jurisdiction in
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