A SUMMARY OF CONTRADICTIONS: AN OUTLINE OF THE EU'S MAIN INTERNAL AND EXTERNAL APPROACHES TO ETHNIC MINORITY PROTECTION

Dimitry Kochenov

[pages 1–52]

Abstract: A number of available legal instruments have the potential to contribute to the elaboration of an EU minority protection standard. These instruments, however, are mostly limited to guaranteeing simple nondiscrimination, which is not enough to ensure minority protection *stricto sensu*. The lack of any viable internal minority protection standard did not prevent the European Union from treating minority protection as one of the key elements of the pre-accession process leading to the Eastern enlargement, reinforcing the internal-external competence divide and reducing the effectiveness of minority protection in the European Union. Although minority protection was one of the Copenhagen political criteria—and thus at the core of the conditionality principle presupposing a fair assessment of the candidate countries’ progress on the merits—the Commission clearly used minority protection in a discriminatory way, tolerating the standard of assimilation in one group of candidate countries (Latvia, Estonia) and backing cultural autonomy in others. Thus, alongside the internal toleration or simple denial of minority problems in the European Union, the Commission simultaneously promoted two contradicting approaches in external relations: *de facto* assimilation, which is prohibited by article 5(2) of the Framework Convention for the Protection of National Minorities, and cultural autonomy, which brings to life a complicated web of partly overlapping, partly contradicting standards.
KOREAN PERCEPTION(S) OF EQUALITY AND EQUAL PROTECTION

Ilhyung Lee

[pages 53–84]

Abstract: Korea has been a constitutional democracy for just twenty years after decades of authoritarian rule. Thus, “equality” is a relatively new concept to average Koreans. Perceptions of equality and equal protection are often shaped by societal culture. Two competing forces affect the Korean situation. First, Korea has deeply embedded Confucian norms that guide contemporary attitudes and practices. Second, Korea has recently undergone a radical social transformation, resulting in changing norms. Toward a more informed understanding of how Koreans perceive equality and equality rights, this Article reports the results of a survey of Korean reactions to a hypothetical suggesting disparate treatment by a commercial airline. The survey assesses whether participants view the airline’s action as (i) discriminatory and/or (ii) unlawful, and (iii) what actions they would take. The vast majority saw the action as discriminatory; a significantly smaller majority viewed it as illegal. Respondents offered many actions they would take in response. In explaining the results, this Article takes account of cultural norms attributed to Korea, the society in transformation, and changes in Korea’s legal institutions during democratization.

NOTES

RUSSIAN RULE-ETTE: USING KHODORKOVSKY’S CRIMINAL TRIAL TO ASSESS THE STATE OF RUSSIA’S JUDICIARY

Dina M. Bernardelli

[pages 85–102]

Abstract: The criminal trial of Russian oligarch and oil tycoon Mikhail Khodorkovsky in connection with Yukos Oil has been one of the most publicized and controversial trials in the history of the Russian Federation. Khodorkovsky’s conviction in the Russian courts has raised grounds for appeal to the European Court of Human Rights on both procedural and substantive grounds. This Note discusses the failures of judicial reform in Russia since the founding of the Russian Federation that have been brought to light by Khodorkovsky’s trial, and assesses the causes of these failures and the prospects for judicial reform.
Tiger, Tiger Flickering Light

Milan Dalal

[pages 103–120]

Abstract: Tiger population in the wild, particularly in India, is disappearing at a rapid rate because of extensive poaching and destruction of habitats. The poaching is mainly driven by demand for tiger parts used in traditional Chinese medicine. As a result, Indian tiger products are smuggled into Tibet in contravention of the CITES treaty. This Note argues that significant changes need to be made to the legal regimes in India and China to deal with the poaching epidemic, including strengthening anti-poaching laws and legal enforcement. Additionally, the Author advocates implementing alternative economic strategies that rely on giving incentives to people and harnessing the free market to conserve the tiger. In particular, this Note suggests that eco-tourism, combined with environmental entrepreneurship, is a better strategy for conserving tigers than the current, ineffective governmental regime.

Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil

John C. Martin

[pages 121–136]

Abstract: Economist Hernando de Soto urges land re-titling programs in developing countries so that squatting farmers and businesspeople may be integrated into a lawful economy. Re-titling programs, however, can go awry, fueling class and racial backlash, and undermining economic stability and trust in property titles. This Note explores the risks and challenges Brazil faces in expropriating and re-titling land occupied by squatters. It addresses the legality of expropriation under international law, draws comparisons with land reform in the United States and Zimbabwe, and addresses the specific hurdles Brazil faces concerning its Constitution, civil code, and judicial system. This Note proposes a legal solution resembling the U.S. Homestead Act. It would involve expropriating land for less than fair market value in order to facilitate a more equal distribution of land and to temper the risk of racial backlash.
Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur

Max W. Matthews

[pages 137–152]

Abstract: Since 2005, both the U.N. General Assembly and the Security Council have expressed for the first time a clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Though scholars have since debated the legal status of this responsibility, commonly referred to as R2P, it is most accurately described as a declaratory principle rather than a binding rule of international law. Still, recent resolutions by the Security Council, particularly those in reaction to the ongoing atrocities in Darfur, Sudan, explicitly invoke R2P while calling for protective actions in accordance with the principle. If the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future.

One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell

Kyle Robertson

[pages 153–168]

Abstract: The proposed merger of General Electric and Honeywell International, two U.S. owned and operated companies, was blocked on an international level by the European Commission even after its domestic approval. Despite the closeness of U.S. and EU antitrust laws, regulators in both countries reached opposite conclusions regarding the effects of the merger. This case highlights the complexities of international merger analysis in the absence of a global competition policy and the dangers that inherently exist in the current regulatory landscape. This has made it clear that countries with restrictive merger guidelines can become the gatekeepers for large scale international mergers. Specifically, China has recently enacted antitrust legislation that may grant them the power of ultimate decision in mergers that cross their boundaries, even if Chinese involvement is only a small component of the overall merger.
Japanese Rice Protectionism: A Challenge for the Development of Agricultural Trade Laws

Chandler H. Udo

[pages 169–184]

Abstract: The Japanese government has failed to contribute meaningfully to agricultural trade negotiations. Japan’s extreme negotiation posture primarily stems from a disinclination to make concessions in its domestic rice market. It is also a result of the ability of Japan, and other developed nations, to take advantage of the rule structure outlined by the Agreement on Agriculture. Under current agricultural laws, Japan is able to maintain many domestic measures that provide support for rice farmers while also charging prohibitively high tariffs. Japan’s reluctance to limit its support for domestic rice farmers is based on the premise that rice plays a central role in Japanese culture, and without protection, the industry would collapse. What Japan has failed to realize, however, is that the bases of its arguments have little merit today. Perhaps more importantly, Japanese resistance to agricultural trade reform seriously undermines the legitimacy of the WTO.
A SUMMARY OF CONTRADICTIONS: AN OUTLINE OF THE EU’S MAIN INTERNAL AND EXTERNAL APPROACHES TO ETHNIC MINORITY PROTECTION

DIMITRY KOCHENOV*

Liberty has always been understood in Europe as the freedom to be our real selves.

—José Ortega y Gasset

Abstract: A number of available legal instruments have the potential to contribute to the elaboration of an EU minority protection standard. These instruments, however, are mostly limited to guaranteeing simple nondiscrimination, which is not enough to ensure minority protection stricto sensu. The lack of any viable internal minority protection standard did not prevent the European Union from treating minority protection as one of the key elements of the pre-accession process leading to the Eastern enlargement, reinforcing the internal-external competence divide and reducing the effectiveness of minority protection in the European Union. Although minority protection was one of the Copenhagen political criteria—and thus at the core of the conditionality principle presupposing a fair assessment of the candidate countries’ progress on the merits—the Commission clearly used minority protection in a discriminatory way, tolerating the standard of assimilation in one group of candidate countries (Latvia, Estonia) and backing cultural autonomy in others. Thus, alongside the internal toleration or simple denial of minority problems in the European Union, the Commission simultaneously promoted two contradicting approaches in external relations: de facto assimilation, which is prohibited by article 5(2) of the Framework Convention for the Protection of National Minorities, and cultural autonomy, which brings to life a complicated web of partly overlapping, partly contradicting standards.

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José Ortega y Gasset, Toward a Philosophy of History 57 (1940).
INTRODUCTION: AN EDIFICE OF MANY CONTRADICTIONS

“Stubbornly thinking in symbols”: this is how a Czech mayor, busy with building a Roma ghetto in the town of Ústí nad Labem, characterized the European Union (EU).2 The mayor in question is not the only person in Central and Eastern Europe to ascribe equality, non-discrimination, and human rights protection only a “symbolic” value. Luckily, the European integration project is largely built around a set of values quite different from the local prejudices found in Member States and candidate countries. Minority protection is one of those principles, vital for the successful creation of a Union based on democracy, the rule of law, and respect for human rights.

The articulation of the pre-accession principle of conditionality3 during the preparation of the Eastern enlargement of the European Union4 provided the organization with a number of tools of influence necessary to effectively alter the situation of minority protection in the candidate countries and other states willing to accede.5 Such developments notwithstanding, the fact that the European Commission (Commission) has honored the minority protection criterion with unprecedented attention surprised a number of academics.6

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3 The essence of the principle of conditionality was to make the accession of the candidate countries to the European Union conditional on a number of preconditions spelled out by the Commission. An elaborate system of legal and political instruments was used to check the candidate countries’ compliance with the preconditions formulated. See Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, Ch. 2 (2008).

4 The fifth enlargement round accommodated Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Slovenia, Malta, Cyprus, and the Czech Republic. See Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 235) 17. The sixth enlargement round accommodated Romania and Bulgaria. See Treaty Concerning the Accession of the Republic of Bulgaria and Romania to the European Union, 2005 O.J. (L 157) 11.


Academics were astonished because minority protection as such lies outside the scope of the *acquis communautaire*. However, given a goal-oriented reading of articles 49 and 6(1) of the European Union Treaty (EU Treaty) in light of article 5 of the Treaty Establishing the European Community (EC Treaty), the Commission’s activities during the pre-accession process were not constrained by article 5 of the EC Treaty’s competence limitations because only checking the candidates’ adherence to the “democracy, the Rule of Law and human rights” issues falling within the scope of the *acquis* would contradict the very purpose of article 6(1) of the EU Treaty, which clearly has an overwhelming scope, not restricted by Community competence limitations. Thus it is not surprising that minority protection, along with other issues generally falling outside the scope of the *acquis*, became one of the corner-stones of the pre-accession. Ethnic minority protection is not the only example of such practice—the rights of sexual minorities, for instance, have been included by the Commission into the pre-accession assessment even though the *acquis* did not include any Community competence on this issue at the time when regular reporting had started and the case law of the European Court of Justice (ECJ) was rather hostile to EU citizens belonging to sexual minorities.

Judging by the reports and opinions released by the Commission during the preparation of the eastern enlargement, it can be concluded that minority protection was at the core of the pre-accession process. Sections of the Copenhagen-related documents concerning the assessment of this criterion are considerably longer than the sections concerning other issues. The analysis contained therein covered a large number of minority protection issues. Reports concerning some countries even adopted a unique sub-structure of the minority protec-

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8 Presidency Conclusions, Copenhagen European Council (June 21–22, 1993). For general information on the Copenhagen Criteria, see generally Christophe Hillion, *The Copenhagen Criteria and Their Progeny*, in EU Enlargement, supra note 5, at 1.

9 See, e.g., Written Question No. 2224/96, 1996 O.J. (C 365) 95; Written Question No. 2134/83, 1984 O.J. (C 152) 25; Written Question No. 2126/83, 1984 O.J. (C 173) 9.


tion section, something the Commission did not do while addressing other issues.

Such an approach to minority protection can be regarded as a logical response to the rise of nationalism in Central and Eastern European countries, and is clearly connected with the European Union’s stability and security concerns. Although it has been argued that “nationalism is an inevitable factor in the creation of the post-communist state,” not all scholars share this view. At the same time, it is impossible to deny that historically, minority protection has always been especially acute for Central and Eastern European countries. This was particularly true during the interbellum period between the two world wars, when the dissolution of several empires and the creation of new nation states shifted borders and gave rise to a number of minority problems all over the region.

The prominent role played by minority protection during the pre-accession process leading to the last enlargement did not result in (and was not based on) elaboration of any serious minority protection standard that the European Union could use both internally and externally, especially during the preparation of the coming enlargements. Such a standard will be needed in the future because the

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enlargement saga is far from over. In 2007, the European Union embraced two new Member States (Bulgaria and Romania) and more will join in the future. Three countries currently enjoy a candidate country status: Croatia; Macedonia (FYROM); and Turkey. More- ever, a number of countries in Europe, including Albania, Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Moldova, Serbia, and Ukraine, made it clear that joining the European Union is among their foreign policy priorities. In other words, the European Union stands somewhere in the middle of its enlargement road. In the future, enlargements are likely to stay on the EU agenda for several decades. It goes without saying that all countries in question, and especially Turkey with its treatment of the Kurdish minority, and the Balkan states recovering from violent ethnic conflicts, have a number of outstanding minority issues. The European Union will have to address these issues during the pre-accession process. To effectively do so, a reliable minority protection standard is required.

As analysis of the application of the conditionality principle demonstrates, the European Union employed at least two mutually exclusive standards during the pre-accession process. The first was roughly built on the idea of tolerating (forced) assimilation (in Estonia and Latvia). The second was based on the idea of cultural autonomy (applied in other countries and, in particular, in Romania, Slovakia and Bulgaria). This process, although reflecting the state of normative disarray of internal EU minority protection, is ill-suited both for the conduct of future enlargements and, more importantly, for the effective protection of minorities within the European Union. Some difficult choices will have to be made in the near future to change this situation.

This Article illustrates two main clashes inherent in EU minority protection. First, building inter alia on the works of Hillion, Hughes

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18 The former Yugoslav republics have only recently turned to a balanced approach on minority issues. See generally Antonija Petričušić, Constitutional Law on the Rights of National Minorities in the Republic of Croatia, 2 EUR. Y.B. MINORITY ISSUES 607 (2003).
19 See infra Section V.
20 Hillion, supra note 12, at 714–40.
and Sasse, 21 and Wiener and Schwellnus, 22 it discusses the internal-external divide in EU minority protection, which allows for the promotion of minority protection outside EU borders while tolerating the neglect of minority issues within. Second, through the use of several examples, this Article demonstrates that a double standard of minority protection arose from external minority protection activity of the European Union during preparation for the fifth and sixth enlargements. These contradictory practices are put into the broader context of available minority protection standards.

The whole edifice of EU minority protection that miraculously stands today is thus built on two contradictions and is unable to serve its main function—namely, to provide effective protection for minorities in the European Union.

I. Structure of the Argument

After briefly discussing the theoretical debate surrounding the very idea of minority protection (focusing on Kymlicka and Waldron), this Article first makes a clear distinction between the nondiscrimination approach taken by the Community and best articulated in the Race Directive, 23 and a fully fledged vision of minority protection as understood in the Permanent Court of International Justice’s (P]IC) Minority Schools in Albania case 24 that also includes special minority protection measures not limited to simple nondiscrimination. It then summarizes some legal provisions that could potentially enable the European Union to espouse a fully-fledged approach to minority protection. Second, this Article briefly focuses on the internal-external minority protection divide in the European Union, providing a summary of minority protection measures promoted by the European Union externally and constituting part of EU enlargement law. This Article also discusses the rare internal references to minority protection, which mostly come from political documents lying outside the normative

22 Wiener & Schwellnus, supra note 12, at 1–39.
24 See Minority Schools in Albania, 1935 P.C.I.J. (ser. A./B.) No. 64 (Apr. 6, 1935). In this case, involving Greek minority schools in Albania, the Court established that formal equality was not enough to guarantee equal rights for the Greek minority residing in Albania and special rights were needed. See id. The Court found that “there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of being a minority.” Id.
framework of EU law. The paradoxical difference between what the European Union itself adhered to and what it promoted is illustrated by one of Joseph Wieler’s maxims: “do not do what I do, do what I tell you to do”\textsuperscript{25} (initially ascribed to “officers” but equally applicable to the European Union’s policy line in the field of minority protection). Third, this Article focuses on EU minority protection standards during the fifth and the sixth enlargement rounds and connects the inadequacy of the European Union’s internal approach to minority protection with the inadequacy of the external one. To do so, the Article looks into the substance and structure of the Copenhagen-related documents released during the preparation of the Eastern enlargement with a view to discovering a standard the European Union used while applying the conditionality principle in this field.

Finally, having discovered at least two of such standards, the Article focuses on the inadequacy of the whole approach to minority protection taken by the European Union.

II. SHOULd THE EUROPean UNIOn BUIld DISNEYLANDS?

WALDRON VS. KYMLICKA

It has been suggested that liberal democracies should take a neutral stance \textit{vis-à-vis} ethnocultural diversity and that equality alone, without specific minority protection rights, can meet the needs of minorities.\textsuperscript{26} Moreover, the negative effects of minority protection are clear, demonstrating the human need to belong to a distinct community,\textsuperscript{27} which in the past was taken for granted.\textsuperscript{28} Thus, the very core of arguments promoting specific rights for minorities has been seriously questioned. Jeremy Waldron opined that:

[I]mmersion in the traditions of a particular community in the modern world is like living in a Disneyland and thinking that one’s surroundings epitomize what it is for a culture really to exist. Worse still, it is like demanding funds to live in a Disneyland and the protection of modern society for the boundaries


\textsuperscript{28} Id. at 759.
of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life.\textsuperscript{29}

Will Kymlicka provides a drastically different approach. His argument is built around an absolute necessity to have specific minority instruments, based on the assumption that no polity can be truly ethnically neutral.\textsuperscript{30} This approach coincides with that of the League of Nations.\textsuperscript{31}

The lack of scholarly consensus on this issue is telling. A number of different practical approaches to minority protection adopted by EU Member States reflect the diversity of theories in the area. This diversity becomes even more striking during enlargement preparation.\textsuperscript{32}

Compared to Waldron and Kymlicka’s theories, the European Union is somewhere in the middle.\textsuperscript{33} Although it does not provide a fully-fledged minority protection mechanism, it does not exclude the possibility of institutionalizing minority protection and even recognizes it. Community Law in the sphere of minority protection might not be well-articulated, but it is certainly far from being “non-existent,” as Hughes and Sasse argue.\textsuperscript{34}

\textsuperscript{29} Id. at 763.


\textsuperscript{31} See Gaetano Pentassuglia, Minorities in International Law 27–29 (2002) [hereinafter Minorities in International Law].

\textsuperscript{32} See Norbert Rouland et al., Droit des minorités et des peuples autochtones 261–305 (2006); Roberto Tonetti, Minorities and Protected Minorities: Constitutional Models Compared, in Citizenship and Rights in Multicultural Societies 195, 205–12 (Michael Dunne & Tiziano Bonazzi eds., 1995).


\textsuperscript{34} Hughes & Sasse, supra note 12, at 2.
III. Nondiscrimination, Special Rights and Albanian Schools

International law has long recognized minority protection. According to an established practice, articulated by the PCIJ in the Advisory Opinion concerning minority schools in Albania, minority protection consists of two main components: non-discrimination on the one hand and special measures for minority protection on the other. Although these elements are certainly interconnected, their essence remains different.

In Europe, the Council of Europe (CoE) has been especially successful in dealing with these components, which play an important role in minority protection. The CoE legal system makes a rather successful attempt to combine both of them through the use of the Framework Convention for the Protection of National Minorities (Framework Convention) and the European Charter for Regional and Minority Languages, coupled with the nondiscrimination provisions of the European Convention on Human Rights (ECHR). Next to ECHR article 14, which has acquired new importance after the entry into force of Protocol 12 to the ECHR (making the self-standing use of the article


37 Minority Schools in Albania, 1935 P.C.I.J. at 17.

38 Henrard, supra note 12, at 59; see also Will Kymlicka, Introduction to The Rights of Minority Cultures 1–29 (Will Kymlicka ed. 1995) (defending this position).


possible), and the case law of the European Court of Human Rights (Eur. Ct. H.R.), the Framework Convention and the Charter form the most developed international minority protection system to date, combining binding and nonbinding legal documents aiming at the creation of a well-regulated minority protection regime in Europe.

It is necessary to keep in mind, however, that simply focusing on equality without providing minorities with specific group rights is another approach consistent with the notion of democracy. In other words, the two-tier system of minority protection is desirable to protect fully the interests of the minorities, but there is no obligation in international law to institute such a system.

A. The European Union and the Nondiscrimination Part of the Standard

European Union law as it stands to date clearly gives an overwhelming priority to the nondiscrimination part of minority protection. This being said, it would be unfair to argue that this approach is a consequence of a particular doctrinal choice made by the Community. Unlike some of its Member States, such as France, the European Union has not defied the PCIJ’s position, but is simply not ‘mature’ enough in this respect to go further than Waldron’s nondiscrimination minimum. The first component of minority protection (i.e. nondiscrimination based on belonging to a minority) is incorporated into the Community legal order via the Race Directive based on article 13 of the EC Treaty and article 6(2) of the EU Treaty, in which reference to the ECHR is made, thus making a connection between article 14 of the ECHR and the principles of Community Law. Article 2 of the Directive states that “there shall be no direct or indirect discrimination based on racial or ethnic origin.” Article 14 of the ECHR prohibits discrimination on the grounds of “sex, race, colour, language, religion, political or

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44 Nathan Glazer, Individual Rights Against Group Rights, in The Rights of Minority Cultures, supra note 38, at 123, 133; see also Waldron, supra note 27, at 752–57 (defending position similar to that of Glazer).
other opinion, national or social origin, association with a national minor-
ity, property, birth or other status.”

Read together, these provisions make it clear that nondiscrimina-
tion on the grounds of national origin or association with a national minority is elevated to one of the principles of Community Law. This legal framework is reinforced by article 21(1) of the Charter of the Fundamental Rights of the European Union (CFR). Article 21(1) of the CFR, which is based on the set of legal instruments outlined above, namely articles 14 of the ECHR, 6(2) of the EU Treaty, and 13 of the EC Treaty, reads as follows:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Although the CFR is a “proclaimed” document having no binding force, its potential is illustrated by the references to its provisions made both by the ECJ51 and the Court of the First Instance (CFI).52 In other words, although not binding,53 the CFR plays a role in the Community legal system.54

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47 See Hillion, supra note 12, at 718–21.
50 See generally Guido Schwellnus, “Much Ado About Nothing?” Minority Protection and the EU Charter of the Fundamental Rights (Const. Web Papers, No. 5, 2001), http://les1.man.ac.uk/conweb (Follow the “archive” hyperlink; then follow the “2001” hyperlink) (describing effects of provision on minority protection in European Union).
52 See Case T-177/01, Jégo-Quéré et Cie SA v. Comm’n, 2002 E.C.R. II-2365 ¶¶ 1, 42.
Thus, a number of provisions lay down the basis for, and are able to influence further development of, the principle of nondiscrimination on the ground of belonging to a national minority in Community Law. These provisions include articles 6(2) of the EU Treaty, 13 of the EC Treaty, 14 of the ECHR, and 21(1) of the CFR as well as Directive 2000/43/EC.

**B. The European Union and the Special Rights Part of the Standard**

The principle of nondiscrimination as included in article 14 of the ECHR, around which the Community approach discussed above is built, is narrower in scope than the Copenhagen criterion of “respect for and protection of minorities” because it does not include the second component of minority protection in light of the PCIJ’s *Albanian Schools* decision. The European Commission on Human Rights established that “[ECHR] does not compel states to provide for positive discrimination in favour of minorities.” It is just another argument denoting that a simple anti-discrimination approach rooted in article 14 of the ECHR hardly includes a possibility to adopt specific measures aimed at improvement of the situation in the sphere of minority protection. In other words, it does not “reach out to minority rights *stricto sensu.*” Even the ECJ’s active approach in several cases involving minorities, where the court viewed nondiscrimination as allowing for positive measures of minority protection, stating *inter alia* that “protection of a [linguistic minority] may constitute a legitimate aim” of state policy, did not change the general picture: the court is yet to establish national minority protection in a sense broader than simple nondiscrimination as a principle of Community Law.

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55 *See supra* Section III.A.


57 *See Minorities in International Law, supra* note 31, at 125–26.


60 *See Rough Orientation, supra* note 33, at 19.
One can outline a number of possibilities to include the second element of minority protection into the ambit of Community Law.\textsuperscript{61} Probably the most realistic is related to the use of the provisions of the EC Treaty dealing with culture.\textsuperscript{62} It has been argued that Title XII of the EC Treaty clearly implies that none of the Member States is culturally homogeneous,\textsuperscript{63} as article 151(1) of the EC Treaty states that “the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity.” The Community is also obliged to “take cultural aspects into account in its action . . . in order to promote the diversity of cultures.”\textsuperscript{64}

Article 22 of the CFR also contains a reference to diversity, inspired by articles 151(1) and (4) of the EC Treaty. It includes cultural, religious and linguistic diversity, thus indirectly referring to the respect for minority rights. It is notable that the drafters of the CFR viewed article 22 as being rooted in article 6 of the EU Treaty,\textsuperscript{65} thus denoting that diversity is a constitutional principle of the European Union.\textsuperscript{66}

The EC Treaty not only requires the Community to “take cultural aspects into account in its action,”\textsuperscript{67} but also creates a climate “to promote culture”\textsuperscript{68} through establishing that aid in this domain is “considered to be compatible with the common market.”\textsuperscript{69}

Certain minority protection measures in the cultural sphere were in place even during the pre-Maastricht period.\textsuperscript{70} One such measure

\textsuperscript{61} See generally Bruno de Witte, The Constitutional Resources for an EU Minority Protection Policy, in ENLARGED EUROPEAN UNION, supra note 12, at 107, 118–23.


\textsuperscript{63} Adam Biscoe, The European Union and Minority Nations, in MINORITY RIGHTS IN THE ‘NEW’ EUROPE, supra note 62, at 93.

\textsuperscript{64} Treaty Establishing the European Community, 2006 O.J. (C 321E) 37, art. 151(4) [hereinafter EC Treaty].

\textsuperscript{65} See EXPLANATION OF CHARTER OF FUNDAMENTAL RIGHTS, supra note 49, at 40. Declaration Number 11 to the Final Act of the Treaty of Amsterdam on the status of churches and non-confessional organizations is also mentioned among the provisions on which article 22 of the CFR was based. See id.; see also Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, Oct. 11, 2000 (providing the explanatory notes of the praesidium).

\textsuperscript{66} See Rough Orientation, supra note 33, at 7 & n.50.

\textsuperscript{67} EC Treaty, supra note 64, art. 151(4).

\textsuperscript{68} Id. art. 87(3)(d).

\textsuperscript{69} Id. art. 87(3).

\textsuperscript{70} See Rough Orientation, supra note 33, at 12.
was Directive 77/486 of July 1977,\textsuperscript{71} concerning the education of migrant workers’ children—nationals of one of the Member States—in their mother tongue. It is questionable, however, whether this directive is really a minority protection tool because it is inspired by the economic free movement and does not protect the rights of migrant workers belonging to the national minorities.\textsuperscript{72} Although the classical approach to minority rights usually does not deal with the European citizens residing in a Member State other than their own, new studies adopt a somewhat more inclusive approach. Bruno de Witte was among the first scholars to ask the question “have the Member States of the EU become ‘national minorities?’”\textsuperscript{73}

A certain evolution is apparent from ECJ case law related to culture, which is particularly acute for minority protection. Martín Estébanez stresses the shift in the court’s reasoning from mainly relying on economic considerations to more cultural ones.\textsuperscript{74} Paying due respect to cultural rights, it is clear, however, that the court’s main case law concerning the elaboration of minority protection rights at the Community level is mostly related to nondiscrimination,\textsuperscript{75} which, as stated above, stops short of providing fully-fledged minority protection.

At present, the second component of the Albanian Schools minority protection standard is missing from Community Law. This situation does not prevent some scholars from being optimistic about the development of internal minority protection system within the European Union: “there seem to be already quite a number of building blocks in place on the basis of which a more explicit internal minority policy for the European Union could be developed if the necessary political will


\textsuperscript{72} “Economic free movement” is the freedom granted by article 39 of the EC Treaty to workers and their family members to reside and work anywhere in the Community on the basis of Community Law, not the law of the Member State of residence. It contrasted with “non-economic free movement” of other categories of European citizens (guaranteed by article 18 of the EC Treaty) which is much more restricted.


\textsuperscript{74} See Martín Estébanez, supra note 33, at 144, nn.32–33.

could be engendered.” The scope of internal EU protection of minorities is thus comparable to the nondiscrimination part of the CoE standard, but is slightly wider than that due to its expansion potential to cover special rights.

IV. INTERNAL AND EXTERNAL ASPECTS OF COMMUNITY ACTION: A MINORITY RIGHTS PARADOX

In light of the wording of article 6(1) of the EU Treaty, which does not explicitly include minority protection, the Copenhagen criterion dealing with respect for and protection of minorities has been called a “criterion which was not elevated to the nobility of Primary Law.” The observations related to the possible reasons why this has happened in such a way are numerous. It is clear that consensus concerning minority protection, as well as the political will to put such a system in place at the EU level is missing among Member States. This is illustrated by the problems related to the drafting and ratification of the CoE Framework Convention and the declarations adopted by EU Member States during this process. According to Bruno de Witte, “[T]he notions of ethnic minority and European Union seem, at the first sight, to belong to two different worlds.”

A. European Union External Dimension of Minority Protection

Looking closer, however, it is clear that “the respect for and protection of minorities” has definitely become a new principle of EU enlargement law, marking a long process of minority-related developments in the context of several enlargements.

Certain rules aimed at the protection of the local communities first appeared in the context of the first enlargement with a reference to the rights of Channel Islanders, Manxmen, and the residents of the Færøe

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76 See Martín Estébanez, supra note 33, at 162.
77 Rough Orientation, supra note 33, § 4.3.
79 Politics v. Law, supra note 33, at 137.
80 Protocol No. 3 on the Channel Islands and the Isle of Man to the Act concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway, and the Kingdom of Great Britain and Northern Ireland art. 2, 1972 O.J. (L73) 164 [hereinafter Protocol No. 3]; see K.R. Simmonds, The British Islands and the Community: III—Guernsey, 8 Common Mkt. L. Rev. 475, 480–82 (1971); K.R. Simmonds, The
Islands.81 Such measures, not being minority protection *per se*, mostly limited the application of Community Law to these territories, with a goal of preserving local communities. In other words, they constituted a sort of “economic” minority protection, which was perfectly in line with the purely economic orientation of the Communities at that time.

At present, such minority protection measures can only be regarded with caution. Although they protect minorities, they also practically deprive the individuals belonging to the minorities of the part of Community Law rights they would otherwise enjoy by limiting the application of EU law to the inhabitants of these special areas. In one example, although the families granted settlement rights on Sark, the feudal fief in the hands of the seigneur of Sark and part of the bailiwick of Guernsey,82 were British citizens,83 they were not regarded as fully-fledged EU citizens because Community Law provisions relating to the free movement of workers and the free movement of services did not apply to them.84 Although some of these people see this as a blessing, others are annoyed by this *de facto* discrimination and the inability to rely on the free movement of persons and services under EC law.85 To become fully-fledged EU citizens, the Sarkese, just as any other Channel Islanders or Manxmen, must reside in the United Kingdom for five years.86

The *de facto* discrimination in terms of free movement rights is even more acute given that the Channel Islanders as well as Manxmen fall within the scope of British nationality, as defined for purposes of

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81 Protocol No. 2 on the Faroe Islands, Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, 1972 O.J. (L 73) 163 art. 1; Jersey, *supra* note 80, at 161.


83 These families were granted citizenship by virtue of their connection with the Crown as a successor of the Dukes of Normandy, not as a British Monarch. See Andrew Massey, *Modernising Government in the Channel Islands: The Context and Problematic of Reform in a Differentiated but Feudal European Polity*, 82 Pub. Admin. 421, 427 (2004).

84 See Protocol No. 3, *supra* note 80, art. 2; Case C-171/96, Rui Alberto Pereira Roque v. His Excellency the Lieutenant Governor of Jersey, 1998 E.C.R. I-4607 (illustrating special status enjoyed by islands in EC free movement law).

85 The status of territories lying mainly outside EU law turned the Channel Islands into tax-heavens allowing them to attain the levels of GDP per head which are much higher than the UK average. Massey, *supra* note 83, at 426.

86 Protocol No. 3, *supra* note 80, art. 6.
EU citizenship in Declaration number 2° annexed to the EEC Treaty by the British Government. Point “c” of the Declaration makes an express reference to Manxman and Channel Islanders, making it clear that they are UK nationals for purposes of Community Law. In other words, the kind of minority protection as used in the Protocols to the 1972 Act of Accession is of dubious nature. While providing Minorities with special protection, it also strips them of some important rights.

A somewhat more usable standard of minority protection, including the protection of traditional occupations, culture, and linguistic diversity, first appeared in EU enlargement law during the fourth enlargement and dealt with the rights of the Sami people° and, to a lesser extent, with the Swedish-speaking population of the Åland Islands. As a result of such measures, these minorities were, in the words of von Toggenburg, “[S]aved from unwanted effects of the Common Market.”°

The principle of minority protection also acquired an immensely important role in the European Union’s enlargement-flavored external relations with the countries of Central and Eastern Europe after the end of the Cold War, especially through the protection of the “rights of persons belonging to minorities” clause of the Europe Agreements

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° See Protocol No.3 on the Sami People, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded arts. 1 & 2, 1994 O.J. (C 241) 352 [hereinafter 1994 Accession Act]. In relation to the rights of the Sami people, it is notable that Norway attached declarations to the Final Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded, § III(G)(38)–(39), 1994 O.J. (C 241) 395. Norway failed to join the European Union in the end as a result of a negative outcome of a popular referendum on this issue.


° Gabriel von Toggenburg, Minority Protection in a Supranational Context: Limits and Opportunities, in Enlarged European Union, supra note 12, at 1, 24.

° Wiener & Schwellnus, supra note 12, at 2.
made with Central and Eastern European countries. In other words, minority protection formed part of EU enlargement law before the first release of Copenhagen-related documents. Yet, only the fifth enlargement allowed minority protection to acquire a “clear political and legal dimension.” These developments notwithstanding, no clear minority protection clauses were included into the 2003 Treaty of Accession.

B. European Union Internal Dimension of Minority Protection

Although an established enlargement law principle, minority protection is far from being well-rooted within the Community. Internally, minority protection has only manifested itself at the Community level on two occasions, both of them accidental and not expressly aimed at minority protection. The first such occasion was the adoption of the EU Special Support Program for Peace and Reconciliation in Northern Ireland, and the second was a Member States’ demarche against Austria after the inclusion of Jörg Haider’s FPÖ into the coalition government in 2000. The protection of minority rights was expressly mentioned during the crisis on a number of occasions, making scholars speculate that “the EU Member States and the EU institutions . . . would be opposed to any breach of inter alia minority rights by the Austrian government.”

Ironically, the report of the “three wise men” who had been sent to Austria to investigate the situation concluded that Austria “protects the existing minorities . . . to a greater extent than


94 *Rough Orientation, supra* note 33, at 11.

95 von Toggenburg, *supra* note 91, at 24. The standards applied by the Commission to the assessment of minority protection in the candidate countries during the preparation of the fifth enlargement are assessed, *infra* Section V.


97 Although one can argue that the European Union did not play an important role in the Austrian crisis, the actions of the fourteen Member States were obviously coordinated and cannot be treated simply as the initiatives of the individual member states. See generally Matthew Happold, *Fourteen Against One: The EU Member States’ Response to Freedom Party Participation in the Austrian Government*, 49 INT’L & COMP. L. Q. 953 (2000); Michael Merlingen, Cas Mudde, & Urich Sedelmeier, *The Rights to Be Righteous?: European Norms, Domestic Politics and the Sanctions Against Austria*, 39 J. COMMON MKT. STUD. 59 (2001).

such protection exists in many other EU countries,”99 thus failing to establish a link between the nature of the government in power and possible minority rights violations.

It is clear that the first example aimed at the establishment of peace and security, and the second dealt with democracy and human rights protection in the broadest possible sense. Neither of them really focused on minority rights, nor did they adopt any viable minority protection standard or go beyond mere political declarations. Minority protection only came as an unavoidable consequence of Community interference.

Although absent from the binding sphere of the acquis, minority protection is nevertheless well-rooted in the sphere of nonbinding acts and political declarations. The importance of minority protection in the European Community was asserted by the 1991 Luxembourg European Council, which adopted a Declaration on Human Rights. That declaration states that respect of the minority protection principle “will favour political, social and economic development.”100 The European Parliament (EP) has also demonstrated its willingness to contribute to the minority protection debate at the EU level on several occasions.101 The EP put forward a number of initiatives to introduce minority protection into the texts of Treaties during every Treaty revision exercise, but these propositions were disregarded and none passed.102 Once again, consensus on this point appears to be missing among the Herren der Verträge.

99 Martti Ahtisaari, Jochen Frowein, & Marcelino Oreja, Report to the European Court of Human Rights, § 29 (Sept. 8, 2000).


102 See Bruno de Witte, The European Community and Its Minorities, in Peoples and Minorities in International Law 179 (Catherine Bröllmann et al. eds., 1992). We know from the history of European integration that proposals put forward by the EP have been followed on a number of occasions, though with considerable delay. The possibility to combat discrimination on the grounds of ethnicity, racial origin or belonging to a national
C. The “Officers’ Maxim” Applied (The Paradox)

Thus, with the exception of a number of political declarations, the idea of minority protection going beyond simple non-discrimination has failed to get to the Community level and enter the scope of the *acquis communautaire*, in order that it may have an internal grip on Member States.\(^{103}\) Such a limited role of minority protection within the European Union does not, however, exclude possible developments in this field.\(^{104}\) Although pessimistic, it is nevertheless highly unlikely that minority protection will become a matter of large-scale EU involvement in the near future as “there remains an evident lack of competence, *i.e.* mandate provided by the Treaty’s High Contracting Parties, regarding ethnic or linguistic minorities.”\(^{105}\) A minority protection standard common to EU Member States is also missing.\(^{106}\) All this threatens to turn EU pre-accession promotion of minority rights into “measuring progress in the absence of benchmarks.”\(^{107}\)

A paradox is evident: an all too powerful principle of EU enlargement law is not at all important internally.\(^{108}\) Even the absence of minority protection from the *acquis* and the non-existence of a common Member States’ standard in the field did not prevent the Community (and especially the Commission) from giving minority protection full priority over other issues during the pre-accession progress assessment exercise.\(^{109}\)

That is to say, just as with general human rights protection,\(^{110}\) minority protection is an instance in which the difference between

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\(^{103}\) See Brusis, *supra* note 33, at 1; Martín Estébanez, *supra* note 33, at 135; Schwellnus, *supra* note 50, at 2; Wiener & Schwellnus, *supra* note 12, at 2.

\(^{104}\) See The Union’s Role, *supra* note 73, at 27.

\(^{105}\) See Rough Orientation, *supra* note 33, at 2.


\(^{109}\) See Maresceau, *supra* note 6, at 16.

“internal” and “external” EU action is crucial.\textsuperscript{111} Taking minority protection requirement as an example, one can argue that “in the context of pre-accession, the constitutional principle of ‘conferral of powers’\textsuperscript{112} does not apply.”\textsuperscript{113}

The gap between internal and external EU minority protection regulation is especially acute after the fifth enlargement, which has only broadened this “political lacuna,”\textsuperscript{114} effectively separating external demands addressed by the Community to the new-comers and the internal protection of minorities within the Community.\textsuperscript{115}

This gap can give rise to a number of far-reaching problems. Clearly, the European Union lost its competence in the field of minority protection after accession became a fact: pre-accession strategy ceased to apply, as did the Copenhagen political criteria. Moreover, the EU minority protection system is practically nonexistent and fails to provide a reasonable degree of protection.\textsuperscript{116} Thus, in order for the European Union to achieve some results in the sphere of minority protection, all minority protection reform in the candidate countries should be completed before, not after the enlargement. Viewed from this perspective, minority protection is distinct from all elements of the Copenhagen criteria falling within the scope of the \textit{acquis} because compliance with the latter is tested only after accession,\textsuperscript{117} and EU involvement remains high. This observation also helps explain the high level of attention the Commission pays to monitoring candidate countries’ compliance with the minority protection criterion, as outlined at Copenhagen.

Thus, although minority protection in the context of enlargement includes both components of minority protection, the European Union’s “internal” minority protection is based purely on nondiscrimination, thus covering only half of the standard as outlined in the PCIJ’s \textit{Albanian Schools} case and Kymlicka’s writings. Although a theoretical

\footnotesize{\textsuperscript{111} \textsc{van der Meulen}, \textit{supra} note 12, at 5; Schwellnus, \textit{supra} note 50, at 1.

\textsuperscript{112} \textsc{Treaty Establishing European Community}, Nov. 10, 1997, 1997 O.J. (C 340) 5 [hereinafter EC Treaty] (“The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned therein.”).

\textsuperscript{113} \textsc{See} \textsc{Hillion}, \textit{supra} note 12, at 716.

\textsuperscript{114} \textsc{von Toggenburg}, \textit{supra} note 91, at 10.

\textsuperscript{115} Although ready to discuss minority languages protection in the candidate countries, the Commission is not ready to give a clear answer to the question regarding protection of minority languages in France. \textsc{See} \textsc{Written Question} 963/98, 1998 O.J. (C 310) 150.

\textsuperscript{116} For an argument for the continuation of minority rights monitoring after enlargement, see \textsc{Hoffmeister}, \textit{supra} note 45, at 105.

\textsuperscript{117} \textsc{See}, \textit{e.g.}, \textsc{EC Treaty}, \textit{supra} note 64, arts. 226–228, 234.}
possibility of embracing the whole approach can, in principle, be found in the body of Community Law, the political will to move in this direction is missing. This picture becomes even more complicated if one scrutinizes the EU standards employed during the pre-accession assessment of the candidate countries’ adherence to the minority protection criterion.

V. Pre-Accession Assessment: Is Estonia Really So Different from Slovakia?

Based on the texts of the Copenhagen-related documents, one can develop a classification of the Commission’s approaches to addressing minority protection in different candidate countries.\(^\text{118}\) A number of approaches emerge.

For some countries, the issue of minority protection was less acute due to a lack of a significant minority population. The Commission adopted an inclusive approach to monitoring minority protection among the candidate countries, and did not specify any minimum minority population necessary for country monitoring in this field to begin.\(^\text{119}\) Nevertheless, the Commission has been reproached for expressly withdrawing from the assessment of the minority situation in some of the candidate countries, Poland is the most telling example of such a practice.\(^\text{120}\) The Commission did not even criticize the fact that Poland was one of the last among the Central and Eastern European countries to ratify the CoE Framework Convention.\(^\text{121}\) It appears that in some candidate countries, conditionality of minority protection during preparation for the fifth enlargement was almost not applied, or was only applied at a rudimentary level, compared to other candidate countries.

It is difficult to establish with certainty the exact sizes of minority populations in the countries of Central and Eastern Europe. The statistical data concerning minority population in that region has been called a “great illusion.”\(^\text{122}\) Although minority population data can pro-

\(^\text{118}\) See Hughes & Sasse, supra note 12, at 14 (making distinction between Roma and Russian-speaking minority versus all other minorities).
\(^\text{119}\) See infra note 136. Even the situation of tiny minorities, such as Csango in Romania, was monitored. See id.
\(^\text{120}\) See Wiener & Schwellnus, supra note 12, at 21–28; see also Vermeersch, supra note 12, at 18–21.
vide a frame of reference, it is far from reality.\footnote{For some statistical estimates, see id. at app. II.} This issue is especially acute in the case of Roma populations;\footnote{See Istvan Pogány, \textit{Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe}, 2 \textit{Queen's Papers on Europeanisation} 2 n.6 (2004), available at http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/EuropeanisationPapers/PublishedPapers (Follow the “2004” hyperlink); Peter Vermeersch, \textit{Ethnic Mobilisation and the Political Conditionality of EU Accession}, 28 \textit{J. Ethnic \\& Migration Stud.} 83, 88–89 (2002).} it equally concerns all the candidate countries, acceding states and the (new) Member States. It is clear, however, that in countries that joined the European Union in 2004 and 2007, millions of people are discriminated based on their belonging to a minority group.

Judging both by the substance and structure of the Copenhagen-related documents concerning minority protection in the countries that joined in 2004 and 2007, considered by the Commission as problematic, one sees two distinct groups of states. The Commission’s approach to them appears to be different, which substantiates the claim that “[minority protection] conditionality varies greatly across accession states.”\footnote{Wiener \\& Schwellnus, \textit{supra} note 12, at 15.} Despite a simple non-inclusion of the issue of minority protection in the Copenhagen-related documents, released in the context of some candidate countries’ pre-accession process, the Commission did not formulate a single approach for all candidate countries where this issue was assessed.\footnote{See, e.g., Wojciech Sadurski, \textit{Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part III: Equality and Minority Rights} (Eur. Univ. Inst., Working Paper No. 1, 2003), available at http://cadmus.iue.it/dspace/index.jsp (Follow the “Date” hyperlink; then select “2003”) (discussing minority protection in constitutional law of countries in this group).}

present-day candidate countries, Croatia. The Copenhagen-related documents concerning minority protection in these countries did not contain any special substructure and dealt with a number of minorities, mostly concentrating on the situation of the Roma, ethnic Hungarians (mostly in Slovakia and Romania), and ethnic Turks (in Bulgaria). A number of smaller minority groups were also mentioned (e.g., the Csango minority in Romania). While dealing with these countries, the Commission advocated wider inclusion for the minority population, respect and support for minority cultures, introduction of education in minority languages (including higher education for some minority groups), and never criticized the grant of cultural autonomy. A special emphasis was made on the issue of nondiscrimination on the ground of belonging to an ethnic minority.

The second group of countries was considerably smaller and included Latvia and Estonia. The Copenhagen-related documents concerning the state of minority protection in those countries adopted a special structure, different from that contained in the Copenhagen-related documents dealing with the first group. The discussion focused on the situation of the “Russian-speaking” minority, although,


136 By mentioning this particular minority in the Regular Reports, the Commission followed the Parliamentary Assembly of the Council of Europe. See EUR. PARL. ASS., RECOMMENDATION 1521: CSANGO MINORITY CULTURE IN ROMANIA (May 4, 2001).


just as in the previous group, a number of other minorities were also discussed. In the context of Estonian and Latvian applications for accession, the Commission relied heavily on the CoE findings\(^{139}\) as well as on the findings of the Organization for Security and Co-operation in Europe (OSCE),\(^{140}\) and was backing developments drastically different from the demands addressed to candidate countries in the first group. Concerning the OSCE’s role, it has been argued that the European Union has “delegated to the High Commissioner on National Minorities (HCNM) the task of judging whether [the candidate countries] have ‘done enough’ in terms of minority rights.”\(^{141}\) The references to the OSCE position are contained both in the Europe Agreements with Estonia and Latvia\(^{142}\) and in the Accession Partner-


\(^{142}\) See Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Estonia, Preamble, 1998 O.J. (L 68) 3, 3–4 (“Considering the commitment to the intensification of political and economic liberties which constitute the basis of this Agreement and to further development of Estonia’s new economic and political system which respects—in accordance *inter alia* with the undertakings made within the context of the . . . Organisation for Security and Cooperation in Europe (OSCE)—the rule of law and human rights, including the rights of persons belonging to minorities.”); see also Europe Agreement Establishing an Association Between the European Communities and Their Member States, and the Republic of Latvia, Preamble, 1998 O.J. (L 26) 3, 3–4 (containing an identical provision).
making the HCNM’s recommendations *de facto* enforceable in the context of enlargement.

The Commission focused on a number of negative developments in the field of minority rights in these countries, but ultimately tolerated established discrimination against minority groups in Latvia and Estonia. Unfortunately, the Commission mostly concentrated on the instances of discrimination that were in blunt contradiction with the obligations stemming from the Europe Agreements made with Estonia, particularly “in the fields of free movement of persons, right to establishment, supply of services, capital movements and award of public contracts.”144 In other words, the market-oriented nature of the European Union prevailed. There was little criticism of the policy of assimilation of the minority population and the exclusion of minorities from many spheres of life, which resulted in the marginalization of minorities—a reality in the countries of the second group.145 The policy of the countries in question, which the Commission tolerated, amounted to attempts to trigger exclusion and, eventually, the emigration of minorities.146 This approach was on its face contradictory to the spirit of inclusion and tolerance the Commission promoted in the first group.

Adopting different approaches to minority protection depending on the countries in which the assessment was conducted, and a particular minority in question, is not in accord with the pre-accession principle of conditionality that consisted of the objective assessment of all candidate countries’ progress based on the same criteria. Moreover, even within each of the groups, the Commission’s approach to

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143 The Accession Partnership with Latvia does not mention the OSCE findings directly; however, the Accession Partnership, makes a reference to acting “in line with the principle of proportionality, international standards and the Europe Agreement.” See Council Decision 2002/88, 2002 O.J. (L 44) 45, 47; see also Council Decision 2002/86, 2002 O.J. (L 44) 29, 31 (making reference, in Accession Partnership with Estonia, to acting “in line with both international standards and the Europe Agreement and respects the principles of justified public interest and proportionality”).


145 See infra Sections V. C–G.

minority protection differed from country to country. Different degrees of pressure and scrutiny were applied.\textsuperscript{147}

The main differences between the Commission’s approaches to the assessment of minority protection in the countries belonging to the first and the second group concerned the following issues:

- Structural approaches to minority rights assessment;
- Naming the minorities concerned;
- Different approaches to the link between belonging to a given minority and the citizenship of a country in question;
- Different approaches to minority education in both groups;
- Different approaches to nondiscrimination in both groups;
- Different approaches to minority self-government in both groups;
- Different approaches to the political rights enjoyed by minorities in both groups.\textsuperscript{148}

\textbf{A. Two Groups of Countries and the Structure of the Copenhagen-Related Documents}

Although the Commission built approaches to the integration of the Russian minorities in Estonia and Latvia and the minorities in other candidate countries along totally different lines, this difference was not reflected in the structure of all the Copenhagen-related documents. It would have been naïve to expect the Commission to introduce into the regular reporting exercise such a differentiated treatment of minorities already at the structural level; this would be in blunt disaccord with the principles of enlargement law, making all the reasonable claims for predictability of the enlargement process irrelevant.\textsuperscript{149} Although the two-tier structure of the problematic countries is not articulated in the structure of the Copenhagen-related documents, such as composite

\textsuperscript{147} For the differences in the Commission’s analysis of Poland, Hungary and Romania, see Wiener & Schwellnus, \textit{supra} note 12, at 15.

\textsuperscript{148} This list is not exclusive and is drafted solely to provide an example of the varied approaches to minority protection used by the Commission.

\textsuperscript{149} Scholars argue that by and large the introduction of the principle of conditionality and its subsequent application did not make the enlargement process more predictable and clear. \textit{See}, \textit{e.g.}, Christophe Hillion, \textit{Enlargement of the European Union: A Legal Analysis, in Accountability and Legitimacy in the European Union} 401, 402 (Anthony Arnull & Daniel Wincott eds., 2002); \textit{cf.} Kochenov, \textit{supra} note 3, at 300–11.
and strategy papers, the same cannot be said about the structure of the Commissions regular reports.\textsuperscript{150}

The composite and strategy papers’ approach to the issue is unsystematic. The 1998 Composite Paper tackles three main issues concerning minority protection: the situation in Latvia and Estonia; the situation with Roma; and the situation of Hungarian minorities in Romania and Slovakia.\textsuperscript{151} One can find a similar structure of the assessment of the candidate countries’ progress in other papers as well. The 1999 Composite Paper notes the progress with the handling of minority protection in Estonia and Slovakia, discusses the need of “finding the right balance between legitimate strengthening of the state language and the protection of minority language rights,”\textsuperscript{152} and the situation with Roma and Hungarian minorities. The 2001 Strategy Paper narrows the minority protection assessment to two main issues: the situation in Latvia and Estonia and the protection of Roma rights.\textsuperscript{153} The 2002 Paper’s structure puts a dividing line between the issues of Roma protection and minority protection—the latter includes all other minorities.\textsuperscript{154}

Overall, the composite and strategy papers do not provide clear guidance through minority protection particularities, and limited to inconsistently hand-picking certain issues while failing to see the larger picture.\textsuperscript{155} This demonstrates an approach similar to that the Commission adopted during the pre-accession assessment of democracy and the rule of law in the candidate countries.\textsuperscript{156}

\textsuperscript{150} For the structure of the whole body of the Copenhagen-related documents, including documents released in implementation of the conditionality principle of the Copenhagen criteria, see Kochenov, supra note 11, at 5–7.


\textsuperscript{156} See sources cited supra note 155.
A different picture is observed through study of the regular reports. Dealing with the second group of countries, the Commission applies a specific “naturalization-oriented” structure of the reports, including subheadings dedicated to the issuance of residence permits and granting citizenship to the members of the minority communities. Thus, all the regular reports dealing with the second group of countries were structurally different from those dealing with the first group. The structure the Commission introduced was mainly threefold, including:

1. A naturalization procedure;
2. Residence permits and special passports for non-citizens; and

Several regular reports also contained a subchapter on linguistic legislation.\footnote{See 1999 Estonian Report, supra note 144, at 14. But see Comm’n of the Eur. Cmtys., Regular Report on Latvia’s Progress Towards Accession (1999), available at http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/ eu10/latvia_en.htm (failing to contain similar subchapter is strange given similarity of problems these two countries faced).} It is clear from this structure that the Commission shifted the accents in its assessment of minority protection in Latvia and Estonia, compared to the minority protection in the first group. Predictably, there was considerable difference in the substantive approach to the minority protection assessment between the countries in the first and second groups.

B. Different Definitions of “Minority” Applied in the Two Groups

As in international law, in which there is no consensus concerning the definition of “minority,” the Commission gave “minority”\footnote{See Henrard, supra note 12, at 367–70; Mullerson, supra note 14, at 807; Schulte-Tenckhoff & Ansbach, supra note 35, at 17; John R. Valentine, Toward a Definition of National Minority, 32 Denv. J. Int’l L. & Policy 445, 463 (2004). See generally Defining “Minority,” supra note 35.} a meaning that differed considerably from the definition adopted in scholarly literature.\footnote{See Henrard, supra note 12, at 367–70; Mullerson, supra note 14, at 807; Schulte-Tenckhoff & Ansbach, supra note 35, at 17; Valentine, supra note 159, at 463.} Moreover, the Commission’s definitions for the first and the second groups of countries differed considerably.
A definition of “minority” is nowhere to be found in the Copenhagen-related documents, leaving it to the candidate countries to determine whom the Commission was asking them to respect and protect. Several peculiar features of the Commission’s understanding of the term follow directly from the Opinions and regular reports.

First, the Commission’s notion of “minority” used in the majority of the Copenhagen-related documents is limited to national minorities, thus excluding a whole range of other minority groups that might otherwise deserve protection. It is true that the Commission addresses the rights of some other minority groups, like religious and sexual minorities, in sections of the Copenhagen-related documents dedicated to other groups of rights. At the same time, it is surprising that the Commission never used the term “national” or “ethnic” minorities in the regular reports, insisting on a broader term “minority” that might appear misleading. It is worth noting here that article 27 of the International Covenant on Civil and Political Rights (ICCPR) distinguishes between at least three kinds of minorities: ethnic; linguistic; and religious. The CoE Framework Convention adopts a slightly different approach, talking about national minorities without specifying this term.

By taking such an ill-articulated view of minorities, the Commission did not necessarily act in accordance with a definition of minorities used by other Community institutions. The EP, for example, called for laying “particular stress on the rights of minorities (ethnic, linguistic, religious, homosexual, etc.) at the time of enlargement negotiations.”

Second, there is certainly some confusion in the way the Commission named the minorities whose situation it monitored. It downgraded the importance of some minorities by defining them differently from other minority groups in similar situations. Talking about a Hungarian minority living in Slovakia or Romania, the Commission

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162 See Valentine, supra note 159, at 455.

163 See Gilbert, supra note 139, at 55.

used the term “Hungarian minority,” though in discussing minorities in Estonia and Latvia the term was “Russian-speaking minority.” The denomination of what kind of minority is dealt with in the regular reports is of crucial importance and can have considerable implications on the strategy and practice of minority protection. The term “Russian-speaking minority” is arguably narrower in meaning (and also might be interpreted to demand a different scope of protection compared to other minority groups assessed by the Commission) than Russian minority. The latter, also including linguistic rights, puts equal emphasis on culture and group identification based on common history, and values, and is not limited to linguistic factors. Thus, in the context of the two groups outlined supra, the Commission started differentiating between minorities in Latvia and Estonia on the one hand and minorities in the second group on the other by defining “minorities” differently.

C. Minorities and Citizenship: Different Approaches in the Two Groups

The Commission behaved wisely by refusing, on several occasions, to follow the definitions adopted in a given candidate country, thereby trying to look into the substance of the issue of minority protection. This issue was particularly acute for the second group of countries. Latvia and Estonia, for example, were eager to make a connection between minority status and national citizenship, thus excluding all non-citizens living (and often born) in their territory from the scope of application of the minority protection criterion. Unlike in the other “states that emerged from the collapse of the Soviet Union [and] chose a ‘zero option’ for citizenship, by which all permanent residents were granted citizenship without naturalization,” huge portions of the permanent


167 von Toggenburg, supra note 91, at 9.

168 Lowell Barrington, The Making of Citizenship Policy in the Baltic States, 13 GEO. IMMIGR. L.J. 159, 166 (1999). It is notable that the 1991 Treaty on the Principles of the Interstate Relations, between the RSFSR (as Russia was then called) and Estonian Republic, was the first step to a similar solution. In Article 3.1, this treaty offered the minorities a choice of either Estonian citizenship or citizenship of the RSFSR. At the same time, Article 3.3
population of Latvia and Estonia were not granted citizenship rights after the dissolution of the Soviet Union, and thus remained stateless.\textsuperscript{169}

In dealing with the countries of the second group, the Commission did not allow such a narrow reading of “minority” to become the starting point of the pre-accession assessment. The Commission pointed out in the Opinions on the Latvian application for EU membership that the assessment of minority protection should be made solely based on the \textit{de facto} situation, “[R]egardless of the nationality held and difference in personal status arising from non-possession of Latvian nationality.”\textsuperscript{170}

One finds an almost identical wording in the Commission’s Opinion regarding Estonia’s application.\textsuperscript{171} The Commission has consistently followed the same approach in the regular reports that followed.\textsuperscript{172} Such a constructive approach to the definition of minorities in the context of these two countries’ pre-accession progress resulted in some mild changes in the naturalization policy adopted in Latvia and Estonia.\textsuperscript{173} The Commission stopped short of capitalizing on the achieve-
ments stemming from the inclusive definition of minorities for the purposes of the pre-accession assessment. Consequently, this approach, although beautiful on paper, only brought meager results, leaving much to be desired.

Although not resulting in any sweeping changes, the Commission’s move was, legally speaking, significant because for the first time, the candidate countries’ naturalization policies were influenced by EU pre-accession pressure, which has only limited powers in this domain. In any other context, the Member States are free (albeit without discrimination between those falling within the scope of their citizenship once it has been outlined, and with “due regard to Community Law”) to decide who their citizens are. Thus, starting in 1997 the Commission adopted a “realistic” or “inclusive” approach to the assessment of minority protection in these candidate countries.

The Opinions on the Application for Membership released by the Commission on July 15, 1997 enable one to assess the scope of the problem. According to the Estonian Opinion, “Around 35% of the population of Estonia consists of minorities, including non-citizens. . . . Of that 35%, a group of 23% (numbering around 335,000, mainly of Russian origin) are not Estonian citizens.” The Latvian Opinion states that “[i]n Latvia, minorities, including non-citizens, account for nearly 44% of the population. . . . Latvians are a minority in 7 of the country’s 8 largest towns. Within that 44%, 28% of the population, i.e. some 685,000 people, does not have Latvian citizenship and a large propor-

177 Declarations on this matter were made by Germany (attached to the EEC Treaty) and by the United Kingdom (attached first to the 1972 Treaty of Accession by the United Kingdom to the European Communities and, later, in light of a new Nationality Act, the United Kingdom made a new declaration on the definition of the term “nationals” on January 28, 1983). See Case C-192/99, The Queen v. Sec’y of State for the Home Dep’t. ex parte Kaur, 2001 E.C.R. I-1237. For an overview, see Stephen Hall, Determining the Scope ratione personae of European Citizenship: Customary International Law Prevails for Now, 28 LEGAL ISSUES OF ECON. INTEGRATION 355 (2001) (commenting on the Kaur case).
179 Commission Opinion on Estonia’s Application, supra note 171, at 18.
tion of that group, consisting of the former citizens of the USSR, has no citizenship at all.”

To summarize, in its assessment of nationality policies, the Commission dealt with the legal status of over one million people, making up a considerable share of the population of the candidate countries belonging to the second group.

The candidate countries themselves considered the persons in possession of foreign or no nationality as not being part of the minority population. Consequently, applying this logic to Latvia and Estonia, the Copenhagen criterion of “respect for and protection of minorities” was not applicable to the situation of these people and, as a result, could not affect the Latvian and Estonian applications for EU membership. One illustration of this point is Estonia’s definition of “minority” during ratification of the CoE’s Framework Convention. The Estonian government declared that:

Estonia understands the term “national minorities” as follows—Citizens of Estonia that

(a) reside on the territory of Estonia;
(b) maintain longstanding, firm and lasting ties with Estonia;
(c) are distinct from Estonians based on their ethnic, cultural, religious or linguistic characteristics;
(d) are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.

The Commission dismissed such a citizenship-centered definition as “not relevant.”

The Commission applied the inclusive vision of minorities only to Latvia and Estonia. The first group of countries was analyzed based on the assumption that persons belonging to a minority hold a nationality of the state in which they reside. To illustrate a difference between the two approaches to minority definition, consider the Czech definition of

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180 Commission Opinion on Latvia’s Application, supra note 170, at 18.
181 See infra text accompanying notes 183 & 185.
182 See generally Framework Convention, supra note 39.
184 Commission Opinion on Estonia’s Application, supra note 171, at 18.
Ethnic Minorities, cited by the Commission. The Czech Law on the Rights of National Minorities defined minorities as “a group of citizens of the Czech Republic living on the current territory of the Czech Republic that differentiate themselves from the rest of the citizens, and though their ethnic, linguistic and cultural origin, create a minority that at the same time wish to be considered a minority.”

The Commission, moreover, actively participated in the drafting of minority protection legislation in the Czech Republic (a pre-accession advisor participated in the drafting process as part of the twining program). Thus, the Commission knowingly approved of such a definition. This definition is also used in the law of the CoE, thus, influencing the legal systems of all European states. It has been noted that such an approach is probably not in line with ECJ case law, which grants a possibility to benefit from the minority protection norms adopted by a Member State not only to citizens, but also to residents and visitors (as long as they are EU citizens or long term residents in the sense of Directive 2003/109/EC of course).

In other words, the Commission asserted its right to apply the Copenhagen minority protection criterion to both citizens and foreigners (or stateless persons) residing in the candidate countries only while dealing with Estonia and Latvia. It is notable that there is no principal consensus in the scholarly literature on the topic concerning the notion of minority or the necessity of a link between minority status and citizenship. Although it is often argued that citizenship is a necessary preconditio to recognition as a minority, many scholars disagree.

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188 See Wiener & Schwellnus, supra note 12, at 33. For general information on the principle of nondiscrimination based on nationality in EC law, see generally Gareth Davies, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET (2003).
Likewise, it is impossible to find a clear solution to this problem in the main international legal instruments. One commentator notes that the Human Rights Committee established by article 28 of the ICCPR recognized that “all members of an ethnic, religious or linguistic minority are granted minority rights, no matter whether they possess the citizenship of the state or not.”194 Neither does the Framework Convention contain any reference to citizenship. This does not help because it does not contain any definition of minority, which would prove that citizenship is not among the necessary requirements to be treated as a minority. The PCIJ did not include a citizenship requirement in its minority definition.195 The European Charter for Regional and Minority Languages, on the other hand, contains an explicit citizenship requirement for minorities.196 Overall, “The European regional system considers citizenship as a necessary precondition for membership of a legally protected minority.”197 From this standpoint, the Estonian Declaration attaching minority status to the citizenship of Estonia is in the mainstream of legal development in the field of legal definition of minorities, which makes the Commission’s position almost revolutionary.

Notwithstanding the innovative nature of the Commission’s move toward an inclusive approach to minority definition, the new understanding of who should qualify as a minority in Estonia and Latvia clearly did not change the approach toward minorities adopted in these particular countries. The 2002 Estonian Report underlined that Estonia gave too narrow a definition to minorities,198 adding, however, that Estonia adopted a more inclusive approach in practice.199 Moreover, such a discrepancy in the definition of who is a minority within
the scope of the Copenhagen political criteria demonstrated clearly that no single approach was used by the Commission during the pre-accession monitoring exercise. This, yet again, undermined the pre-accession rhetoric of a single and fair standard equally applicable to all candidate countries.

As Chief Justice Earl Warren famously stated in *Perez v. Brownell*, “Citizenship is man’s basic right, for it is nothing less than the right to have rights.”200 In the context of the Russian speaking minority in Latvia and Estonia, the problem of statelessness is aggravated by the fact that, by having a stateless status, huge portions of the population of these states are *de facto* prevented from acquiring the nationality of the Baltic States in question and EU citizenship, derivative thereof, by virtue of strict ethnocentric policy of the states belonging to the second group. Low naturalization rates in the second group (particularly Latvia) are telling in this regard,201 inviting speculation about ineffective and discriminatory policy choices in these countries. To claim certain limited community rights, members of minority groups, unless they are family members of Community citizens, can only rely on Directive 2003/109/EC.202

### D. Different Approaches to Minority Education in the Two Groups

Putting the fight for school desegregation aside (which is too complicated an issue for this Article)203 the Commission’s approach to education of minorities is also inconsistent. Although one minority should have a university, other minorities lose their rights to schooling in their language.204 In the context of the “Russian-speaking” mi-

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201 See Hughes, *supra* note 146, 751 (providing statistics on naturalization rates).
norities, *de facto* assimilation is stressed, while the Commission’s principles concerning the Hungarian minority are absolutely different.205

The Commission followed the developments related to the amendment of the Law on Education in Romania to create a Hungarian-German University.206 This university was not supposed to become the only institution of higher education in Romania operating in minority languages because Hungarian is used at a number of departments of state universities in that country.207

The developments in Latvia and Estonia reveal that the prohibition or limitation of teaching in the minority language is considered an organic part of the promotion of the state language. In Estonia, Russian schools get State funding.208 The Law on Basic and Upper Secondary Schools, however, only allows for forty percent of teaching to be done in a language other than Estonian starting in 2007,209 which is clearly contrary to the Commission’s position in the Opinion on the Estonian Application for EU Membership. There, the Commission recommended that education in Russian language “should be maintained without time limit in the future.”210 Latvian education law insists that all minority schools choose a bilingual program.211 Minority school teachers not proficient in Latvian are subject to dismissal.212 According to the 2000 Latvian Report, by 2004 “all state funded schools will provide sec-

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205 *Van der Meulen*, supra note 12, at 7.


212 Id.
ondary education (from 10th grade onwards) in the state language only”; thus, the law is effectively prohibiting education in the native language of forty-four percent of the population.\textsuperscript{213} Strikingly, in response to this development the Commission stated that “[t]he Language Law and implementing regulations . . . essentially comply with Latvia’s international obligations.”\textsuperscript{214} The Commission’s position is difficult to explain, as the approval of the Latvian policy banning Russian language from schools is clearly contrary to the Commission’s minority protection guidelines for the first group of countries, in which education in the minority language is supported and safeguarded. Scholars regret that “under the present situation there seem to be no clear grounds to obstruct the implementation of the Latvian Education Law.”\textsuperscript{215}

Although the Commission supported Hungarians in Romania schooled in Hungarian in establishing a university in their own language, the Russian minority schools in the second group of countries are being closed; the Commission did not take issue with this during pre-accession.

E. Different Approaches to Nondiscrimination on the Grounds of Belonging to a Minority in the Two Groups

In the first group of countries, unlike in the second, the Commission was attentive to minority representation in Government and the police, as well as to the organization of minority self-government. Importantly, minority participation, as promoted by the Commission during the pre-accession process, was intended to reach up the hierarchy of army and administrative personnel.\textsuperscript{216}

The Commission also monitored with great care access to the labor market in general, especially regarding discrimination concerning the Roma minority. Notwithstanding the efforts of the Commission and the countries of the first group, \textit{de facto} discrimination flourished.\textsuperscript{217}


\textsuperscript{214} Id. at 97.

\textsuperscript{215} See \textit{Russian Speaking Minorities}, supra note 208, at 15.


A different situation arose in the context of promoting nondiscrimination in the second group of countries. Judging by the Commission’s Reports and Opinions it is possible to conclude that the Commission only regarded the Russian minority in Latvia and Estonia as a linguistic minority. In the course of the pre-accession process, the Commission gave overwhelming priority to the measures related to teaching minorities Latvian and Estonian.218 All the Accession Partnerships focused on the same issue and the PHARE funding was used for the program.219 Thus, language teaching seems to be regarded, by the States of the second group and the Commission, as the main tool of integration and promotion of nondiscrimination.

Viewed from a legal perspective, such an approach is problematic because the Commission, in its Reports, does not draw a line between integration and assimilation, and arguably supports the complete assimilation of the Russian minority, which is clearly a state policy in the two Baltic States. Such a policy contradicts article 5(2) of the Framework Convention for the Protection of Minorities, which states that “the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”220

But what is most striking is that the Commission, on a number of occasions, simply refused to acknowledge that there were problems concerning treatment of the Russian speaking minority, unreservedly taking the side of the two Baltic States. It is as if the Commission “participates in a national conspiracy of silence, [like some Estonians and Latvians who] simply seem to refuse to acknowledge that the Russian minority may have legitimate complaints.”221 All reports dealing with Latvian and Estonian preparation for accession, state that the rights of the Russian-speaking minority, with or without Estonian or Latvian nationality, continue to be observed and safeguarded.222 In fact, this stan-

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219 Id. at 92–93.

220 Framework Convention, supra note 39, art. 5(2).


standard was set in 1997 by Agenda 2000, which did not find any “evidence that [Russian-speaking] minorities are subject to discrimination.”

In other words, according to the Commission, there is basically no minority problem in the two Baltic States and thus no discrimination. Ironically, the Commission returned to the issue of minority discrimination in later regular reports, mostly addressing discrimination arising from the absence of nationality, having a “non state language” as a mother tongue and related to the use of the minority language, social security, education, work, and political representation. The far-reaching nature of the institutionalized discrimination based on belonging to a minority in place in Latvia and Estonia received extensive coverage in academic literature. Researchers’ findings are in clear contradiction with the Commission’s claims.

F. Different Approaches to Minority Self-Government and Political Rights of Minorities in the Two Groups

Another important issue that arose during preparation for the fifth enlargement concerned the adaptation of the candidate countries’ political systems to better accommodate minority needs. The Commission’s demands to change legislation went as high as the candidate countries’ constitutional level. In Bulgaria, for example, considering the Constitutional prohibition to form political parties around ethnic, religious or racial lines, the Commission found that “[i]t could be desirable to clarify these Constitutional provisions about the restrictions on the establishment of the political parties.”

Although a number of minorities in the first group of countries benefited from the possibility of forming political parties, using their language in communication with the authorities, and the grant of a share of self-government (whether for Hungarians in Romania or the Roma in Hungary), the Russian minority in the second group was again treated differently. The difference in treatment was largely caused by the stateless status of a huge number of individuals among the Russians in Latvia and Estonia.

Generally speaking, it is clear that “the inability of nearly one-third of the population of these states to participate in elections (which is a

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225 See sources cited supra note 138.
reality, albeit to a different extent, in Latvia and Estonia) is hardly in line with norms established by western democracies.”227 Latvian and Estonian non-citizens cannot vote in national elections or be members of political parties.228 This has been criticized by the U.N. Human Rights Committee,229 the CoE and the OSCE, but not by the Commission.230

Even those possessing citizenship of the state in which they reside face enormous obstacles if they try to participate in political life. The Commission did little to change the situation. According to Latvian law, candidates running for office, even if Latvian citizens, had to produce a language proficiency certificate.231 Latvia lost a case in the European Court of Human Rights (Eur. Ct. H.R.)232 and proceedings in front of the U.N. Human Rights Committee233 in relation to this requirement. The Eur. Ct. H.R. case Podkolzina v. Latvia involved a Latvian of Russian descent who was not allowed to run for office although she possessed a language proficiency certificate of the highest third level on the grounds that she failed a “linguistic check,” administered at her workplace by a special officer without prior notification. In 2002, the Eur. Ct. H.R. found that Latvia violated the claimant’s right to free elections, at the same time recognizing the importance of the legislation in force, which pleased the Commission.234 Indeed, the court stated that “requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim.”235
Soon after the *Podkolzina* case was decided, the Latvian Parliament amended the relevant legislation, lifting the linguistic proficiency requirements for candidates in national and local elections, which the Commission welcomed.\footnote{2002 Latvian Report, *supra* note 234, at 33.} Interestingly, the amendment came right before the North Atlantic Treaty Organization (NATO) summit in Reykjavik in May 2002, which was supposed to discuss *inter alia* the Latvian application for membership in the organization.\footnote{Hoffmeister, *supra* note 232, at 668.} Such a coincidence made scholars suspect that the law was actually amended “for the NATO.”\footnote{If the amendment was not passed expressly for NATO, the proximity of the summit sheds light on the seventy-five percent majority achieved in Parliament at the ratification of the amendments—a fact also noted by the Commission. See *id*; Taube, *supra* note 232, at 514–15.} Indeed, the Commission, well aware of the practices of arbitrary linguistic checks of Latvian citizens belonging to a minority willing to run for office, did not take any measures to make Latvia reconsider its policy.

The majority of Russians in the second group of countries remain largely excluded from political life because of their stateless status. In other words, the citizenship legislation (or the lack thereof)\footnote{Latvia did not have a citizenship law for some time, thus making naturalizations legally impossible. See Il’ja Kudriavtzev, *Latviya: cherez skol’ko let budet grazhdanstvo?*, 3 Rossiiskij biulleten’ po pravam cheloveka 96 (1994), available at http://www.hrights.ru/text/b3/bul3.htm.} was used in those countries to create ethnic electorates,\footnote{See Visek, *supra* note 221, at 354; Stepan, *supra* note 227, at 100–09.} which does not comport with the democratic principles of inclusion and nondiscrimination.

**G. Different Approaches to International Minority Protection Instruments in the Two Groups**

Although Estonia at least ratified some international minority protection instruments by the time of its EU accession, the same cannot be said of Latvia. The Commission has been stressing the importance of Latvian ratification of the Framework Convention for the Protection of Minorities throughout the reporting exercise, starting with the Opinion on the Latvian Application for EU Membership.\footnote{2002 Latvian Report, *supra* note 234, at 30.} By the time the last Report (structurally based on the Copenhagen criteria) was released, the Convention *still* was not ratified. The delays, which eventually re-

H. Analysis of the Commission’s Approach

From the examples mentioned above it is clear that the Commission’s approach \textit{vis-à-vis} minorities in each of the two groups of countries was not uniform. In fact, all the steps of the pre-accession assessment and the application of the principle of conditionality were \textit{de facto} built along two different lines. The choice of a minority-protection standard to be promoted depended on the country (whether within the first or second group) and minority in question. The first standard was vaguely built around the approach to minority protection in the CoE documents and was applied in the context of the first group of countries. The second standard, built around the practices of tolerating exclusion and forced assimilation (deemed illegal by CoE minority protection documents) was applied to minorities in the second group.

Such a discrepancy between the two approaches taken by the Commission is nothing short of a disaster for the application of the conditionality principle in this field.\footnote{Kochenov, \textit{supra} note 3, at 308–09 (noting similar disaster in other areas of pre-accession).} Moreover, given the similarities between the practices espoused by the second group of countries during the pre-accession process, the Commission’s logic of conditionality becomes even more impenetrable with regard to the choice of countries with which to open negotiations. It is impossible to find any consistent explanation as to why the negotiations with Estonia have been opened before Latvia.

It is difficult to disagree with Marc Maresceau who stated that “[t]he true and complete story of this unexpected choice by the Commission will probably never be fully known.”\footnote{Maresceau, \textit{supra} note 6, at 18.} The only possible explanation for such a choice is probably geo-political necessity, which has nothing to do with political conditionality.\footnote{See Dorodnova, \textit{supra} note 138, at 9.} This necessity is the same that likely explains the existence of two pre-accession minority protection standards applied by the Commission during the preparation of the fifth enlargement. Some authors link the EU decision not to include Latvia within the first wave of countries to several events that took
place in 1998. These events included a violent dispersion of a demonstration of “Russian-speaking” pensioners in March, the explosion of a bomb in front of the Russian embassy in Riga in April, and a march of the Waffen SS veterans in the Latvian capital, attended by a number of senior Latvian military officials. Taken together, these events do not produce a convincing success story on the integration of the Russian minority. Nevertheless, Latvia and Estonia already met the Copenhagen political criteria in 1997, as implied in the Commission’s Opinions.

Returning to the standards, the Commission’s stance in the field of minority rights is particularly ironic. Minority protection was probably the only area of pre-accession monitoring in which relatively clear standards were actually available, thanks to the CoE. Compared with other areas, in which such standards simply did not exist, and in which the Commission was trying to act as a “myth-maker,” playing as if it had such standards at hand (e.g., in judicial independence), the Commission, instead of applying ready-to-use CoE findings, came up with two distinct approaches that contradicted each other and sat uneasily next to the CoE documents. The example of the application of the pre-accession conditionality principle to the requirement of the “protection of and respect for minorities” illustrates the necessity to better cooperate. This is apparent from the relations between the European Union and the CoE (particularly in the context of the preparation of the enlargements of the former).

The approach of the two Baltic States can probably be explained with the concept of “ethnic democracy.” Ethnic democracy, a concept formulated in Israel, is understood as “a political system that combines extension of democratic rights for all with institutionalization of dominance by one ethnic group.” The use of this Israeli concept in

246 See Barrington, supra note 168, at 174.
247 See id.
248 Commission Opinion on Estonian Application, supra note 165, at 116; Commission Opinion on Latvia’s Application, supra note 170, at 114.
249 See supra text accompanying notes 38–42.
EU Member States “united in diversity”\textsuperscript{253} is somewhat dubious. In contrast with the idea of domination implied in the concept, the bases of the European Union are pluralism and tolerance.

What could the Commission do to change the situation in the sphere of minority protection in the countries of the second group? The tools available to the Commission within the framework of the EU conditionality principle and enhanced pre-accession policy,\textsuperscript{254} applied during the preparation of candidate countries for EU accession, provided the Commission with a wide range of options for solving the statelessness crisis in Latvia and Estonia. This allowed unification of the two contradicting approaches it applied during preparation for the fifth enlargement. Moreover, as follows from other areas of the pre-accession reform, these tools could be used in a flexible way to ensure better compliance, without bluntly dictating to candidate countries the kind of policies they are expected to adopt.\textsuperscript{255}

At least three options were available to the Commission:

1. To challenge discrimination on the grounds of the non-possession of a citizenship status by the residents of Latvia and Estonia;
2. To promote milder conditions for naturalization; or
3. To attack the citizenship policies of Latvia and Estonia directly, which would have resulted in minority acquisition of citizenship and thus the elimination of the most severe forms of discrimination.

The Commission had two main tools with which to pursue these developments. First, it had the \textit{Micheletti v. Delegación del Gobierno en Cantabria} reference to the importance of a due regard of Community Law while granting citizenship.\textsuperscript{256} The second builds on the assumption that “external pressure can be a powerful force for change.”\textsuperscript{257} Most notable


\textsuperscript{254} See Kochenov, \textit{supra} note 11, at 7.


\textsuperscript{256} Kochenov, \textit{supra} note 173, at 87 (noting that Commission actually tried to use this tool, albeit in a shy manner, consequently bringing minimal results).

within this second category, the European Union could have made effective use of the Accession Partnerships, which allows the halting of pre-accession financial assistance in cases of non-compliance\(^\text{258}\) and enables the Commission to go as far as freezing accession talks. Scholarly literature and the tools available to the European Union within the auspices of the pre-accession strategy, make clear that the European Union was in a privileged position to monitor and influence the minority situation in Estonia and Latvia.\(^\text{259}\)

While dealing with the first group of countries, unlike the second, the Commission used the third approach outlined above: the constructive critique of the grounds of naturalization. The issue was resolved quickly.\(^\text{260}\) It concerned the citizenship law of the Czech Republic, drafted to exclude the possibility of the Roma acquiring Czech citizenship.\(^\text{261}\) The Commission found that the approach taken by the Czech Republic (especially the need to provide evidence of clean criminal record for five years) was inadmissible and contrary to the succession rule. It thus demanded that the candidate country alter its naturalization policy, including the grounds for naturalization as included in the Czech law No. 40/1993 Sb.,\(^\text{262}\) something that had never happened in the context of reporting of Latvian or Estonian progress toward accession.\(^\text{263}\)

Strikingly, all the international organizations and a great majority of scholars working on the minority protection issue in the two Baltic States do not discuss the legitimacy of the naturalization policy the two

\(^{258}\) Council Regulation 622/98 art. 4, 1998 O.J. (L 85) 1 (introducing Accession Partnerships and making receipt of pre-accession aid conditional on pre-accession progress); see also Alain Guggenbühl & Margareta Theelen, *The Financial Assistance of the EU to its Eastern and Southern Neighbours: A Comparative Analysis*, in *The EU’s Enlargement and Mediterranean Strategies*, supra note 6, at 217.

\(^{259}\) See *Russian Speaking Minorities*, supra note 208, at 17.


\(^{261}\) See id. (providing analysis of this case).


\(^{263}\) Kochenov, *supra* note 260, at 138–40 (comparing Commission’s involvement with statelessness issues in Czech Republic with similar issues in Latvia and Estonia).
countries applied. An important exception is the position of Ferdinand de Varennes, who is among the few to question the legitimacy of linguistic proficiency requirements in those countries. 264 “The exclusive preference given to Latvian and Estonian seems disproportionate and unreasonable as an attempt to rectify past Soviet practices, bearing in mind the number of permanent residents born in Estonia and Latvia but not of Estonian or Latvian ‘ethnic origin.’” 265 It is notable that international legal practice recognizes the application of the principle of nondiscrimination in the acquisition of citizenship. 266 Citing a dissenting opinion of Judge Rodolfo E. Piza in a Costa-Rican naturalization case of the Inter-American Court, de Varennes makes a convincing argument that “a reasonable and nondiscriminatory naturalization policy must reflect, in a balanced way, the population of a state. It cannot operate in disregard of the languages actually used in the country.” 267 Unfortunately, neither the Council nor the CoE supported this approach.

**Conclusion: Too Many Paradoxes**

As this Article demonstrates, the web of minority protection standards in Europe is sophisticated. Not only are there CoE standards on the one hand and EU standards on the other, but EU standards are split into internal and external groups. The latter are broader in scope, while the former are hardly articulated. Despite such a split, it remains clear that it is still possible for the European Union to develop a meaningful internal minority protection standard in the future, once there is better consensus regarding this issue among the *Herren der Verträge*.

None of the available minority protection standards are uniform: their duality is inherent, corresponding to two levels of minority protection. This includes nondiscrimination based on belonging to a minority on the one hand, and minority protection *per se* on the other (e.g., special rights for minorities). Not all the above standards cover both elements of such an “ideal” tandem. Although the CoE instruments allow talking about an inclusive approach, it is nevertheless clear that the nondiscrimination element of the CoE standard is better articulated,

264 See de Varennes, supra note 166, at 136–42.

265 Id. at 137. Maresceau made a similar point. *Quelques réflexions*, supra note 218, at 89–95.


being inscribed in the ECHR, than is the group-rights element. This is so because the latter is mostly rooted in the documents of nonbinding nature, such as the Framework Convention. Viewed from the perspective of this duality, also reflected in academic literature and PCIJ case law, the EU approach to internal minority protection is almost totally confined to nondiscrimination and says little on the group rights issue. Moving one level of governance lower, it is clear that any more or less uniform approach to minority protection issues among the Member States is missing. Group rights are *de jure* illegal in some Member States (*e.g.*, France) and taken to extremes in others (*e.g.*, Belgium). The last enlargement only added to the array of national approaches to minority protection, making it even more uncertain that the European Union as a whole might move in the direction of articulated supranational minority protection.

The picture gains complexity once one analyzes the external aspects of EU minority rights. Historically, the European Union has used a number of different approaches to minority rights in external relations and during the preparation of enlargements. In enlargement law, the EU path has mostly been confined to total or partial exclusion of the territories with minority population from the scope of application of Community Law. The application of such a standard, however, has not always been beneficial to the minorities concerned because the scope of their Community Law rights becomes significantly narrower than that of other EU citizens. Also, in respect to islands and specific territories or communities, the standard is hardly useful in situations in which minority populations are intermingled with the majority. Taken together, both these considerations explain the reluctance to apply such a standard during the preparation of the fifth enlargement.

This reluctance, however, did not make the pre-accession process easier. Having no internal minority protection tradition, the European Union nevertheless made minority protection one of the pre-accession criteria to be met by the candidate countries. Claiming to apply a single standard in judging all applicants, which was a must in light of the pre-accession principle of conditionality, the European Union stopped short of creating a minority protection standard to be exported. Moreover, as this Article has explained, it even failed to apply similar standards of minority protection to all candidate countries,

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instead applying two contradictory standards. The first standard, mostly rooted in CoE documents and applied in the context of the pre-accession assessment of the majority of the candidate countries, was drastically different from the second standard, which was applied in the context of Latvian and Estonian pre-accession progress, and will soon be contrary to law once the CoE benchmarks are applied. Defining minorities differently and adopting different approaches to minority self-governance, political participation, education and other issues, the two approaches contradict each other and hardly overlap. Generally speaking, one can state that while the Commission is clearly on the side of the minorities with respect to the first group of countries, the Commission takes the side of the candidate countries with respect to the second, turning a blind eye to Latvia and Estonia’s “undoubtedly intentional” policy of exclusion.

Such a vision of the promotion of minority protection in the candidate countries amounts to a disaster for the principle of conditionality. It demonstrates that there was no fair, merit-based assessment of candidate countries based on the same standards (presupposed by the principle). Dividing the candidate countries into two groups allows discovering some standards behind this “ad-hocism and inconsistency.”

Still, the fact that there are at least two standards certainly plays against the Commission because this is precisely what the principle of conditionality was supposed to avoid.

The whole story of minority protection standard-setting in the European Union is that of numerous fictions and contradictions. The internal standards are weak and poorly articulated, the Member States’ national standards are contradictory, and the external standards are numerous and poorly aligned. There is little or no order in this construction.

The current state of EU standard-setting in the field of minority rights has far-reaching negative implications on the development of a consistent system of EU minority protection in the future. A number of painful choices will have to be made to alter this situation. Most importantly, the European Union’s internal standard has to be made more

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270 See Blackman, supra note 169, at 1189 n.163.
271 Gwendolyn Sasse, Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?, in ENLARGED EUROPEAN UNION, supra note 12, at 69.
272 According to the Luxembourg European Council, the candidate countries were “destined to join the Union on the basis of the same criteria . . . on an equal footing.” Presidency Conclusions, Luxembourg European Council ¶ 10 (Dec. 12–13, 1997).
inclusive and uniform, while the European Union simply needs to create an external standard.

Both developments are likely to gain importance in the near future. After the incorporation of Central and Eastern European countries, the enlarged European Union is likely to face more minority-related problems than in the past, thus the need to effectively tackle them internally, both at the Member State and Community level. To make this work, a clear system of rules, which is missing at present, is indispensable. Also, to ensure smooth EU enlargement in the future, a uniform pre-accession minority protection standard needs to be devised, which would replace the two contradictory standards employed during the fifth enlargement. Such a standard will be absolutely necessary, given the human rights and minority protection record of the present day candidate countries and those states hoping to submit membership applications in the future. Only when both internal and external standards are clearly articulated will it be possible to talk about a developed EU system of minority protection standards. At present, the European Union is only making the first tiny steps in this direction.
KOREAN PERCEPTION(S) OF EQUALITY AND EQUAL PROTECTION

ILHYUNG LEE*

Abstract: Korea has been a constitutional democracy for just twenty years after decades of authoritarian rule. Thus, “equality” is a relatively new concept to average Koreans. Perceptions of equality and equal protection are often shaped by societal culture. Two competing forces affect the Korean situation. First, Korea has deeply embedded Confucian norms that guide contemporary attitudes and practices. Second, Korea has recently undergone a radical social transformation, resulting in changing norms. Toward a more informed understanding of how Koreans perceive equality and equality rights, this Article reports the results of a survey of Korean reactions to a hypothetical suggesting disparate treatment by a commercial airline. The survey assesses whether participants view the airline’s action as (i) discriminatory and/or (ii) unlawful, and (iii) what actions they would take. The vast majority saw the action as discriminatory; a significantly smaller majority viewed it as illegal. Respondents offered many actions they would take in response. In explaining the results, this Article takes account of cultural norms attributed to Korea, the society in transformation, and changes in Korea’s legal institutions during democratization.

Introduction

A frequent refrain heard in the Korean1 self-description is that it is a society with a 5000 year history.2 Yet Korea has been a constitutional

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1 All references to “Korea” herein are to the Republic of Korea, popularly known as South Korea.

democracy for just twenty years, beginning with the momentous reforms of 1987, after decades of tumultuous authoritarian rule. It is against this backdrop that one commentator (and former member of the Korean National Assembly) noted at the turn of the century that terms like “freedom” and “equality” are “unfamiliar” to average Koreans. Such an observation presumes that these terms have understood meanings in other societies, and also might encourage a comparative study. This Article attempts to shed light on the Korean setting, with an examination of how Koreans perceive equality and equality rights.

Two competing forces shape Korean perceptions of individual legal rights, indeed, virtually every aspect of the contemporary Korean scene. First, as alluded to above, Korea is a national society with a long history, and deeply-rooted norms that continue to shape contemporary practices. The second is almost diametrically opposite: in recent years, Korea has undergone a radical social transformation, leading to changes in attitudes. Briefly, regarding the former, the legally segregated classes of the dynasty centuries might explain the acute status consciousness prevalent in current society. With respect to the latter, perhaps changing attitudes might fuel an angry demand for social equality, and a willingness to assert legal rights in court, over the traditional preference for harmonious conciliation. All of these realities impact on the contemporary views towards equality in Korea.

The discussion herein begins with a brief history of Korea’s constitutional development and description of the jurisdiction’s approach to equal protection analysis. This legal summary is followed by an ethnographic discussion, elaborating on Korean societal and cultural norms that might shape perceptions of equality and the resolution of disputes. As discussed below, the sensitive subject of equality has risen in a number of situations in contemporary Korean society, forcing policy makers to consider public attitudes (occasionally bitter), the legal framework, and traditional norms.

With this background, the Article takes a more focused turn. Toward a further understanding of how Koreans perceive equality and equal protection under law, this Article reports the results of a survey.
relating to a hypothetical event that suggests disparate treatment of passengers by a commercial carrier. Specifically, the survey is designed to ascertain Korean participants’ reactions to, and perceptions of, discriminatory activity and illegality and what action they would take in response. In brief, the survey results reflect participants’ keen awareness of equality and discriminatory treatment and an aggressive willingness to seek a remedy.

I. Equality at Law

After years of authoritarian rule, public outrage and protest led to the ouster of the Doo-Hwan Chun regime, and ushered in profound democratization reforms. Commentators have described 1987 as the “year of the constitutional miracle.” A constitutional text was not new to Korean society, of course. Korea had adopted its original Constitution in 1948, after liberation from Japanese rule. Yet the document was revised periodically to maintain and continue the power of the chief executive, beginning with Syng-Mahn Rhee, followed by military generals. The suppression of dissent was brutal and often violent, and the constitutional provision of civil liberties meant little.

Reforms in the post-Chun era included the implementation of the Constitutional Court, modeled after the German Federal Constitutional Court, the final arbiter of questions relating to constitutional law. With the memory of authoritarian rule still fresh, the Constitutional Court apparently sees itself with a mandate to check executive power.\(^5\) Court observers note that the relatively new tribunal has


\(^5\) The Court’s Internet site is unambiguous with respect to this function:

The Constitutional Court was established in September 1988 by the current Constitution, which followed after the people’s successful movement for democracy in 1987. The Framers of the Constitution adopted, in addition to the Supreme Court, a new independently specialized court, based on the European Model, in order to fully protect the people’s fundamental rights and effectively check governmental powers.

taken on an active role in Korean politics and the legal process. Indeed, the Constitutional Court took center stage in 2004 when it decided the fate of President Moo-Hyun Roh in the first ever impeachment of a Korean president.

It is in this setting, a jurisdiction with a relatively new constitutional democracy and an increasingly visible judiciary, that this Article examines the notion of equal protection. Article 11(1) of the Constitution provides: “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.” Comparativists will note that the Korean article provides for legal equality and proscribes discriminatory action more affirmatively and positively than does the Fourteenth Amendment of the U.S. counterpart (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The Korean version also explicitly lists “suspect classes” (in the parlance of U.S. constitutional commentary); whereas, equivalent classifications on the U.S. side must be uncovered from the case law.

The positivist phrasing and explicit enumeration of prohibited classifications in the Constitution aside, equal protection jurisprudence in Korea (indeed constitutional law generally) is far from the U.S. version in development or sophistication. The case law is limited, and those versed in U.S. constitutional precepts will not find easy equivalents in the Korean model. An example relates to the standard of review to be applied for particular constitutional claims. In 1999, the Constitutional Court specifically declared that one of two standards of review required in constitutional jurisprudence.


7 The Constitutional Court set aside the impeachment and restored the president’s full powers. For a discussion of the impeachment, see Youngjae Lee, Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective, 53 Am. J. Comp. L. 403 (2005).

8 S. Korea Const. art. 11(1). East Asianists will note the striking similarity of this text with the counterpart in the Japanese Constitution: “All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.” Japan Const. art. 14. For a discussion of the social status classification under Korean law, see Ilhyung Lee, Equivalence at Law (and Society): Social Status in Korea, Race in America, 37 Vand. J. Transnat’l L. 109 (2004).

9 U.S. Const. amend. XIV, § 1.

10 This is with good reason. To date, the Korean judiciary has had barely twenty years of jurisprudence under a constitutional democracy. See Constitutional Court of Korea, supra note 5. The comparative point stateside would place the U.S. Supreme Court in the second half of the Jefferson Administration.
review is to be applied, depending on the nature of the case.\textsuperscript{11} The “reasonable test”\textsuperscript{12} would be applied in a large number of cases, but the more heightened “balancing test”\textsuperscript{13} would be applied in cases that allege violations of fundamental rights provided for in the Constitution or discrimination based on grounds explicitly stated in the Constitution.\textsuperscript{14} Yet the Constitutional Court has not applied the balancing test evenly, leading to inconsistent results. As one commentator notes, it is not always clear what standard the court is applying or why it is doing so.\textsuperscript{15}

\begin{footnotesize}
\begin{enumerate}
\item The Constitutional Court had referred to the two tests in previous cases, but had not previously indicated which test should be applied in what circumstances. \textit{Id.}
\item Roughly meaning “proportionality principle” (\textit{bib-neh-won-chik}), the balancing test would require consideration of: (1) the legitimacy of government purpose; (2) the propriety of the government measure; (3) the degree of infringement on the individual or the degree of restriction of the measure; and (4) the balancing of the government interests and individual rights. \textit{See} Young-Sung Kwon, Hun-bub-hahk-Won-rohn [Constitutional Law: A Textbook] 338–40 (4th rev. ed. 2001).
\item See S. Korea Const. arts. 11(1), 15, 17, 18, 19, 20, \& 21. Thus, presumably, the heightened standard would be applied in cases involving classifications based on sex, social status and religion; those alleging violation of the freedom of occupation; freedom of privacy; freedom of conscience; freedom of speech and of the press; and freedom of assembly and association. \textit{See id.}

[T]he judicial tradition of not elaborating the \textit{ratio decidendi} of decisions. In many opinions the reasoning is based on a foregone conclusion. A typical ending may go something like this: “The discrimination here is not unconstitutional because it is not unreasonable.” By American standards, opinions of Korean courts fall short of full discussion on the legal arguments and issues raised and sometimes jump to hasty conclusions. Further ambiguities arise from the new judicial fashion of incorporating several constitutional provisions without sorting out the core ingredients of each provision.

Ahn, \textit{supra} note 12, at 102.
\end{enumerate}
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As with the Fourteenth Amendment, Korea’s article 11(1) applies only to governmental, not private, action. Thus, the guarantee of equality and the prohibition of discrimination explicitly stated in the Constitution do not apply to private actors, unless a specific statute so provides. In this regard, the leading anti-discrimination law in Korea appears to be the 2001 National Human Rights Commission Act. The Act covers both governmental and private actors. Its purpose is to “contribute to the realization of the human dignity and worth and . . . to ensure the protection of the inviolable and fundamental human rights of all individuals.” The law establishes the National Human Rights Commission (Commission), a “quasi-judicial” entity that has authority to address alleged incidents of discrimination. Citizens or foreigners residing in Korea alleging discrimination may file a petition to the Commission. Under the statute, discriminatory action is generally described as any act “committed without reasonable cause” based on a lengthy list of classifications, including: gender, religion, social status (repeating the proscribed classifications in article 11 of the Constitution); regional origin (of interest, given the intense regional factionalism in the country); and race, national origin, and ethnic origin (akin to suspect classes in the U.S. setting that give rise to the highest level of scrutiny).

When a petition alleging discrimination is filed, the Commission has authority to conduct a wide range of activities, but most chiefly, The term “discriminatory act violating the right to equality” means any of the following acts committed without reasonable cause based on gender, religion, disability, age, social status, region of birth (including place of birth, domicile of origin, one’s legal domicile, and major residential district where a minor lives until he/she becomes an adult), national origin, ethnic origin, appearance, marital status (i.e., married, single, separated, divorced, widowed, and de facto married), race, skin color, thoughts or political opinions, family type or family status, pregnancy or birth, criminal record of which effective term of the punishment has expired, sexual orientation, academic background or medical history, etc.

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16 S. Korea Const. art. 11(1). This is implicit in the decisions of the Constitutional Court and is the majority view of commentators. See, e.g., Kwon, supra note 13, at 316–18.
18 Id. art. 30.
19 See id.
21 National Human Rights Commission Act art. 4.
22 The full language, including the list of grounds, reads as follows: See id. art. 2(4).
investigation of alleged discrimination, recommendations to respondent parties, and conciliation services.\footnote{See id. arts. 19–50.} Importantly, the Commission does \textit{not} have the authority to issue a decision or judgment that is binding on the parties. An unsatisfied petitioner may bring an action in court, and the Act allows the Commission to submit “opinions on \textit{de facto} and \textit{de jure} matters” at the court’s request.\footnote{See id. art. 28.} It is not clear what effect the Commission’s submissions have in a court action.

Although the Commission has reported significant activity in recent years,\footnote{The Commission’s Internet site provides useful information about the Commission’s authority, functions, and organization. Nat’l Human Rights Comm’n of Korea, http://www.humanrights.go.kr/eng/index.jsp (last visited Jan. 17, 2008) (providing links to press releases of recent cases).} there is still some doubt in the public mind as to whether the Act or the Commission can, in reality, facilitate the lofty goal of achieving equality rights.\footnote{See \textit{In-gwon-we-ah ‘mah-dahng-bahl’-in i-yu [The Reason Why the NHRC Became a ‘Nuisance’]}, Han-gyu-reh, June 20, 2003 (copy on file with author). Perhaps the lengthy list of grounds on which discriminatory acts can give rise to a petition raises public doubt as to whether the Commission truly has the power to upset traditional practices for the purpose of effecting lofty goals. \textit{Id.}} Nor does the law specifically permit a private cause of action for alleged discriminatory activity. Practitioners and commentators advise that, in practice, an action advancing a discrimination claim in a court of law must be brought under, not an anti-discrimination law, but a provision of the Civil Code relating to tort actions. Section 750 of the Civil Act provides: “Any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom.”\footnote{Statutes of the Republic of Korea, Civil Act, art. 750, available at http://www.hani.co.kr/section-001033000/2003/06/001033000200306201824212.html (last visited Jan. 17, 2008).} Thus, in the judicial arena, a discrimination claim must be presented under this framework.\footnote{To date, there is no reported case of a party who has brought a discrimination claim in court following an unsatisfactory result in the Commission.}

The above discussion provides an introductory description of the legal framework of equality rights in the Korean jurisdiction, namely: a constitutional equal protection clause; the jurisdiction’s most comprehensive anti-discrimination law that has broad scope, but that contemplates no binding result; and the practical particularities of a discrimination claim in a court of law. Yet understanding the notion of legal equality in the Korean setting requires more than reiteration of
the legal text and practice. Given that notions of equality (along with those of “fairness,” “justice,” and “due process”) might be a matter of societal construction that impacts on legal conclusions, the next part discusses relevant cultural norms that may shape the Korean perception.

II. THE SOCIETAL CULTURE

Although the basic meaning of human equality may be universal, perceptions as to its implementation may differ from society to society. For the Korean setting, the discussion that follows is in two parts. The first part describes the deeply-rooted Confucian norms and hierarchical society seen in the dynasty era; Confucian attitudes arguably still have influence in the contemporary scene. This iteration also notes, however, that the trend toward democratization has made equality a thorny subject, as seen in occasional media reports. The second part identifies Korean cultural norms and attitudes as presented in social science empirical research, giving Korea observers more concrete measures by which to assess the societal mindset.

A. Impact of Confucian Culture on Contemporary Korea

Any appreciation of the societal culture in Korea inevitably requires a return to a portion of the 5000 year history when the deeply-rooted traditions were planted. An examination of Korea during the Chosun dynasty (1392–1910) reveals a pervasive presence of Confucian ideology, and as a result, a truly unequal society. An integral part of Confucianism is that it provides for a “means of ordering society.” Confucianism, or perhaps more aptly “neo-Confucianism,” that is, a brand of Confucianism adapted by the founders of the Chosun dynasty, “[S]erved as a blueprint for ordering and integrating Korea’s political
When this blueprint was followed closely (at least in the early centuries of the dynasty), the Confucian tradition demanded hierarchy and adherence to respective roles in all aspects of human relations. Within the hierarchical society, social status was “rigid and dominant” and legally defined. Beneath the king and the royal family, Korean society was formalized and stratified into discrete classes, with the yangban, representing the ruling class and the societal elite at the very top, followed by, in descending order, joong-in (literally, “middle people”), sang-in (the commoner class), and chun-min (literally, the “low-born’ or ‘inferior people’”). “Membership in all these status groups was ascribed by birth rather than acquired by achievement, and the law as well as social custom guarded against infringement of social boundaries.” Thus, ancestry and birth to a particular class determined one’s social status, role in society, and all aspects of everyday life.

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33 Tae-Rim Yoon, The Koreans, Their Culture and Personality, in THE PSYCHOLOGY OF THE KOREAN PEOPLE: COLLECTIVISM AND INDIVIDUALISM 18–19 (Gene Yoon & Sang-Chin Choi eds., 1994). “Acknowledging the authority of the nation and family, and obedience of the common people to the king, children to parents, wives to husbands, and the young to the elderly were considered the cardinal rules in maintaining social order.” Id.
34 Id. at 19.
35 The joong-in consisted of central and local functionaries, and medical, scientific, and foreign language professionals; sang-in was composed of “farmers, craftsmen, fishermen and merchants;” and chun-min included slaves, domestic servants, sorcerers, butchers, basket-makers, and public entertainers. See Andrew C. Nahm, INTRODUCTION TO KOREAN HISTORY AND CULTURE 105–06 (1993); see also Pyong-Choon Hahm, THE KOREAN POLITICAL TRADITION AND LAW 110 n.4 (1971) (describing multiple classes in dynasty society); Pyong-Choon Hahm, THE TRADITIONAL PATTERNS OF AUTHORITATIVE SYMBOLS AND THE JUDICIAL PROCESS IN KOREA, in PYONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE 33–42 (1986) (adding another class of “outcasts” below chun-min). Hierarchy reigned supreme, as there was hierarchy within almost every class, including and perhaps especially, the yangban. See Carter J. Eckert et al., KOREA OLD AND NEW 109 (1990).
37 Lett, supra note 30, at 14–16; see Eckert, supra note 35, at 114; Gregory Henderson, KOREA: THE POLITICS OF THE VORTEXT 37 (1968). Initially, yangban status was achieved by competitive civil service exams, which required mastery of philosophy and ethics in Chinese; thus, education afforded opportunities for social mobility. Eventually, however, “[m]embers of established ruling elite had effectively placed a hereditary requirement on future exam takers,” and only descendants of a former successful candidate were eligible for the exams. Lett, supra note 30, at 14–16; see Eckert, supra note 35, at 114; Henderson, supra, at 37. It should be noted that the social status system described above lost much of its rigid and strict character long before the Chosun dynasty came to an end in 1910. The four-class description is the “official one of the dynasty,” but, especially in the latter centuries, class distinctions were not as sharp or rigid as presumed. Henderson, supra, at 36–37. One author confirms that the formal class system was legally abolished and the yangban-dominated status structure eliminated during the Chosun dynasty itself, in the “sweeping” and “momentous” social re-
Most relevant to the discussion herein is to what extent Confucian norms, especially those of hierarchy and division are present in contemporary Korean society. The views are somewhat scattered. Korea specialist William Shaw challenges the “notion of static, timeless characteristics” of a “Korean social order” and questions the lasting effects of Confucianism on Korea’s institutions.\(^{38}\) Another commentator notes that “Confucian culture [still] provides the tools with which Koreans interpret and give order to the world around them.”\(^{39}\) Even Shaw acknowledges “the residual strength” of Confucianism in “interpersonal relations”\(^{40}\); such relations are a constant in the development of every society. Korea observers indicate that the residue has proved quite potent,\(^{41}\) and that the continuing influence of Confucianism on contemporary Korea is palpable.\(^{42}\) Despite critical com-

\(^{38}\) William Shaw, *Rights, Culture, and Policy: The Prevailing Model*, in *Human Rights in Korea* 1, 4 (William Shaw ed., 1991). Shaw relies on developments on the peninsula beginning from the end of the nineteenth century; the decline of Confucianism as a “living political philosophy . . . that began in the 1880s and sharply accelerated after the loss of Korean independence in 1910;” the growth during the same period of “alternative philosophical, religious, or political traditions and forms of organization, including . . . Christianity [and] Western liberalism;” the “militarized government and social control” by the Japanese from 1910 to 1945; and the “large, often politically significant military establishment[]” since 1945. *Id.* Regarding the effect of Japanese colonial rule (1910–1945) on the traditional class structure, Lett asserts that “[t]here is no major ‘leap’ between yangban society and contemporary South Korean middle-class society, even with the intrusion of the Japanese colonization.” *Lett*, * supra* note 30, at 226. Another author acknowledges the possibility of the elimination of such Korean traditions, but adds: “[I]t may also be argued that the Japanese system reinforced more abstracted concepts of hierarchy and allowed at least some of the yangban to retain their traditional roles vis-à-vis other Koreans, if not the Japanese themselves.” *David I. Steinberg, The Republic of Korea: Economic Transformation and Social Change* 94 (1989).

\(^{39}\) Hahm, * supra* note 29, at 257; *see also id.* at 271–72 (“[Confucianism] provides the people with the signs, symbols, and strategies—the tools with which to negotiate the world around them.”).

\(^{40}\) Shaw, * supra* note 38, at 4.


\(^{42}\) Clifford, * supra* note 41, at 10; Choe, * supra* note 41. One way to explain the influence of Confucianism on contemporary Korea is that Korean society appears to be one that “values tradition and continuity with the past,” and is still connected to “a nostalgic past to which everything attempted in the present must appeal.” Ilhyung Lee, *Culturally-Based Copyright Systems? The U.S. and Korea in Conflict*, 79 Wash. U. L.Q. 1103, 1155 (2001) (quoting Mark Withers, *Leveraging Cultural Differences to Improve Performance*, 7 Int’l Hum. Resources J. 5, 7 (1998)) [hereinafter *Culturally-Based Copyright Systems?]]; *see Fons Trom-
mentary of Confucianism seen in more recent years, many of the Confucian norms prevalent in the Chosun dynasty are stitched tightly into the Korean social fabric.

On the one hand, the Korea of today may indeed be the most Confucian society in the world and still deeply influenced by Confucian traditions. On the other hand, it is also a society in the midst of a social transformation, spurred by democratization reforms and the emergence of a middle class, which might mark the beginnings of a quiet egalitarian revolution. Perhaps the deeply-rooted Confucian regard for hierarchy profoundly shapes ordinary Koreans in their interactions with others. Or perhaps the long-held expectation of certain conduct has led to chafing in a setting where the contemporary climate is that of citizens demanding their equal lot. Especially in the bearing of burdens and receiving of benefits, the public demands equal treatment, and suggestions of inequality touch upon tender sensitivities, and occasionally, simmering anger. Three brief examples will illustrate the contemporary angst regarding the equality demand.

1. Compulsory Military Service

One of the most significant burdens for Koreans, indeed, members of any society, is that of military service. Korean law requires all males to serve in its military for up to two years and four months, with...
limited exceptions. Yet media reports of able-bodied males who receive exemptions for questionable reasons have become sufficiently routine as to be predictable. Those who are exposed as having obtained exemptions through family connections or bribes must endure the most critical and public scrutiny. Most Koreans see military service as “a sacred duty of manhood” borne of patriotic responsibility. Individuals evading the duty or those securing exemptions for their sons through patronage or payment strike a sensitive chord in the Korean mindset.

2. Legal Education Reform

Claims of discriminatory and elitist attitudes also surfaced in the ongoing debate over reforms in legal education. As necessary background, after years of discussion, planning, and some stiff opposition, the National Assembly in July 2007 enacted legislation authorizing the creation of graduate-level law schools similar to those seen in the United States, scheduled to begin operations in 2009. When implemented, the new law school will represent a major overhaul of legal education and training in Korea. Under the current system, there are no requirements of formal education for those who wish to take the national judicial examination, Korea’s equivalent to the bar examination stateside. The exam is open to virtually anyone, but has a passing

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47 Statutes of the Republic of Korea, Enforcement Decree of the Military Service Act (2007); Statutes of the Republic of Korea, Military Service Act, arts. 3(1) & 18(2) (2006).
48 See Choe, supra note 41.
49 See id. (reporting “repeated scandals showed many of the country’s rich and powerful pay bribes or help their sons get U.S. citizenship to keep them out of the military”).
50 Id.

Those who are successful must then complete a two-year program at the Judicial Research and Training Institute, under the supervision of the Supreme Court. Critics have long argued that the system, originally designed to train career prosecutors and judges, is ill-equipped to prepare a practicing bar that will be called on to guide the needs of a more litigious society and to engage in an increasingly specialized, international practice. Reformists proposed that an undergraduate degree be a prerequisite to admission to graduate-level professional legal education.\footnote{Indeed, the vast majority of those successful in passing the bar examination are graduates of four year colleges. See 2007 Yeon-jeh-2-cha-Sah-bub-si-uhm Deh-hahk-buhl Boon-poh [The Results of the Second Part of the Korean Bar Examination in 2007 Analyzed by School], \textit{Mae-II BUSINESS}, Oct. 18, 2007, \textit{available at} http://news.mk.co.kr/outside/view.php?year2007\&no=564867; see also 2005–2002 Yeon-doh-byul Sah-bub-si-uhm Choi-jonh-hahb-yuk-jah Myung-dahn [Korean Bar Exam Statistics by School from 2002 to 2005], http://cafe.navar.com/gugrade.cafe?ifram_url=ArticleRead.nhn\%3Farticleid=62469 (last visited Jan. 17, 2008).}

Opposition was seen from various quarters,\footnote{Among them are: the practicing bar, which has been critical and mistrusting of university law faculty members (many of whom are not admitted to the bar); and the Supreme Court, which resists losing, to an agency in the executive branch, control of the only institution for formal legal education and training. Lee et al., \textit{supra} note 52.} including, most relevant here, those who argued that the proposed format would be unfair and unconstitutional (as violative of article 11), in that it would discriminate against those who do not have the financial means to obtain a legal education, thus effectively denying them the opportunity to be a member of the bar. The popular sentiment is that the current bar exam is “a symbol of fairness, equality, and most of all, a decisive opportunity to achieve a Korean dream.”\footnote{Kyong-Whan Ahn, \textit{Law Reform in Korea and the Agenda of “Graduate Law School,”} \textit{24 WIS. INT’L L. J.} 223, 227 (2006) (emphasis added).}

3. Korean Affirmative Action

Commentators have emphasized that Korea is a homogenous society,\footnote{See Ahn, \textit{supra} note 12, at 102; Dae-Kyu Yoon, \textit{New Developments in Korean Constitutionalism: Changes and Prospects}, \textit{4 PAC. RIM L. \\& POL’Y J.} 395, 396–97 (1995); see also Alex Y. Seita, \textit{The Intractable State of United States-Japan Relations}, \textit{32 COLUM. J. TRANSNAT’L L.} 467, 492 n.72 (1995) (referring to “99.9% ethnic Korean” population in Korea).} one that does not suffer from the difficulties relating to race seen
in the United States.\textsuperscript{57} Yet others have noted that the society is far from monolithic, and that deep divisions are present, based on a number of factors, including regional origin.\textsuperscript{58} Most pronounced in politics, partisan regionalism was hardened in the early 1960s with the authoritarian rule of Chung-Hee Park. Park’s rule began a thirty-six year reign of chief executives from the Gyung-sang Provinces who favored their native southeastern regions at the expense of others, especially the Juhl-lah Provinces.\textsuperscript{59} This period saw heightened regional consciousness in politics, civil service, employment, and even marriage selection.\textsuperscript{60} Those from the disfavored regions were said to have faced discrimination, both subtle and overt.\textsuperscript{61} Partisan regionalism continues to be a source of internal tension and division in Korean society.\textsuperscript{62}

Recent years have seen an open discussion of the possible implementation of U.S.-style affirmative action programs in education and civil service that would provide for preferential treatment of those from traditionally disfavored regions.\textsuperscript{63} Those who support such programs point to the disparity in economic standing between the Gyung-sang and Juhl-lah regions, resulting from “the legacy of political power and patronage.”\textsuperscript{64} Those opposed to such programs reject the notion of quotas, and urge the virtues of individual hard work and open competition. Cries of “reverse discrimination” are also heard.\textsuperscript{65} In short, the

\textsuperscript{57} See Korean Overseas Info. Serv., A Handbook of Korea 14 (9th ed. 1993) (“There are no significant racial minorities in Korea.”); see also Ahn, supra note 12, at 102 (“No race or place of origin issue has ever bothered the Korean judiciary.”); Amy L. Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 Yale L.J. 1, 28 n.134 (1998) (“In . . . Korea, ethnic minorities are not merely economically disadvantaged, but practically nonexistent.”); James Robinson, Social Status and Academic Success in South Korea, 38 Comp. Educ. Rev. 506, 509 (1994) (“[R]acial, ethnic, and linguistic difference are absent in South Korea.”).


\textsuperscript{59} Sung Chul Yang, South Korea’s Top Bureaucratic Elites, 1948–1993: Their Recruitment Patterns and Modal Characteristics, 34 Korea J. 5, 5 (1994); Baker, supra note 58; French, supra note 58; GNP Defections, supra note 58.

\textsuperscript{60} See Yang, supra note 59.

\textsuperscript{61} See French, supra note 58.

\textsuperscript{62} See ROK’s Yonhap: Roh Asked to Bring National Unity, Economic Stability, World News Connection, Dec. 19, 2002 (quoting Seoul National University professor: “The country is in a crisis from three different confrontations—between regions, social classes and between South and North Korea.”).

\textsuperscript{63} See French, supra note 58.

\textsuperscript{64} Id.

\textsuperscript{65} Id.
rhetoric heard in Korea relating to region-based affirmative action programs has a similar ring to the debate over race-based affirmative action programs in the United States. References to legal equality are heard from both sides of the Pacific and on both sides of the argument.

B. From the Cultural Database

With the nature of the survey in mind—a hypothetical situation that results in negative action due to apparent disparate treatment—it is necessary to first outline the cultural norms that might affect Korean reactions to such an event. In order to better appreciate the Korean mindset, four different cultural characteristics are discussed herein. Three of these cultural dimensions have been advanced by social scientists who note differences between and among national societies (including Korea); the remaining dimension pertains to changing Korean attitudes regarding resort to courts for the resolution of disputes.

1. Universalism/Particularism

In an insightful work, Charles M. Hampden-Turner and Fons Trompenaars report a “discovery” of six dichotomous cultural dimensions that vary between national societies. Of special interest here is the universalism/particularism distinction. “Universalism emphasizes rules that apply to a universe of people, while Particularism emphasizes exceptions and particular cases.” At the core of universalism is “rules, codes, laws, and generalizations,” while particularism prefers “exceptions, special circumstances, [and] unique relations.”

In rankings based on survey data taken of 46,000 managers from more than forty countries, the two authors note that while the most universalist countries tend to be “Protestant and stable democracies” (including the United States), “Buddhist, Confucian, Hindu, and Shinto countries” (including Korea), are notably more particularist. Indeed, Korea emerges as one of the most particularist countries in the rankings, second only to Yugoslavia. Many of the negative con-

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67 Id. at 2.
68 Id. at 11, 13.
69 Id. at 16.
70 Id.
71 HAMPDEN-TURNER & FONS TROMPENAARS, supra note 66, at 16.
sequences of particularism “taken too far” have been seen in the contemporary Korean experience. That is:

- Particularism “resorts to power and coercion, using intimidation,” and “[t]here is no way of resolving rival particularities, in the absence of law, save through force.”\(^72\) This was evident in the authoritarian rule of Korea’s army generals who occupied the Blue House, the official residence of the President.
- “Nationalism . . . super-patriotism, and appeals to ethnic identity are . . . particularistic.”\(^73\) This is patent in the Korean setting.
- “Particularism . . . is a protest against rules imposed from the outside by cultures seen as foreign,”\(^74\) as indicated by long-held attitudes in Korea that laws and rules were seen as an instrument of oppression by the Japanese, and to a lesser extent, the United States, in an effort to preserve imperial interests during their respective occupation of the Korean peninsula.\(^75\)
- Particularism is “prone to favoritism and special privileges,”\(^76\) as Korea is a society notorious for reliance on personal connections and special treatment.

Hampden-Turner and Trompenaars note explicitly that “trust in the legal system”—another variable in the analysis of universalist-particularist countries—“is known to be low” among various particularist countries, including Korea.\(^77\)

2. Individualism/Collectivism

The individualism/collectivism dichotomy is one of the most widely researched constructs that explains behaviors in different countries. Professor Harry C. Triandis offers a beginning definition of individualism:

a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize

\(^{72}\) Id. at 24.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) See Kim, supra note 3, at 7, 8.

\(^{76}\) HAMPDEN-TURNER & TROMPENAARS, supra note 66, at 25 fig.1.6.

\(^{77}\) Id. at 16.
rational analyses of the advantages and disadvantages to associating with others.\textsuperscript{78}

In contrast, collectivism is:

a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives.\textsuperscript{79}

Triandis’s well-cited text isolates the United States as the model individualist culture on the one hand, and Japan (as well as China) as a classic case of collectivist culture on the other.\textsuperscript{80} Triandis also comments on the collectivist leanings in Korean culture.\textsuperscript{81}

The individualism/collectivism cultural dimension is also included in widely-known works by Geert Hofstede,\textsuperscript{82} who has been described as “the ‘father’ of cross-cultural data bases.”\textsuperscript{83} In Hofstede’s survey and rankings of seventy-four countries, the United States emerges as the most individualist society, thus confirming Triandis; Japan is significantly more collectivist, in a tie for forty-sixth.\textsuperscript{84} Yet in Hofstede’s study,

\textsuperscript{78} Harry C. Triandis, Individualism \& Collectivism 2 (1995).

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 89, 97.

\textsuperscript{81} See id. at 3.


\textsuperscript{83} Hampden-Turner \& Trompenaars, supra note 66, at x.

\textsuperscript{84} Cultures and Organizations 2005, supra note 82, at 78 tbl.3.1 (2005). Hofstede defines the terms similarly:

Individualism pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people’s lifetimes continue to protect them in exchange for unquestioning loyalty.

Id. at 76 (emphasis omitted).
Korea emerges in sixty-third place, even more collectivist than Japan, the classic case of collectivist culture.\textsuperscript{85}

The significance of the individualism/collectivism dimension to perceptions of equality is strong. Hofstede draws a stark contrast between the two (and also draws a parallel to the universalism/particularism dichotomy): “[l]aws and rights differ by group” in collectivist societies like Korea; whereas, in individualist cultures like the United States, “Laws and rights are supposed to be the same for all.”\textsuperscript{86}

But any discussion of the purportedly collectivist nature of the Korean setting must consider reports of changes in social attitudes and norms there in recent years. A \textit{New York Times} report in 2003 captured a Korea in transition, and underscored the weight of its past and the directions of the present society: “[s]till anchored in Confucian values of family and patriarchy, South Korea is fast becoming an open, Westernized society—with the world’s highest concentration of Internet broadband users, a pop culture that has recently been breaking taboos left and right, and living patterns increasingly focusing on \textit{individual} satisfaction.”\textsuperscript{87} Korea may be in “the throes of a social transformation,”\textsuperscript{88} and its place in Hofstede’s rankings notwithstanding, the society appears headed toward a more comparatively individualistic orientation.

3. Power Distance

Power distance, another of Hofstede’s cultural dimensions, is defined as “the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.”\textsuperscript{89} A low power distance culture posits that “[i]nequalities among people should be minimized,” while high power distance coun-

\textsuperscript{85} Id. at 79 tbl.3.1. This author notes that Korean acquaintances in academia have expressed strong and vocal objection to the characterization of Korea as a collectivist society, the writings of Hofstede, Triandis, and others notwithstanding. This author, also without supporting research, would posit that although Korean culture demands and expects an outward collectivist appearance, deeply individualist tendencies motivate many Koreans.

\textsuperscript{86} Id. at 109 tbl.3.5. Individualist cultures tend to be universalist; collectivist cultures, particularist. Id. at 104 tbl.3.4.

\textsuperscript{87} Norimitsu Onishi, \textit{Divorce in South Korea: Striking a New Attitude}, N.Y. TIMES, Sept. 21, 2003, at 19 (emphasis added).

\textsuperscript{88} Id.

\textsuperscript{89} \textsc{Cultures and Organizations} 2005, \textit{supra} note 82, at 46 (emphasis omitted). Hofstede adds: “Institutions are the basic elements of society, such as the family, the school, and the community; organizations are the places where people work.” \textit{Id.} (emphasis omitted).
tries subscribe to the view that “[i]nequalities among people are expected and desired.”\textsuperscript{90} Privileges and symbols of status are “frowned upon” in low power distance cultures, but are “normal and popular” in high power distance cultures.\textsuperscript{91} Given the deeply hierarchical nature of Korean society, the country appears surprisingly (to this author) on the lower end of Hofstede’s power distance rankings of seventy-four countries, tied for forty-first (with Greece).\textsuperscript{92} Still, Korea is a higher power distance culture in contrast to the United States, which occupies a three-way tie for fifty-seventh (with Estonia and Luxembourg).\textsuperscript{93} Some of the contrasting characteristics that Hofstede attributes to lower and higher power distance cultures could be offered as key cultural differences between U.S. and Korean societies, respectively, especially in the educational setting:

<table>
<thead>
<tr>
<th>Characteristics of Low &amp; High Power Distance Cultures</th>
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<tbody>
<tr>
<td><strong>Low power distance/United States</strong></td>
</tr>
<tr>
<td>“Parents treat children as equals”</td>
</tr>
<tr>
<td>“Children treat parents and older relatives as equals”</td>
</tr>
<tr>
<td>“Students treat teachers as equals”</td>
</tr>
</tbody>
</table>

Source: Cultures and Organizations 2005, supra note 82, at 57 tbl.2.3.

Most informative for this discussion, Hofstede notes that in low power distance societies, it is the view that “[a]ll should have equal rights;” whereas, in high power distance countries, “The powerful should have privileges.”\textsuperscript{94}

4. Korean Attitudes Toward Resort to Court Adjudication

Traditionally, Korea has been described as a society profoundly shaped by deeply-embedded Confucian virtues that emphasize harmony and avoiding dispute and litigation. Professor Pyong-Choon Hahm wrote in 1969:

Koreans have abhorred the black-and-white designation of one party to a dispute as right and his opponent as wrong. Assigning all blame to one for the sake of rendering a judg-

\textsuperscript{90} Id. at 57 tbl.2.3.
\textsuperscript{91} Id. at 59 tbl.2.4.
\textsuperscript{92} See id. at 43 tbl.2.1.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 67 tbl.2.5.
ment has been repugnant to the fundamental valuation of harmony, because such a judgment has retarded swift restoration of broken harmony. The ultimate ideal has been a complete absence of dispute and conflict. But if discord could not be avoided, society demanded the quickest restoration of broken concord.  

Professor Hahm also explained:

A litigious man is a warlike man to the Koreans. He threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity.  

Such observations might reflect the traditional Korean view, but may well be outdated for a significant portion of the current population. Although some Koreans still adhere to the traditional preference for non-legal settlement over court adjudication, there has been a “dramatic change in the attitudes of the Korean people toward litigation.” Koreans are becoming more litigious, more willing to advance legal claims, and more willing to resort to the courts. In the late 1960s, “The vast majority of the population . . . had never been to a courthouse . . . [and] were proud of that fact.” Yet a survey taken in the 1990s shows that nearly thirty percent of respondents had “been to court for legal problems” and almost half “regard[ed] filing a suit for a money matter as a means of achieving justice or as a method of exercising their rights.” The commentary’s references to skyrocket-
ing lawsuits and an emerging “litigious zeitgeist” are evidence of change and a departure from traditional norms.

The background discussion to this point—first, the law on equal protection, and second, the cultural characteristics attributed to the population—is offered with the goal of better understanding Korea and the societal mindset. Importantly, the description of Korean cultural norms is not offered to suggest any particular result in the survey. Nor was the survey designed necessarily to test the presence of any of the cultural attributes. The discussion of the law and societal culture, as well as the survey results, is designed to inform about Korean perceptions on equal treatment.

III. The Survey

The survey was conducted from December 2006 to March 2007, and was available only on the Internet. All of the survey was in Korean text. Participants could provide answers to open-ended questions in Korean as well. An initial test survey was conducted for Koreans in Columbia, Missouri (involving three dozen participants), followed by the main survey for those in the Seoul metropolitan area in Korea (which numbered nearly 300 participants). The content of the survey was identical for both the test and main surveys, save for a few questions, as explained herein.

A. The Hypothetical

The survey asks participants to place themselves in a hypothetical situation occurring at an airport. Participants live in Korea, and are going on a business trip to Chicago. At the Incheon airport, they are to board a flight for Narita airport in Japan, from where they will take a connecting flight to O’Hare. While they stand in line to check in for

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103 The survey project received prior approval by the University of Missouri Institutional Review Board. Ilhyung Lee, Survey, Korean Perception(s) of Equality (Dec. 2006–Mar. 2007) (on file with author) [hereinafter Korean Perception(s) of Equality Survey].
the flight to Narita, an airline employee tells them, first in Korean and then in English, that the morning flight to Narita is canceled, and that those who have a connecting flight to Narita are to go to the counter for another airline—Gah-Nah-Dah Airline—to see if there are seats on its flight to Narita that will allow enough time to make the connecting flight to O’Hare. A few persons standing in line make their way to the counter for Gah-Nah-Dah Airline as instructed.

An employee at the Gah-Nah-Dah counter tells the participant that he or she must wait until all passengers with confirmed seats are processed before stand-by passengers can be considered. The employee refuses to take the name of the participant for a waiting list, and instead advises the participant to have a seat in the waiting area. The participant stands nearby, and observes four other passengers whose scheduled flight to Narita was also canceled, and who, like the participant, attempt to obtain a seat on the Gah-Nah-Dah flight.

The resulting situation is that of the five passengers—the participant plus the four other passengers—two received boarding passes and checked in luggage, while three others were told to step aside and wait until all confirmed passengers were processed, without being able to leave their names for a waiting list. The participant confirms this by approaching and asking the four passengers directly. The two passengers who received boarding passes—one male and one female—are American. The three passengers who did not—one male, one female, and the survey participant—are Korean. The hypothetical concludes with the participant approaching the Gah-Nah-Dah employee to again ask about getting a seat on the Gah-Nah-Dah flight to Narita. The employee tells the participant that the flight is completely booked. The participant asks the employee why he or she was not able to leave his or her name for stand-by when other people who came from the other airline received boarding passes. The employee tells the participant that there are no more seats on the flight and turns away.

Survey participants are asked to assume that the hypothetical described occurred to them, and then to answer the questions that follow.\[104\]

\[104\] Id. As an aside, the hypothetical was created to place each participant in a realistic situation where a strong suggestion of discriminatory treatment (in the view of this author) is present. There are anecdotal accounts of Korean patrons receiving poor or at least differing treatment from Korean employees at business establishments that cater to a significant number of foreigners. The realistic nature of the hypothetical was confirmed by the comments of some of the participants, who volunteered: “This could happen;” “These
B. Questions

Participants were asked whether they believed the actions of Gah-Nah-Dah were (i) discriminatory and (ii) illegal or unlawful, and to provide respective reasons for their views. They were also asked what action, if any, they would take. The survey seeks to assess the degree of the participants’ reactions to the allegedly discriminatory and illegal nature of the airline’s actions. That is, survey participants were asked whether they “strongly agree,” “somewhat agree,” “neither agree nor disagree,” “somewhat disagree,” or “strongly disagree” with the statement: “[w]hat Gah-Nah-Dah Airline did to me is discriminatory.” In a separate question, participants were asked to provide reasons for their responses in open-ended form. Similarly, participants were asked to express their agreement or disagreement—with the five options given above—to another statement: “[w]hat Gah-Nah-Dah Airline did to me is illegal or unlawful,” and were also asked to provide their reasons thereof.

Regarding the question of what if any action participants would take in response to the incident, the test survey asked the question in a completely open-ended form, soliciting responses without suggestion. For the main survey, participants were asked to assume that they returned from the business trip and filed a complaint with Gah-Nah-Dah management, but received an unsatisfactory or unresponsive answer. Then participants were asked what action they would take, and were provided with the following list of options, from which they could choose one or more:

- Contact airport management about the incident.
- Contact a government agency about the incident. [Participants choosing this option were asked to specify which government agency.]
- Contact the participant’s representative in the National Assembly.
- Contact an attorney for possible legal action.
- Other [Participants choosing this option were asked to specify what other action.] 
- Nothing [Participants choosing this option were reminded that they could not also choose any of the above options.]
C. Participation

In all, 329 persons completed the survey, thirty-six for the test survey conducted in Columbia, Missouri and 293 for those in the Seoul area.\textsuperscript{105} The pool of participants in Missouri was primarily Korean graduate students and visiting scholars at the University of Missouri. Participants in the main survey for those in the Seoul area were company professionals, government employees, and university faculty, staff, and students.\textsuperscript{106}

D. Results and Analysis

As discussed above, Korea emerged in the studies of some researchers as a particularist, collectivist, and high power distance society, comparatively speaking. A society with such characteristics, researchers say, is less likely to demand equal rights for all, and more likely to allow for different treatment based on the circumstances, group membership, or relative power position. In contrast, a universalist, individualist, and low power distance would be the opposite, demanding equal treatment for all regardless of the same factors stated above.

In this survey, over ninety percent (298/329) of all participants strongly agreed or somewhat agreed that the airline’s action was discriminatory.\textsuperscript{107} This result suggests an orientation more universalist than particularist, individualist than collectivist, and lower rather than higher power distance. Perhaps Korean society is becoming a more universalist and lower power distance setting in recent years, just as it is reportedly becoming more individualist; or perhaps, one must be quick to note, the hypothetical in the survey presents such a strong case of discriminatory activity that it transcends all or some of the cultural dichotomous distinctions. (Caution is necessary to avoid hasty conclusions.) In all events, most of the participants who agreed that the airline was discriminatory separately emphasized the disparate

\textsuperscript{105} Id. In an effort to increase participation, this author initially proposed the random selection of two participants in the survey to receive a shopping gift certificate. But because virtually all of the participants in the survey were Korean citizens and without U.S. permanent resident status, university personnel advised that a significant tax and complicated reporting requirements would be involved. The financial incentive was eliminated. \textit{Id.}

\textsuperscript{106} Id. This author acknowledges that one limitation of the survey is that the pool of respondents, although not monolithic, does not represent a cross-section of Korean society.

\textsuperscript{107} Id. Just over fifty-eight percent of the participants strongly agreed that the airline action was discriminatory; over thirty-two percent somewhat agreed. \textit{Id.}
treatment of similarly situated Korean and American passengers. The predominant agreement with the discrimination description and supporting explanations do sound of the “search for sameness and similarity” and attempt “to impose on all members of a class or universe the laws of their commonality.”

Although a large majority of the participants agreed that the airline’s action was discriminatory, about seven percent (23/329) neither agreed nor disagreed with the statement, and just over two percent (8/329) strongly disagreed or somewhat disagreed. In the explanations for these responses, the most frequently seen comment was that the limited facts did not allow the conclusion that discrimination was present. Some participants responded that there could be a rational or legitimate reason for the airline’s action, with a few offering the possibility that the American passengers who received boarding passes had “expensive” or “privileged” seats or “premium membership.” There is, in this author’s view, a suggestion of a particularist orientation here. If indeed there was a simple reason why only the American passengers received boarding passes, the airline employee presumably could have said so when confronted, instead of turning away, or the airline, in response to a formal complaint, could have explained the reason, instead of giving an unresponsive or unsatisfactory answer, as the hypothetical explicitly states. Nevertheless, some of the participants engaged in a proactive search for a justifying reason.

Without any exposition of the applicable law, statutes, or regulations, participants were asked whether they viewed the airline’s action as illegal or unlawful. This question was not an attempt to test participants’ knowledge of the law, but rather to solicit their intuitive reaction based on their individual perception of the law and its application. Whereas over ninety percent (298/329) of the participants

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108 Korean Perception(s) of Equality Survey, supra note 103. Some of the respondents explained that boarding passes were not distributed on a first come, first serve basis. Id.
109 HAMPDEN-TURNER & TROMPENAARS, supra note 66, at 14.
110 Korean Perception(s) of Equality Survey, supra note 103. In all events, perhaps the comment most reflecting a particularist mindset is the explanation by one participant that “the American may have had an urgent reason—family emergency, etc.—for Gah-Nah-Dah Airline to distribute a boarding pass.” Id.
111 Id. To be clear, the participants were not asked whether the airline action should be illegal or unlawful. Id.
112 Id. For example, lay persons are likely able to give a reaction as to whether legal liability or responsibility attaches when they witness one person making physical contact with another, based on the totality of the circumstances they witnessed and their perception of law, even if they may not know the rules on assault and battery.
saw discriminatory activity by the airline, a significantly smaller portion, fifty-two percent (170/327), agreed with the statement that the airline action was illegal or unlawful.\footnote{Id.} Those who viewed the action as illegal emphasized separately the differing and discriminatory treatment, with some specifically referring to race- or nationality-based treatment. Several others made some reference to equal (pyung-deung) or unequal treatment. A small number referred to rights (gwon).

Nearly three in ten of all responding participants (twenty-nine percent or 95/327) neither agreed nor disagreed with the view that the airline’s action was illegal or unlawful. Most of these indicated that they were uncertain as to the law, while a few explained that the situation did not present sufficient information to indicate unlawful conduct. In addition, just under nineteen percent of the participants (62/327) disagreed, strongly or somewhat, that the airline’s action was illegal or unlawful. Their explanations are informative.\footnote{Id.} Some of these respondents described the airline action as “unethical,” “immoral,” “improper,” “inappropriate,” or “unfair,” but not illegal or unlawful.\footnote{Id.} A few participants explicitly distinguished between discriminatory and illegal conduct. Others flatly dismissed a violation of law:

- “It is not illegal” \footnote{Id.} [multiple].
- “There is no law regarding such matters.”
- “It is not against the law.”
- “Legally, there is no problem.”
- “The airline did not violate the law.”
- “I don’t think the company has violated any laws by serving its customers poorly.”\footnote{Id.}

Similarly, some comments declared the irrelevance of law to the situation presented:

\footnote{Id. A few points of explanation are in order. Two of the participants did not provide responses to the question regarding the (il)legality of the airline action; thus, the total number of persons responding to this question is adjusted from 329 to 327. Also, in the raw numerical results, 190 out of 327 (about fifty-eight percent) selected the “strongly agree” (about twenty-four percent) or “somewhat agree” (about thirty-four percent) options, but the separate comments of twenty of these participants actually indicate disagreement with the statement that the airline’s action was illegal or unlawful. \textit{Id.}}

\footnote{Id. These include participants who selected the option that they “neither agree nor disagree” with the statement that the airline’s action was illegal, but whose comments indicate disagreement. \textit{Id.}}

\footnote{Korean Perception(s) of Equality Survey, \textit{supra} note 103.}

\footnote{Id. A few respondents expressed that “if it was illegal, Gah-Nah-Dah would probably not have acted as such.” \textit{Id.}}
• “I believe law has nothing to do with this situation.”
• “It is not a matter of whether it is illegal or not.”
• “I don’t think we could govern these kinds of situations through laws.”
• “Being discriminated is not a good feeling but I don’t think you could regulate such action legally. An airline can be prejudiced against something for the benefit of the company.”

For a few of the participants who saw no illegality in the airline’s action, the fact that the airline may have had a “policy” of giving preference to foreigners was apparently significant, as they emphasized this point in their comments.

The comments of some survey respondents who disagreed that the airline action was illegal might evoke recollections of the debate over (and especially the opposition to) civil rights legislation affecting common carriers in the United States during the 1960s. For example, a few participants specifically stated that the airline’s action was not illegal because it involved a private company. Also consider the following comments:

• “Service provider has the right to refuse to provide service to the customers. Regardless of the reason for not giving a boarding pass to me, it is not unlawful, if there was no direct money damage to me.”
• “The airline has discretion.”
• “The airline has ultimate decision for boarding.”

If the situation in the hypothetical would give rise to a dispute (as is suggested by the majority of the participants’ reactions), the survey also sheds light on what action the participants would seek to resolve the dispute. Would respondents seek compromise and conciliation (under the traditional Confucian construct) or more quickly resort to legal methods (as part of the so-called “litigious zeitgeist”)? The test survey, involving a small number of participants in Columbia, Missouri, posed the question of what the participants would do, soliciting

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open-ended responses. A majority of the respondents (21/36) included in their answers the action of contacting the airline with a complaint. Others offered that they would: post a message on the airline website (one); contact the Consumer Protection Board (four); and take no direct action with respect to the airline (two). Significantly, however, in this open-ended format, with no leading questions or suggestive options, seven of the thirty-six participants referred to resort to some activity of a legal nature.\textsuperscript{118}

In the main survey, for those in the Seoul area, participants were asked to assume that they contacted the airline management with a formal complaint, but did not receive a satisfactory or responsive answer, and were then given a list of options from which they could choose one or more of their preferred actions. The results:\textsuperscript{119}

- Contact airport management about the incident: 69\% (201/291)
- Contact a government agency about the incident: 12\% (35/291)\textsuperscript{120}
- Contact one’s representative in the National Assembly: 0.3\% (1/291)
- Contact an attorney for legal advice and possible legal action: 21\% (62/291)\textsuperscript{121}
- Nothing: 9.6\% (28/291)
- Other: 20\% (59/291)

The responses invite comment and analysis. First, nearly one in ten of the participants indicated that they would do nothing. It is of interest that of the twenty-eight persons who chose this option, twenty-one answered that the airline action was discriminatory, and eleven agreed that its action was illegal or unlawful.\textsuperscript{122} Second, the responses

\textsuperscript{118} Korean Perception(s) of Equality Survey, \textit{supra} note 103. Of the seven in the test survey, three respondents stated that they would file a lawsuit or take legal action. Another offered, “I could sue.” Others indicated: possibly filing a lawsuit (while noting the costs and obstacles); pursuing legal action if evidence is present; and finding out about the governing laws. \textit{Id.}

\textsuperscript{119} \textit{Id.} Because participants were permitted to choose more than one option, the total number of options selected will exceed the number of persons in the main survey, and the total percentage will exceed a hundred percent.

\textsuperscript{120} \textit{Id.} The numerical results indicate that twenty-eight participants chose this option, but an additional seven others referred to a government agency in their separate comments. \textit{Id.}

\textsuperscript{121} \textit{Id.} This is roughly equivalent in proportion to the respondents in the test survey (7/36) for the same action. \textit{Id.}

\textsuperscript{122} Korean Perception(s) of Equality Survey, \textit{supra} note 103. One person, who strongly agreed that the airline action was discriminatory but neither agreed nor disagreed with the statement that the action was illegal, selected the “Nothing” option under the question of what, if any, action that person would take. In separate comments, this respondent wrote,
indicate participants’ (and perhaps societal) recognition and awareness of a grievance procedure, which includes petition to a governmental agency, as well as resort to adversarial legal action, in order to seek corrective measures or a compensating remedy. This is in contrast with further attempts to resolve the conflict directly with the other party. Specifically, nearly one in eight participants indicated that they would contact a government agency. Of these, the Consumer Protection Board received the most mention, identified by eighteen persons, followed by the Ministry of Construction and Transportation (six), and the Ministry of Foreign Affairs (three). Interestingly, only two of the respondents mentioned by name the National Human Rights Commission Act or the Commission, the organization established to address discrimination matters in Korea.

Although the above figures indicate a societal awareness and willingness to contact a third party to seek a remedy, especially a government office, the survey reveals that only one out of the two-hundred ninety-one participants in the main survey selected the option of contacting one’s representative in the National Assembly. Participants were far more likely to resort to legal advice or legal action, as over twenty percent of the participants indicated that they would contact a lawyer, suggesting that Korean society is indeed more willing to resort to the legal process. This figure also supports previous researchers’ conclusions that the traditional method of resolving a dispute by seeking harmonious compromise and conciliation (without reliance on, or intervention by, an arm of the government) is no longer the predomi-

“If the employee’s discriminatory action is illegal, it is exaggerating this whole situation (taking the situation too seriously).” Id.


124 Korean Perception(s) of Equality Survey, supra note 103. Two respondents explained that they would contact the complaint office at the Blue House. One respondent identified the Fair Trade Commission. The rest of the respondents did not identify the specific government agency or office. Id.

125 Id. Korean colleagues have indicated to this author that Koreans are far more likely to contact an acquaintance who might personally know any member of the National Assembly rather than their own representative in the National Assembly whom they do not know personally. In all events, the survey results show that as many participants would consider holding a “nude demonstration” at the airport protesting the airline’s action as would contact one’s representative in the National Assembly: one each. Id.
nant method. It should be noted here that changes in the public’s accessibility to the legal institutions accompanied the increasing willingness to resort to court adjudication to preserve individual legal rights. Until 1996, only 300 persons per year could pass the bar examination that would allow them to begin the two-year program at the Judicial Research and Training Institute, followed by law practice. But “as demand for legal services has increased, the number has gradually risen to 500 in 1997, 700 in 1998, 800 in 2000, and 1000 a year since 2002.”

The other options—contacting airport management and “other”—present an opportunity to elaborate on the inherent challenges in survey design. The selection of options following the question of what, if any, action the participants would take if the hypothetical situation occurred to them reflects the speculation and prediction of this individual author. The option of contacting airport management seemed to this author as a rational, and altogether predictable, option of several. Indeed, nearly seven out of ten participants chose this very option. Nevertheless, this author was of the view that practically no result of significance would obtain if a passenger facing the situation presented in the hypothetical actually contacted airport management and filed a complaint. (This was confirmed by an exchange of e-mail messages between this author’s assistant and a manager at the Incheon International Airport.) While contacting airport management was a predict-

126 See supra text accompanying note 97–98.
128 E-mail from Suhn Hee Yoon to Min-Chung Lee (copy on file with author). At this author’s direction, the assistant submitted, on the Internet site of the airport, a message inquiring (in Korean):

If a passenger was racially discriminated from an airline company at the Incheon Airport, and the passenger wants to file a complaint about this incident to the Incheon Airport, what steps do you take to solve this complaint? First, I want to know if there is a division that deals with customer’s complaint, and secondly, what kind of response or solutions do you provide if a passenger raises this sort of complaint? Thank you.

The assistant received an individualized response by e-mail, from someone identifying herself as “manager of the on-line customer service at Incheon Airport,” stating in relevant part (in Korean):

[If you, the customer, were mistreated from a certain airline company, then the manager of the customer service would directly transfer this complaint to the airline company that has provided the cause for the complaint. If you tell me how you were mistreated, the time it occurred, and circumstances of the incident once again, then I would transfer this complaint to]
able if not an ineffectual option (again, in this author’s view), this survey did not contemplate the option of Internet-related activity in response to the airline action. Of the fifty-nine participants (out of 291) who selected “other” as an option, thirty-four—or over ten percent of all respondents—stated separately that they would post a complaint on the Internet (with a few specifying that they would attempt to gather more information through that vehicle). This underscores the fact that Korea, which has one of the highest rates of broadband access in the world, has seen a popular trend to vet social issues and individual matters in cyberspace.

**Conclusion**

Korea is a constitutional democracy, albeit a relatively new one, whose law guarantees equality before the law, at least with respect to state actors. This jurisdiction has also created a human rights commission to which persons may petition to address complaints of unequal treatment by any party, private or otherwise. But how equality, discrimination, and unlawful discrimination are viewed by members of various national societies may be shaped by their respective social histories and societal norms. This is not to suggest that cultural norms attributed to Korean society (or any society) must have a deterministic effect on a predetermined result. Moreover, with respect to Korea, one is reminded that a societal culture is not permanent, fixed, or unchanging, given the recent changes seen there.

The notion and perceptions of equality in contemporary Korea are of interest given the unique setting: a young constitutional democracy with a deeply-rooted Confucian history. One basic goal of this survey was to see how participating Koreans would respond to questions of discrimination, illegality, and responding action. A large majority of the participants saw discrimination in the hypothetical, but only about half saw it as illegal or unlawful. The explanations pro-

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that specific airline company and then there will be an appropriate action regarding this matter.

I apologize on behalf of the airline company, if you were discomforted at the Incheon Airport.

Id.  

129 Korean Perception(s) of Equality Survey, supra note 103. Of the fifty-nine, twelve others stated that they would contact the media, ten said they would contact the airline another time, and five indicated leading a boycott. Id.  

130 See Sang-Hun Choe, Tracking an Online Trend, and a Route to Suicide, N.Y. TIMES, May 23, 2007, at A4 (noting use of Internet by Koreans to trade tips about committing suicide).
vided by those who did not see illegality or unlawfulness or did not see how law was relevant to the situation, might indicate how a portion of the society perceives the role of law in everyday life situations. The comments relating to what action the participants would take in response indicate a society that appears to be more aware of the petitioning procedure, including the resort to government and to a more accessible practicing bar and legal system. All of these factors are indicators of a society in continuing transition. This Article encourages further examination of Korean society and transition, and comparative examinations of universal legal precepts.
RUSSIAN RULE-ETTE: USING KHODORKOVSKY’S CRIMINAL TRIAL TO ASSESS THE STATE OF RUSSIA’S JUDICIARY

Dina M. Bernardelli*

Abstract: The criminal trial of Russian oligarch and oil tycoon Mikhail Khodorkovsky in connection with Yukos Oil has been one of the most publicized and controversial trials in the history of the Russian Federation. Khodorkovsky’s conviction in the Russian courts has raised grounds for appeal to the European Court of Human Rights on both procedural and substantive grounds. This Note discusses the failures of judicial reform in Russia since the founding of the Russian Federation that have been brought to light by Khodorkovsky’s trial, and assesses the causes of these failures and the prospects for judicial reform.

Introduction

The controversial proceedings in the criminal case against former Yukos Oil executive Mikhail Khodorkovsky have put the judiciary of the Russian Federation in the spotlight. Although many feel that the charge and conviction of one of the nation’s youngest oligarchs was politically motivated, few doubt his guilt; what they do doubt is the process the State used to convict him. From the State’s utilization of unorthodox discovery methods to the deportation of his defense attorney, potentially sabotaging his appeals process, the historic trial has left Russians and the international community wondering whether the Russian Federation met the due process burdens to which it is committed through its constitution and international treaties.

This Note first addresses the socio-political background of the rise and fall of Mikhail Khodorkovsky. Part II discusses Russia’s case against Khodorkovsky and his opportunities for appeal in light of the international right of due process as set forth by the United Nations.

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2 See id.

I. Background

Mikhail Khodorkovsky had humble beginnings in a time of political upheaval and rising economic opportunity in the Soviet Union. In 1985, Mikhail Gorbachev became General Secretary of the Communist Party, putting him at the helm of the Soviet Union. Gorbachev sought to reform and revitalize the Communist Party by giving greater freedom to the Soviet people through glasnost (openness), and to jump-start the economy through radical economic reforms known as perestroika (restructuring) that ultimately permitted and encouraged private ownership. It was during perestroika that entrepreneurs such as Khodorkovsky were able to build businesses in the service industry and take advantage of foreign investment. These radical reforms, however, signaled the beginning of the end of the Soviet Union.

The Soviet Union dissolved in 1991, and Boris Yeltsin emerged from the tumult as the first democratically elected president of Russia. Yeltsin launched an aggressive privatization campaign, popularly referred to as “shock therapy,” to jolt the stagnant Russian economy into a capitalist market by divesting formerly lucrative state-run industries in public auctions. A combination of forces stemming from high inflation and investor uncertainty resulted in only a few bidders obtaining large holdings in lucrative industries such as energy and telecommunications from the state for minimal rates. The men who prof-

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5 See id. at 90–91.
7 See McAuley, supra note 4, at 95.
8 Id. at 110.
10 See Hoffman, supra note 6, at 40. Khodorkovsky, recalling the vast opportunities and the limited population taking advantage of them during privatization, stated:

    I talked with people and asked them, why didn’t you start doing the same thing? Why didn’t you go into it? Because any head of an institute had more
ited most from privatization became known as the Russian oligarchs.\textsuperscript{11} They had the connections, capital, and confidence to take advantage of the sale of state enterprises in the early and mid 1990s.\textsuperscript{12} The concentration of so much wealth and media control in the hands of so few also gave these men political power.\textsuperscript{13} Yeltsin, in need of support as leader of the new Russian Federation, bargained with the oligarchs for their monetary and political support to stave off competing parties from overturning the young democratic government.\textsuperscript{14} After Yeltsin was re-elected in 1996, the oligarchs in turn received economic incentives and influence over government policies as appointees to positions in the Kremlin.\textsuperscript{15}

During this time, Khodorkovsky used his political connections and capital generated from earlier privatization endeavors to purchase Yukos Oil, the first fully privatized oil company in Russia, at the extremely low cost of $300 million.\textsuperscript{16} He was now in control of the second-largest oil company in what was the leading oil producing country in the world.\textsuperscript{17} Khodorkovsky also acquired political power by supporting President Boris Yeltsin, becoming his Deputy Fuel and Oil Minister.\textsuperscript{18} His wealth and the support of the Kremlin made Khodorkovsky the model oligarch.\textsuperscript{19}

In the late 1990s, Khodorkovsky’s role began to change.\textsuperscript{20} No longer the strong, silent supporter of the Kremlin, he began making

possibilities than I had, by an order of magnitude. They explained that they had all gone through the period—the Kosygin thaw—when the same self-financing system was allowed. And then, at best, people were unable to succeed in their career and, at worst, found themselves in jail. They were all sure that would be the case this time, and that is why they did not go into it. And I—I did not remember this! I was too young! And I went for it.

\textit{id.} at 107.

\textsuperscript{11} See \textit{id.} at 4–7. “Oligarch” was a term used to represent their elite status as the ruling few who used their wealth and control of the media to gain great political power. See \textit{id.}; Spulber, \textit{supra} note 9, at 311.

\textsuperscript{12} See Hoffman, \textit{supra} note 6, at 4–7.

\textsuperscript{13} See Spulber, \textit{supra} note 9, at 311; Scott-Joynt, \textit{supra} note 3.

\textsuperscript{14} See Hoffman, \textit{supra} note 6, at 324; Spulber, \textit{supra} note 9, at 311.

\textsuperscript{15} See Hoffman, \textit{supra} note 6, at 358–62. These incentives included opportunities to buy shares of state industries before their initial public offering and government investment in their private businesses, which provided the capital necessary for expansion. See \textit{id.}

\textsuperscript{16} See \textit{id.} at 205; see also Scott-Joynt, \textit{supra} note 3 (noting that Yukos, at height of its wealth, was valued at $20 billion).

\textsuperscript{17} Hurbert B. Herring, \textit{Who Produces the Most Oil? Not Who You Think}, N.Y. TIMES, Sept. 17, 2006, at 3–2 (noting that Russia topped Saudi Arabia in at least the first half of 2006).

\textsuperscript{18} Scott-Joynt, \textit{supra} note 3.

\textsuperscript{19} See \textit{id.}

\textsuperscript{20} See \textit{id.}
public donations to diverse Russian political parties. He also planned to run for a seat in the lower house of the State Duma in Moscow in December 2005—a move made impossible by his imprisonment. President Vladimir Putin took office in 2000 and the political inactivity of many of the oligarchs coupled with the imprisonment of Khodorkovsky during his time in office have many in Russia and abroad questioning the lengths to which he would go to eliminate any political opposition from this privileged class.

In October 2003, Khodorkovsky was arrested on charges of embezzlement, tax evasion, and fraud. The investigation into Yukos finances occurred amidst Khodorkovsky’s opposition to proposed tax hikes on Russian oil companies. A State review of the same books they had approved the year before resulted in $3 billion in back-taxes and fines for one year alone. Khodorkovsky has been found guilty on all but one charge, but many Russians believe that an oligarch not guilty of economic crimes would be the exception to the rule. Furthermore, Khodorkovsky’s recent political aspirations cause concern as to whether the trial and convictions were politically motivated. A study of Khodorkovsky’s criminal trial may give insight to judicial independence in post-communist Russia by examining the validity of alleged violations in the Eur. Ct. H.R. and whether the violations, or lack thereof, mark judicial reform compared to past violation of due process that have reached the Court.

II. Discussion

Mikhail Khodorkovsky has been tried and convicted of violating six articles of the Criminal Code of the Russian Federation. The first

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21 See id.
24 Court Rejects Khodorkovsky Appeal, supra note 22; Yukos: Has a Deal Been Done?, TIMES ONLINE (U.K.) (Mar. 29, 2004), available at http://www.timesonline.co.uk/article/0,,1-1055668,00.html.
25 Yukos: Has a Deal been Done?, supra note 24.
27 See Liss, supra note 1.
28 See Court Rejects Khodorkovsky Appeal, supra note 22.
29 See Philip Leach, Taking a Case to the European Court of Human Rights 774–75 (2d ed. 2005).
30 Id.; see Ugolovnyi Kodeks [UK] [Criminal Code] arts. 160, 165(3), 198(2), 199(2), 199(3), 315 (Russ.).
three counts relate to the acquisition of Apatit, a bankrupt fertilizer company, from the State in 1994 during privatization.\textsuperscript{31} Apatit was sold at a reduced price, but with performance conditions attached as part of the contract of sale.\textsuperscript{32} The buyer was to invest $283 million in developing Apatit in the remote town of Kirovsk and in the town itself over a period of two years in exchange for future stock options in the company.\textsuperscript{33} Kohodorkovsky never satisfied these conditions, however, and was found guilty of grand theft of property by an organized criminal group.\textsuperscript{34}

Apatit engaged in successful international business from 2000–2002, but operated with little profit because the company would sell fertilizer at greatly reduced rates to international buyers who would then re-sell the product at twice the price.\textsuperscript{35} The government found that this caused Russian national investors, including the State, to lose proceeds paid in the form of shareholder dividends, and Khodorkovsky was found guilty of damage to assets through fraud committed by an organized criminal group.\textsuperscript{36} This was not the first time the breach of the Apatit contract had reached Russian courts.\textsuperscript{37} In November 2002, Khodorkovsky and his business partners settled the dispute with the State for a sum based on estimates of Apatit’s value.\textsuperscript{38} The State found that these estimates were based on misleading and unreliable data.\textsuperscript{39} Khodorkovsky was held accountable for submitting the unreliable and undervalued assessments of Apatit’s worth and charged with malicious non-compliance with a court ruling by representatives of a commercial organization.\textsuperscript{40}

Khodorkovsky was also convicted on three violations related to his involvement with Yukos.\textsuperscript{41} He was found guilty of multiple counts of conspiracy to evade corporate tax obligations by an organized

\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{34} UK art. 159(3); see Peter L. Clateman, Clateman: Review of the Criminal Sentence and Appeal, Mar. 29, 2006, at 1–2, 6, http://www.cdi.org/russia/johnson/Yukos-VII-Sentence-and-Appeal.pdf.
\textsuperscript{35} See Clateman, supra note 34, at 13.
\textsuperscript{36} UK art. 165(3); See Clateman, supra note 314, at 1–2, 13.
\textsuperscript{37} See Clateman, supra note 31, at 6–7.
\textsuperscript{38} See id.
\textsuperscript{39} See id. at 7.
\textsuperscript{40} UK art. 315; see Clateman, supra note 31, at 1–2.
\textsuperscript{41} See Clateman, supra note 31, at 1–2.
This included involvement in a tax evasion scheme by creating dummy entities with preferred tax status, and payment of these taxes with corporate bonds instead of cash to avoid further taxation.\textsuperscript{43} In some areas, Yukos did not pay its taxes in cash as required by the Tax Code, but rather paid local officials in the form of promissory notes.\textsuperscript{44} Yukos then filed for tax refunds on these payments—another form of tax evasion.\textsuperscript{45} Additionally, Khodorkovsky was convicted on charges of embezzlement of property for siphoning over 2.5 billion rubles from various Yukos corporate accounts.\textsuperscript{46}

Finally, Khodorkovsky was convicted of evasion of personal tax and social security obligations by an individual.\textsuperscript{47} The Russian tax system allows for simplified filing and lower taxes for small entrepreneurial businesses.\textsuperscript{48} Khodorkovsky attempted to claim salary and other benefits paid by Yukos and other companies as income derived from “independent entrepreneurial activity” by drafting private consulting contracts with off-shore entities of businesses he already owned.\textsuperscript{49} This structure allowed him to take advantage of the simplified tax system and qualified him for tax breaks that he was not legally due during 1998 and 1999.\textsuperscript{50}

Khodorkovsky was arrested in October 2003 and detained as a flight risk without bail on charges of embezzlement, fraud, and tax evasion until his sentencing in May 2005.\textsuperscript{51} His trial, which began in June 2004, lasted for eleven months and culminated with the reading of a 600-plus page sentence over the course of twelve days in Judge Irina Kolesnikova’s Meschansky District Court.\textsuperscript{52} Khodorkovsky was sentenced to nine years imprisonment—only one year under the maximum penalty for these offenses.\textsuperscript{53} If unsuccessful in his appeals,
Khodorkovsky will serve seven and a half years in a medium-security Siberian prison.54

Khodorkovsky’s trial team brings to the forefront alleged civil rights violations, claiming that “Mr. Khodorkovsky, and those caught up in the campaign against him, have been denied due process in every sense of the word,” under both Russian and international standards.55 First, Khodorkovsky contends that the State’s October 2003 search of defense attorney Anton Drel’s office, the seizure of materials therein related to Yukos, and Drel’s summons for questioning by the Prosecutor General were in violation of attorney-client privilege and a breach of the rules of advocacy.56 Second, Khodorkovsky’s pre-trial detention from October 2003 through the end of his trial in 2005 was arbitrary and a sign of presumption of guilt before trial.57 Finally, Khodorkovsky argues that the State engaged in improper search methods including searching without a warrant and in the absence of parties subject to the search.58

These alleged due process violations have support in both the laws of the Russian Federation and international law.59 The Russian Federation is a party to the CCPR and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms “Serious Crimes” are punishable up to ten years in prison, and “Very Serious Crimes” are punishable by over ten years in prison to life or even death).54 See Yukos Ex-Chief Jailed for 9 Years, BBC News, May 31, 2005, http://news.bbc.co.uk/2/hi/business/4595289.stm. Khodorkovsky’s total stay in prison reflects the nine year sentence less the time spent in state detention before trial. Id.


56 Id. at 2.

57 See id. at 3.

58 Id.

59 See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15(4) (Russ.) stating:

The universally recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those established by the law, the rules of the international treaty shall apply.

Id.; see also Alexander Severance, Note, Old Habits Die Hard: Aleksandr Nikitin, the European Court of Human Rights, and Criminal Procedure in the Russian Federation, 25 B.C. Int’l & Comp. L. Rev. 177, 185 (2002) (providing background and illustrations of interplay between Russian Constitution and the then newly-adopted international treaty obligations).
Thus Khodorkovsky’s civil rights are protected not only by the Russian Constitution and Russian Criminal Procedure Code, but may also be appealed to the Eur. Ct. H.R., which has jurisdiction under ECPF. His case may also be reviewed by the United Nations for human rights violations. The State must meet the due process standards set forth by these international bodies insofar as they differ from the laws of the Russian Federation.

Chapter 13 of the Russian Code of Criminal Procedure protects against arbitrary detention. A suspect may be placed in pre-trial detention if there are sufficient grounds to believe that the accused will flee, continue the criminal activity, threaten witnesses or participants, or destroy evidence or interfere with proceedings on the criminal case in any other way. Any measure of pre-trial restraint of a suspect must be a matter of “exceptional circumstances.” Full pre-trial detention is only available for those accused of committing a crime that carries a sentence longer than two years, and can only be imposed by a judge after reviewing a request from the prosecutor or investigation officer specifying the circumstances that have rendered other measures of restraint impossible. Khodorkovsky argues that no such “exceptional circumstances” existed to warrant full detention, the harshest restriction. Furthermore, in his appeal, or cassation, to the Moscow City Court, Khodorkovsky stated that he was illegally held before trial because his detention was not motivated by a court decision and thus could not exceed two months. Even if the extension was authorized by a judge, Khodorkovsky’s nineteen month detention from October 2003 until May 2005 is illegal under article 109 of the Russian Code of Criminal Procedure, which allows extensions of detention over one year, but not exceeding eighteen months, if sought with the consent

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60 See generally Statute of the Council of Europe, May 5, 1949, 1949 Europ. T.S. No. 1 (listing Russia as a member State and listing obligations of member States).
63 Konst. RF art. 15(4).
64 See generally Ugolovno-Protsessual’nyi Kodeks [UPK][Criminal Procedure Code] art. 13 (Russ.) (prohibiting arbitrary detention).
65 Id. art. 97.
66 Id.
67 Id. art. 108.
69 Id.; see UPK art. 109(1).
of the Procurator General in “exceptional cases” involving “serious or very serious offenses.”

Article 182 of the Code of Criminal Procedure lays out the grounds and procedures for making a search. All searches of living quarters must be done with the authority of a court decision and should be executed with an idea of what is being searched for, and probable cause to believe that the item(s) may be there. An examination or search and seizure may be performed without a judicial decision only in exceptional cases in which the search cannot be delayed. In such situations, however, a judge must rule on the legality of the search within twenty-four hours of its commencement. If the search is found to have been illegal, all evidence obtained during the investigation is inadmissible. Khodorkovsky argues that the searches made of defense attorney Drel’s office, the seizure of documents within, as well as the search and seizure of evidence from Yukos’ offices may have been concluded without a warrant and should have the protection of article 182.

The Constitution of the Russian Federation stipulates that “arrest, detention, and retention in custody are admissible only on the basis of a court order,” and gives teeth to Khodorkovsky’s protests against his pre-trial detention. Without a court order, a person may not be detained for a period of more than forty-eight hours. Additionally, any suspect or defendant is presumed innocent until proven guilty.

The Russian Constitution also protects attorney-client privilege and the rules of advocacy. The interrogation of defense attorney Anton Drel and search and seizure of documents from his office was in direct violation of article 56(3), which forbids interrogating an advocate about facts obtained during his representation of clients in criminal proceedings. As an attorney for Anton Lebdev in his role

71 UPK art. 182.
72 Id.
73 Id.
74 Id.
75 Id. art. 165.
76 See White Paper, supra note 55, at 3.
77 Konst. RF art. 22(2).
78 Id.
79 Id. art. 49.
80 Id. art. 56(3).
81 Id.
with Yukos, Drel acquired knowledge about Khodorkovsky’s criminal trial to which he would not otherwise have had access.\textsuperscript{82}

The Eur. Ct. H.R. also lays out standards for pre-trial detention and search and seizure.\textsuperscript{83} Anyone who has been lawfully detained is to be brought promptly before a judge and is entitled to either trial within a reasonable time or release pending trial.\textsuperscript{84} The right to a fair trial includes the right to a public hearing with few exceptions and the presumption of innocence.\textsuperscript{85}

Khodorkovsky’s claims may be addressed through the Russian appeals process.\textsuperscript{86} Within ten days of the ruling issued by the Meshchansky District Court, Khodorkovsky filed his first \textit{cassation} to the Moscow City Court in accordance with articles 354–56 of the Russian Code of Criminal Procedure.\textsuperscript{87} The Moscow City Court must begin review of the case within one month and can uphold the ruling of the District Court or overturn the ruling by complete dismissal of charges, change of the sentence, or initiation of a new trial.\textsuperscript{88} If the District Court’s ruling is upheld, it achieves official legal status the moment the decision is announced in the Moscow City Court, making the sentence immediately enforceable.\textsuperscript{89} Khodorkovsky’s cassation was brought before the Moscow City Court, and after only an hour of deliberation the 600 page sentence was upheld.\textsuperscript{90} Either party may at any time appeal the Moscow City Court’s ruling by requesting a supervisory review with the Presidium of the Moscow City Court.\textsuperscript{91} These requests are reviewed by a court-appointed \textit{judge Rapporteur} who will review the case and recommend to the Presidium whether the case should be reviewed.\textsuperscript{92} If supervisory review is denied, or if the review is granted and the earlier ruling upheld, either party may appeal the decision to the Chair of the Moscow City Court within one year.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{82}See \textit{White Paper}, supra note 55, at 2.
  \item \textsuperscript{83}ECPF, \textit{supra} note 61, arts. 5, 6, 8.
  \item \textsuperscript{84}Id. art. 5(3).
  \item \textsuperscript{85}See id. art. 6(1).
  \item \textsuperscript{86}UPK arts. 354–356.
  \item \textsuperscript{87}Id.; \textit{Court Rejects Khodorkovsky Appeal}, \textit{supra} note 22.
  \item \textsuperscript{89}UPK art. 391.
  \item \textsuperscript{91}\textit{Appeals: Russian Appeals Process}, \textit{supra} note 88.
  \item \textsuperscript{92}Id.
  \item \textsuperscript{93}Id.
\end{itemize}
Although there is one higher court, the Supreme Court of the Russian Federation, for many cases an appeal to the Chair ends the process, exhausting intra-state legal remedies. A case will only be heard by the Supreme Court upon the recommendation of a hearing by the Judge Rapporteur and a decision by the Presidium of the Moscow City Court accepting the recommendation. If the Supreme Court reviews the case and upholds the lower court decisions, a final appeal may be made to the Presidium of the Supreme Court. Khodorkovsky will be serving his term in prison during the entire appeals process.

Khodorkovsky is not limited to the Russian legal system, and his claims that the Russian authorities “violated several articles of the European Convention on Human Rights” may be directed to the Eur. Ct. H.R. Appeals to this court must be raised within six months of the final domestic ruling, and will only be considered after all domestic remedies have been exhausted. The Eur. Ct. H.R. will not accept applications that are substantially related to decisions already made in the Eur. Ct. H.R. with no new information, claims that are ill-founded, or any application that has already been submitted to another international resolution mechanism without new information. The procedure includes submission and acceptance of an application, communication to the respondent state, submissions of observations by both parties, an admissibility hearing, supplementary observations, and a hearing on the merits. In addition to the facts of the case, the procedural history, and the observations submitted by the applicant and respondent state, the Eur. Ct. H.R. will often also accept supplementary submissions from independent sources and NGOs.

94 Id.
95 Id.
96 Appeals: Russian Appeals Process, supra note 88.
97 See Yukos Ex-Chief Jailed for 9 Years, supra note 54.
98 Konst. RF art. 46(3) (“Everyone in conformity with the international treaties of the Russian Federation has the right to turn to international organs concerned with the protection of human rights and freedoms if all the means of legal protection available within the state have been exhausted.”); see ECPF, supra note 61, art. 34; Khodorkovsky in European Appeal, supra note 90.
99 ECPF, supra note 61, art. 35(1).
100 See Leach, supra note 29, at 153.
101 ECPF, supra note 61, arts. 31–46.
102 Leach, supra note 29, at 64.
III. Analysis

The review of Khodorkovsky’s appeal to the Eur. Ct. H.R. may be an important indication of the success of judicial reform in the Russian Federation. Although Khodorkovsky has avenues of appeal through both the Eur. Ct. H.R. and the United Nations, the former has more case law regarding violations of due process in criminal trials by member states.

Through the ECPF and case law, the Eur. Ct. H.R. has created a positive obligation for States to grant detainees bail unless there are public interest grounds justifying their continued pre-trial detention under article 5(3). Persisting suspicion that the person arrested has committed an offense is a condition for the lawfulness of the detention, but after a certain lapse of time suspicion alone no longer suffices. Grounds must be relevant, sufficient, and the court “must also be satisfied that the national authorities displayed ‘special diligence’ in investigating the continued need for withholding bail set out in their decisions on the application for release.”

Mikhail Khodorkovsky was detained without bail for nineteen months from the time of his arrest until his conviction. He claims that the domestic court did not document the factors and reasoning supporting his detention. Furthermore, although the domestic court considered Khodorkovsky a flight risk, there are less severe methods of detention under Russian law, such as house arrest, that could have equally prevented this risk. The Eur. Ct. H.R. would likely find Khodorkovsky’s pre-trial detention unreasonable under article 5(3) because the domestic court did not meet its burden of demonstrating the relevance of Khodorkovsky’s detention or diligent investigation showing the dangers to public policy that would be posed by his release.

103 See id. at 774–75.
105 See Leach, supra note 29, at 222.
107 Id.
108 See Court Rejects Khodorkovsky Appeal, supra note 22.
110 Ugolovno-Protsessual’nyi Kodeks [UPK][Criminal Procedure Code] art. 108 (Russ.).
111 See Leach, supra note 29, at 222.
The Eur. Ct. H.R. preserves the right to a fair and public trial as an essential civil right in article 6. A trial must be conducted in public unless special interests such as public order, national security, or circumstances where publicity may “prejudice the interests of justice” exist. In reviewing if the domestic court met its burden of providing a fair hearing, the Eur. Ct. H.R. looks at whether the proceedings as a whole were fair, rather than focusing only on whether the formal requirements set out in domestic law were met. The Eur. Ct. H.R. will readily regulate the preservation of the privilege against self-incrimination and the right to silence, equality of access and questioning for both prosecution and defense, and the right to a hearing within a reasonable time. The areas of admissibility of evidence and the right to a public hearing and judgment, conversely, are seen primarily as areas for domestic regulation and will only be viewed as part of the overall trial. Where the Eur. Ct. H.R. finds that the right to a fair hearing has been violated, it increasingly recommends that the domestic proceedings be re-opened.

Khodorkovsky has alleged that the State used evidence rendered inadmissible because of its means of collection. The Eur. Ct. H.R. sees this as a matter of domestic law and will not issue a ruling on the use of inadmissible evidence, but rather will consider it in its assessment of the totality of the elements of the trial. An overall analysis of the fairness of the trial, therefore, must take into consideration whether the State has violated its own laws, resulting in an unfair advantage over the defense. The forceful deportation of one of Khodorkovsky’s defense attorneys, Robert Amsterdam, from Russia may also factor into the Eur. Ct. H.R.’s review of the overall fairness of the proceedings as a violation of article 6(3). This is not likely, however, to be a substantial factor in the totality test because the deportation occurred after the trial and only affects the appeals process.

112 ECPF, supra note 61, art. 6(1).
113 Id.
114 See Leach, supra note 29, at 253.
115 See id. at 255–57, 259–60.
116 See id. at 254, 257–59.
117 See id. at 242.
118 White Paper, supra note 55, at 3.
119 Leach, supra note 29, at 254.
120 See id.
121 See id. at 273; see also Khodorkovsky in European Appeal, supra note 90 (stating that, Russian officials took the Canadian national’s passport and revoked his visa on September 22, 2005 informing him that he had twenty-four hours to leave the country).
122 See Leach, supra note 29, at 253.
Khodorkovsky’s case does not demonstrate significant improvement in the preservation of human rights by the judiciary, but it does mark a more independent, less politicized judiciary than when Putin came to power in 2000.\textsuperscript{123} In the 1998 case \textit{Kalashnikov v. Russia}, the Eur. Ct. H.R. struck down as unreasonable a four-year pretrial detention without bail for an appellant who had obstructed the investigation into his alleged criminal conduct of misappropriating a large number of shares in his role as the president of a bank.\textsuperscript{124} The court ruled that after evidence had been collected, there was no relevant reason for denying the plaintiff bail, and therefore insufficient grounds for continued pre-trial detention.\textsuperscript{125} The Eur. Ct. H.R. was hopeful that the new Code of Criminal Procedure would put an end to most article 5 and article 6 claims.\textsuperscript{126} The Code provides for more specificity as to when pre-trial detention is allowed, the length of detention, and timetables to achieve speedy trial and appeals.\textsuperscript{127} Despite the implementation of the Code, however, the Eur. Ct. H.R. continues to receive applications for due process violations under article 6 at rates similar to other states that have not undergone recent reform in this area.\textsuperscript{128}

The State also has not had significant improvement in preventing unlawful pre-trial detention under article 5 since the 2001 case of \textit{Gusinskiy v. Russia}.\textsuperscript{129} Some important distinctions, however, may be made between Khodorkovsky’s allegations and \textit{Gusinskiy}, which indicate improvement in the independence of the judiciary.\textsuperscript{130} Although the State may have violated Khodorkovsky’s civil rights by not composing a formal opinion regarding his pre-trial detention and therefore not showing how it was reasonable, this failure in procedure stands in sharp contrast to the substantive failures of the judiciary to operate justly and independently from political pressures in \textit{Gusinskiy}.\textsuperscript{131}

\begin{thebibliography}{99}
\bibitem{Mowbray} \textit{Mowbray}, \textit{supra} note 105, at 81.
\bibitem{Leach} \textit{Leach}, \textit{supra} note 29, at 774–75.
\bibitem{See id.} See \textit{id.}
\bibitem{See id.} See \textit{id.} at 455.
\bibitem{See generally Gusinskiy} See generally \textit{Gusinskiy}, 2004–IV Eur. Ct. H.R., at ¶¶ 73–78 (finding Russia in violation of article 18 in conjunction with article 5).
\bibitem{See generally id.} See generally \textit{id.} at ¶¶ 9–44 (detailing Gusinskiy’s arrest, detention, and trial); \textit{White Paper}, \textit{supra} note 55.
\bibitem{Hoffman} See \textit{Hoffman}, \textit{supra} note 6, at 476–82. The former media mogul and oligarch Vladimir Gusinskiy owed a significant debt to the state-owned Gazprom. The debt had been negotiated under the Yeltsin Administration as a reward for political support through his television stations and newspapers. Under Putin Administration, however, the govern-
\end{thebibliography}
sky was a fellow oligarch detained by the Russian authorities in 2000 on charges of fraud. Authorities arrested Gusinsky and used his detention and charges against him to coerce him to sign away his media company to secure his freedom. The Eur. Ct. H.R. found that Russia had violated article 5 by detaining Gusinsky for a reason other than or in addition to committing a crime.

According to a 2002 national survey of the Russian Federation “an overwhelming majority of Russians do not think that they live under a rule-of-law state.” In Russian society, a common view seems to be that Khodorkovsky may be guilty of the criminal charges brought against him, but that he is a political prisoner because he alone among the oligarchs has been held accountable for his crimes. This, however, is partly mistaken since Khodorkovsky is only one of a number of the oligarchs the Kremlin has sought to investigate for criminal activities. Furthermore, although Khodorkovsky received nearly the most severe sentence for crimes of this nature, such severity is on par with contemporary sentencing of economic crimes in the United States.

What, then, contributes to this view of a politically motivated judiciary and why does judicial reform fail? The ineffectiveness of judicial reform in Russia is largely the product of a young democracy, the gap between codified law and its implementation, and corruption in law enforcement bodies.

The Russian Federation is still a young democracy. The rapid change from communism, much like the rapid “shock therapy” economic decided to collect on this debt, attempting to bankrupt Gusinskiy and force him to sign over Media-Most conglomerate to Gazprom. See id.

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132 Id. at 479.
133 Id. at 477, 482–83.
137 See Spulber, supra note 9, at 313.
138 See Carrie Johnson, End of Enron’s Saga Brings Era to a Close: Corporate Crime Enforcement Shifts Focus, Wash. Post, Oct. 25, 2006, at D1. In September 2006, former Enron CEO Jeffry Skilling was sentenced to twenty-five years for fraud and conspiracy leading to the company’s collapse. Bernard Ebbers, former CEO of WorldCom, is serving twenty-five years for securities fraud—a virtual life sentence for the sixty-six year old southern tycoon. See id.
140 See McAuley, supra note 4, at 95.
onomic transition, instantly laid a new, democratic ideology over a society that had for the greater part of a century operated as a communist state.\textsuperscript{141} The all-controlling executive of the Soviet system created an enduring perception of the judiciary as politically influenced, even as the new government and constitution were implemented.\textsuperscript{142} In Khodorkovsky’s case, this lapse of perception of the transition to democracy strongly biases the people against the political independence of the court when prosecuting high-profile officials.\textsuperscript{143}

How the judicial system is perceived by the people and local governments plays a part in the effectiveness of its actual enforcement.\textsuperscript{144} Where citizens do not have faith in the rule of law, as in Russia, courts and their adjudication of the law lose legitimacy.\textsuperscript{145} This creates a gap between the written law and its actual practice within the State.\textsuperscript{146} The inability to enforce laws exacerbates this problem, reducing the incentive of the public to play by the rules set in written law.\textsuperscript{147} The failure to follow the Code of Criminal Procedure in the Khodorkovsky case, regardless of the findings in the Eur. Ct. H.R., cuts at the legitimacy of the court.\textsuperscript{148} When the State does not enforce its own laws, especially in a highly-publicized case, people lose trust that they will be protected by the laws of the court, and lower courts receive the message that enforcement of the written law is only partly necessary.\textsuperscript{149}

Finally, corruption in the legal system undermines the ability of the judiciary to prosecute criminals.\textsuperscript{150} In a recent scandal known as “Three Wales” it was revealed that President Putin’s efforts to stop economic crimes have, in part, been thwarted from within.\textsuperscript{151} The Prosecutor General’s office announced the recent dismissal and investigation of high-ranking officials in offices related to economic regulation throughout Russia for their involvement in supressing a case in 2000

\textsuperscript{141} See id.
\textsuperscript{142} See Kahn, supra note 139, at 390, 392–94.
\textsuperscript{143} See Liss, supra note 1.
\textsuperscript{144} See Kahn, supra note 139, at 392–93.
\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See Liss, supra note 1.
\textsuperscript{149} See id.
\textsuperscript{150} See Mirow, supra note 139, at 238; Kahn, supra note 139, at 403.
against high profile businessmen.\textsuperscript{152} This demonstrates that the effectiveness of the judiciary may still be elusive because deep-seated corruption in investigation and law enforcement impedes the development of a strong rule of law.\textsuperscript{153}

**Conclusion**

Khodorkovsky’s criminal trial highlights Russia’s lack of judicial reform since the fallout of the Soviet Union and the establishment of a democratic form of government. In comparing Khodorkovsky’s case to other Russian cases that have come before the Eur. Ct. H.R., it is apparent that although there are improvements in the separation of the judiciary from the executive, the State still violates the right of due process. This stagnation in judicial reform is the product of a young democracy still working against the deep roots of the former Soviet culture, the gap between codified law and its implementation, and corruption in law enforcement bodies—three factors which must be addressed for improvements to take hold.

\textsuperscript{152} Id. \\
\textsuperscript{153} See id.
Abstract: Tiger population in the wild, particularly in India, is disappearing at a rapid rate because of extensive poaching and destruction of habitats. The poaching is mainly driven by demand for tiger parts used in traditional Chinese medicine. As a result, Indian tiger products are smuggled into Tibet in contravention of the CITES treaty. This Note argues that significant changes need to be made to the legal regimes in India and China to deal with the poaching epidemic, including strengthening anti-poaching laws and legal enforcement. Additionally, the Author advocates implementing alternative economic strategies that rely on giving incentives to people and harnessing the free market to conserve the tiger. In particular, this Note suggests that eco-tourism, combined with environmental entrepreneurship, is a better strategy for conserving tigers than the current, ineffective governmental regime.

Introduction

One of the most pressing problems the world faces today is the destruction of its environment, primarily due to human action. Nothing symbolizes this destruction more vividly than the rapid disappearance of that majestic animal, the tiger, from its natural environment in Asia, particularly in India. India is party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and as such, has undertaken certain obligations to protect

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the tiger.\textsuperscript{5} Unfortunately, it has not met these obligations; nor has China, another party to CITES.\textsuperscript{6}

Part I of this Note describes the history and nature of the growing threat to tigers in the wild. Part II discusses the background of the CITES treaty, the legal framework for enforcing the Wild Life Protection Act in India, and what actions are being taken by individuals, the Indian government and the courts. Part III proposes two solutions to the systemic problems that prevent enforcement of the law, along with alternative strategies for saving the tiger through an economic incentive that makes a wild tiger worth more than a dead tiger.

\section*{I. Background}

Only a hundred years ago, the tiger roamed widely over Asia, stretching from the arid Caspian Sea to the lush rainforests of India.\textsuperscript{7} Early records of British explorers in India in the nineteenth century report on the existence of tigers only a few miles outside of the present-day metropolis of Bombay, in western India.\textsuperscript{8} That famous hunter of man-eating tigers, Jim Corbett, first noticed the rapid decline in tiger population in the early 1900s in India, and alerted people to the need for saving the species and preserving the habitat for its survival.\textsuperscript{9} The increase in human population, particularly in the last fifty years, has rapidly encroached upon tiger habitats, and reduced the population of tigers today to approximately 2000 in India,\textsuperscript{10} from 100,000 in 1900.\textsuperscript{11} In many other places where the tiger used to roam, such as

\begin{itemize}
\item \textsuperscript{6} See Debbie Banks et al., \textit{Skinning the Cat: Crime and Politics of the Big Cat Skin Trade} 1 (2006), http://www.eia-international.org/cgi/reports/reports.cgi? t=template&a=129.
\item \textsuperscript{7} See Save the Tiger Fund, Tiger Maps, http://www.savethetigerfund.org/am/custom source/tiger/mapping/index.cfm (last visited Jan. 26, 2008) (mapping the tiger’s historic range).
\item \textsuperscript{8} Meena Menon, \textit{India’s Natural History}, Hindu, Aug. 28, 2005, available at http://www.hindu.com/br/2005/08/30/stories/2005083000221500.htm (stating that tigers were spotted in Thane, a present-day suburb of Bombay, and that a tiger was spotted on Malabar Hill in the city of Bombay in 1806).
\item \textsuperscript{9} Jim Corbett, \textit{The Jim Corbett Omnibus} 236 (1991).
\item \textsuperscript{10} Stephen Mills, \textit{The Dangers of Wooing a Tiger}, BBC Science & Nature, http://www.bbc.co.uk/nature/animals/features/261feature2.shtml. Although some estimates place the population of tigers in India at 3000, conservationist Valmik Thapar approximates that the population is closer to 2000 to 2500. \textit{Id}.
\end{itemize}
Java, Bali, the Caspian Sea region, and North Korea, it is now extinct. Only a small population of a few hundred survives in Siberia, north of Vladivostok near the Pacific coast of Russia.

This scene is very different from the one twenty years ago, when the tiger population was growing, particularly in India, owing to determined efforts of two Prime Ministers of India, Indira Gandhi and her son, Rajiv Gandhi. Indira Gandhi set up the Project Tiger to help conserve the animals, and Parliament passed the Wild Life Protection Act. The Indian central government devoted significant resources to preserving the tiger, and set aside land establishing sanctuaries where the tiger could roam. Above all, the personal attention paid by the two Prime Ministers to saving the tiger made the preservation of tigers a priority for the bureaucrats running Project Tiger. Sadly, the assassinations of these two Prime Ministers also led to the demise of the interest in preserving the tiger, with the succeeding Indian governments paying scant attention to the tiger reserves. The state governments, which control the forests, also showed little interest in conservation, and instead allowed widespread incursions by

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12 Save the Tiger Fund, Extinct Tiger Species, http://www.savethetigerfund.org/Content/NavigationMenu2/Community/TigerSubspecies/Extinctsubspppecies/default.htm (last visited Jan. 26, 2008) [hereinafter Extinct Tiger Species]; World Wildlife Fund, Population Estimates, http://www.worldwildlife.org/tigers/ population.cfm (last visited Jan. 23, 2008) [hereinafter WWF Population Estimates]. There is a debate over how many species of tigers still exist in the wild. See Extinct Tiger Species, supra. Only four decades ago, there were over 4000 South China tigers in the wild. Id. After the government labeled them “pests,” uncontrolled hunting ensued. Id. According to the Chinese Ministry of Forests, in 1995, there were twenty South China tigers in the wild. Id. With no independent sightings, however, speculation abounds that the South China tiger is extinct. See id. The World Wildlife Fund estimates there are twenty to thirty South China tigers left in the wild. WWF Population Estimates, supra.


14 See Tigers in Twilight, supra note 3; Ranthambore Tiger Reserve, http://envfor.nic.in /pt/status95/rantham.html (last visited Jan. 23, 2008) (stating the first eco-development project at Ranthambore was established through the insistence of Rajiv Gandhi).

15 See Tigers in Twilight, supra note 3.


17 INSIGHT GUIDES, supra note 3, at 42.

18 See id.

19 See Tigers in Twilight, supra note 3 (noting the lack of “interest in protecting the great felines” by Indian leaders after Mrs. Gandhi’s death). Indira Gandhi was assassinated in 1984. Indian Prime Minister Shot Dead, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/ dates/stories/october/31/newsid_2464000/2464423.stm. Rajiv Gandhi was assassinated in 1991. Id.
mining and other industrial interests into the reserves, as well as massive incursions by the neighboring villagers, thereby further shrinking the habitat even in the reserves.

In addition to this apathy, increasing prosperity in China revived the market for luxury goods such as tiger skins and for traditional Chinese medicine (which use tiger parts as ingredients), leading to significant increases in poaching. The result is that the tiger is rapidly disappearing from India, with several tiger reserves having lost all or most of their tigers to poaching over the last few years. The tiger population in India has plummeted from approximately 3600 a decade ago to less than 2000 today. Over 200 tigers are poached every year in India alone, and at this rate, the wild tiger will disappear from India within a decade or two. This is in spite of the fact that both India and China are parties to the CITES treaty, which obligates them to protect the tiger by actively pursuing poachers, and bans trading in tiger parts. This ban is widely and openly violated in China and Taiwan, where tiger skins and tiger bones are readily available.

China is the primary destination for tiger skins poached in India. There, people in the Tibetan communities wear tiger skins as part of their traditional costumes. Khampa Tibetans meet at horse racing festivals, displaying their skins, in an effort to portray their wealth and court potential spouses. Officials even promote wearing skins to engender “an image of Tibetans prospering, economically

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24 INSIGHT GUIDES, supra note 3, at 67; Mills, supra note 10.
25 Mills, supra note 10.
26 CITES, supra note 4.
28 Banks, supra note 6, at 3.
29 See id. at 4.
30 Id. at 3.
31 Id. at 9.
and culturally.” Unfortunately, law enforcement measures to prevent the sale of tiger skins are ineffective in this region, with traders operating in the open in Lhasa and other cities across Tibet and mainland China. Cultural awareness programs, however, are underway to educate Tibetans on the use of animal skins. As one commentator notes, in January 2006 the Dalai Lama even addressed the issue by warning Tibetans not to “use, sell or buy wild animals, their products or derivatives.”

Other tiger products are used as ingredients in traditional Chinese medicines. Tiger claws are used to treat insomnia; the fat and meat is used as a cure for leprosy and rheumatism; bones are crushed up and made into wine; and the tiger penis is made into a soup and used as an aphrodisiac.

II. Discussion

A. Background of CITES

By the 1960s, it was clear that several species of animals, including the tiger, would soon become extinct if no measures were taken to ensure their preservation. Thus representatives of several nations convened under the aegis of the World Conservation Union with an aim to “ensure that international trade in specimens of wild animals and plants does not threaten their survival.” The result was CITES. The spirit of the multilateral environmental agreement is to use international cooperation to protect endangered species from extinction, and is binding on all signatories. Today there are 169 parties, including India and China.
B. Obligations Undertaken by India and China under CITES

As a result of its ratifying CITES, India was required to enact domestic legislation to enforce CITES’ international obligations. To facilitate the implementation of procedures designed to protect endangered species from eradication through relentless hunting and habitat encroachment, Prime Minister Indira Gandhi pushed through Parliament the Wild Life Protection Act of 1972 (WPA 1972). Chapter III of WPA 1972 prohibited the hunting of several species of wild animals, including tigers. Furthermore, it gave the central government and state governments the power to designate areas as “a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment.” Most significantly, the Act criminalized offenses against protected animals, with penalties including up to three years in prison, as well as fines up to 25,000 Rupees (approximately $500). The Act did not, however, give the Ministry of Environment and Forests “statutory sway” over state governments and their management of the tiger reserves.

Following the adoption of WPA 1972, the Indian government also established a tiger conservation task-force dubbed “Project Tiger.” Implemented in 1973, the task-force created several tiger sanctuaries with the goal of ensuring the tiger’s survival in these protected areas.

Similarly, China became a signatory to CITES in 1981 and implemented legislation in compliance with the multilateral environmental agreement. These acts included: the Forestry Law and the Law on the Protection of Wildlife (LPW). Among the purposes of LPW was the protection of “species of wildlife which are rare or near
extinction.”\textsuperscript{53} In addition, China’s State Council banned the domestic trade of tiger products and “the use of tiger bone in traditional Chinese medicine” in 1993.\textsuperscript{54}

C. Initial Success

The results from the establishment of new wildlife sanctuaries under Project Tiger and the enforcement of the wildlife laws of the 1970s were astonishing.\textsuperscript{55} The scheme, at its induction, created six tiger reserves that spawned into fifteen tiger parks by 1986.\textsuperscript{56} The tiger population rebounded significantly and began to reverse the trend that had begun almost a century earlier.\textsuperscript{57} Data collected in the mid-1980s estimated that the population of tigers in India had more than doubled from the 1800 surveyed in 1972.\textsuperscript{58} At the time, one commentator gloated, “[b]y any measure, Project Tiger must be seen as one of Asia’s most successful conservation sagas and the tiger a symbol of the health of the Indian jungle.”\textsuperscript{59}

D. Selective Enforcement and Other Problems

The cause for jubilation after the initial successes of India’s conservation scheme soon began to diminish.\textsuperscript{60} Valmik Thapar, a prominent tiger expert and conservationist, warned as early as 1989 that the success of Project Tiger was waning, noting that although official figures estimated the number of tigers in India at 4500, the actual population was probably closer to 3000.\textsuperscript{61} Tigers, he wrote had “little chance of survival against” the twin onslaught from “man and livestock” unless laws were again enforced.\textsuperscript{62} Unfortunately, the governments that succeeded those of Prime Ministers Indira and Rajiv Gandhi ignored Mr. Thapar’s admonition.\textsuperscript{63}

\textsuperscript{54} \textit{Made in China}, \textit{supra} note 27, at 2.
\textsuperscript{55} \textit{See Insight Guides}, \textit{supra} note 3, at 43.
\textsuperscript{56} \textit{Id}. at 42.
\textsuperscript{57} \textit{Id}. at 67.
\textsuperscript{58} \textit{Id}. at 73.
\textsuperscript{59} \textit{Id}. at 42–43.
\textsuperscript{60} \textit{See Valmik Thapar}, \textit{Tigers: The Secret Life} 149 (1989).
\textsuperscript{61} \textit{Id}.
\textsuperscript{62} \textit{Id}.
\textsuperscript{63} \textit{See Tigers in Twilight}, \textit{supra} note 3.
What followed was a relapse into the destructive state that existed prior to the adoption of WPA 1972 and the creation of the Project Tiger administration. With selective enforcement of the laws, and neglect for conservation efforts, the tiger population once again began to decrease. Yet, it was not until early 2005 that the Indian government received a wakeup call.

In early 2005, stories began to circulate that the entire tiger population of one of India’s premier tiger sanctuaries, Sariska National Park in the state of Rajasthan, had become extinct. These reports alerted the head of UN CITES, Willem Wijnstekers, who took the unusual and bold step of writing an open letter to India’s prime minister imploring him to take measures to protect the tigers. The letter informed India that it was in danger of violating international law, as it was a signatory to the CITES treaty and therefore had an obligation to ensure the protection of endangered species such as the tiger. Specifically, Wijnstekers was worried that India’s lackadaisical approach to “implementing anti-poaching measures” was a sign that it was waver ing on its commitment to CITES.

After the Sariska alert, instead of owning up to the problems of tiger poaching, many Indian government officials issued excuses and tried to pass the blame. One former senior forest official from the province of Madhya Pradesh complained about the “hue and cry” and told BBC News that the decrease in population was likely due to “migration.” Rajasthan’s Minister for Forest and Environment, L.N. Dave, while admitting “these events have taken place because of the lax attitude of subordinate officials,” tried to justify the lower tiger population by suggesting mining and farming were to blame. Other officials speculated the tigers “might be hiding.” In an interview with

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64 See id.
65 See Thapar, supra note 60, at 149. The decline in tiger population was not a shock—conservationists had warned about the danger beginning in the late 1980s. See id.
67 Id. A May 2004 survey showed twelve tigers in Sariska; however, a census conducted a year later turned up none. Id.
68 Foulkes supra note 5.
69 See id.
70 Id.
72 Shaini, supra note 71.
73 Where Have Tigers Gone?, supra note 23.
74 Id.
BBC News, a member of Parliament from Rajasthan tried to excuse the tragedy of Sariska by saying, “This has been happening all over the country, not just Rajasthan.”

Simultaneous to the poaching epidemic in India, disturbing reports have surfaced from China about illegal trade in tiger products. Despite the 1993 State Council ban on domestic trade and use of tiger bone, several tiger wine selling schemes have been uncovered. In addition, traders selling tiger skins were discovered to be operating in the open in Lhasa, Tibet and mainland China as recently as 2006. The failure of China to enforce its obligations under CITES has wrought destruction upon the worldwide tiger population, as the continued production and marketing of wine and other traditional medicines has fed the demand for dead tigers.

E. India’s Response to the Sariska Crisis

In response to this startling development and the international criticism his government was facing, Indian Prime Minister Manmohan Singh took action. One of his first steps was to agree to chair Project Tiger for the next two years in order to “push implementation of recommendations” of the task-force. The Prime Minister also agreed to convert Project Tiger into a legal entity, which would give it statutory power, and to establish a wildlife crime bureau. In addition, the Indian government created a new Central Empowered Committee, which was given the power to settle disputes such as “illegal encroachments within tiger reserves.” Prominent conservationists, including Valmik Thapar, have been appointed to the Committee.

On September 4, 2006, the Indian Parliament amended the Wild Life Protection Act of 1972. The amendment (WPA 2006) did sev-
eral vital things. First, it established the National Tiger Conservation Authority. This is significant because, unlike under Project Tiger, the central government’s Ministry of Environment and Forests now has the statutory power to coordinate with and mandate tiger conservation at the state level. It also created an agency, the Wildlife Crime Control Bureau, to “investigate and prosecute crimes against tigers.” Moreover, WPA 2006 increased the penalties for poaching “to seven years in jail and $4,000 for a first offense and at least seven years imprisonment” and up to $100,000 for subsequent crimes.

Most important is what the amendment did not do. Some conservationists and editorialists feared that Parliament would simultaneously enact legislation, called the Tribal Bill, allowing villagers to “pillage the heart of tiger reserves” by moving into the reserves and encroaching on the habitat of the animals through deforestation. Fortunately, such legislation has been put on hold.

III. Analysis

The recent modifications of the Wild Life Protection Act may not be enough, as tigers continue to be poached at an alarming rate. Amending the law to ensure stiffer penalties for poaching and giving the federal government more control to implement protection schemes are steps in the right direction. The new legislation was certainly long overdue and desperately needed. Furthermore, because the legislation gives additional incentive for cooperation between state governments and the national government, there is hope that turf wars that previously led to a lack of vigilance will be avoided.

There are systemic problems in India that prevent the swift administration of justice that is necessary to punish crimes against wild-
life. The first major problem is corruption. As one commentator diplomatically states, “border officials can often be persuaded to look the other way.” Furthermore, adjudication is rarely swift. Cases often take several years, sometimes over ten years, to come to court, and in the meantime, “those involved are free to re-offend whilst out on bail.” Third, recent governments have not prioritized protection of endangered species and are now seen as too weak to be effective. Tiger conservationist Valmik Thapar stated, “[W]hat we suffer from in India is a government which has reached an abysmal state where they’re not able to protect our national parks and sanctuaries.”

Selective and inconsistent enforcement of the law is also a problem in China. As noted earlier, despite legislation banning the sale of tiger products for traditional Chinese medicine, the practice occurs frequently with little governmental interference. Furthermore, the trade in skins operates in the open in the markets of Lhasa and Linxia.

A. Proposals to Save the Tiger

There are a number of measures that the Indian and Chinese authorities can enact to ensure the safety and prosperity of the remaining 2000 to 3000 tigers in their natural habitat. First, these countries should strengthen the police forces responsible for protecting the tiger. The present arrangement of using poorly equipped rangers to patrol the forests and prevent poaching is simply not working. The rangers are not equipped with either the vehicles or the guns needed to confront the poachers. India could use Nepal as a model for successful efforts, where the Royal Nepalese Army, while patrolling the Royal Chitwan National Park and other tiger sanctuaries, was very successful.
in protecting the tiger, leading to a significant decrease in poaching.\textsuperscript{111} In the short term, while the rangers are given paramilitary training, some reserve companies of either the Army or the paramilitary Central Reserve Police could be posted to the tiger parks, with the rangers helping these soldiers in the patrolling task.\textsuperscript{112} The poachers do not fear the rangers, but they would fear the Army.\textsuperscript{113}

The second proposal is to strengthen the enforcement of laws. \textsuperscript{114} Special fast-track courts, similar to the courts established under The Terrorist and Disruptive Activities Prevention Act (TADA), which try terrorists, need to be set up to deal swift justice to poachers and those who traffic in tiger parts.\textsuperscript{115} Alternatively, the Indian Supreme Court could order the lower courts to proceed quickly on such cases. The Supreme Court has significant powers to enforce the laws, and in many cases, has taken action in the public interest.\textsuperscript{116} India has an interesting mechanism called Public Interest Litigation (PIL), where any citizen can file a petition with the courts, including the Supreme Court, requesting relief for the public good when laws are violated or enforced.\textsuperscript{117} A classic example is the PIL that resulted in the Supreme Court ordering that all public transport and public conveyances (taxis and auto-rickshaws) in major cities of India, such as Delhi and Mumbai, be fueled by natural gas instead of diesel or gasoline.\textsuperscript{118} This order resulted in a significant and measurable decrease in pollution in the major cities over the past few years.\textsuperscript{119} It is not unreasonable to suggest that the Court be moved under a PIL to order the state and central governments to enforce anti-poaching laws, employ all necessary means to


\textsuperscript{112} See id.

\textsuperscript{113} See id.

\textsuperscript{114} See Banks, supra note 6, at 12.


\textsuperscript{117} Id. at 6.

\textsuperscript{118} See id. at 10–11.

\textsuperscript{119} See id.
reduce poaching, and to appoint a special master who will monitor such compliance and report to the Court on a regular basis.  

A third idea is to increase the penalties for poaching and trading in tiger products.  Because a tiger’s body parts are potentially worth $40,000 to $50,000, a fine of $440 is a paltry amount for a poacher to pay.  Substantial fines and jail sentences will serve as a deterrent for poaching.  Because poaching and international trade in tiger parts is part of international organized crime, the penalties for engaging in poaching should be commensurate with those of other organized crimes.

Over the long term, the conservation of tigers can only be ensured if the local villagers who come in daily contact with them and who are sometimes antagonistic to the concept of national parks, see the tiger not as a hindrance but as a key to their economic well-being.  That is, a live tiger must be worth more than a dead tiger to the local villagers.  This objective can be achieved by using the free market to benefit the villagers.  Currently, the free market benefits the local poacher because he has access to a free resource, namely the tiger.  The vast majority of villagers do not share in this bounty, yet neither do they suffer from the poaching.

There is a great demand for eco-tourism in the world.  Places like Kruger National Park in South Africa provide luxury accommodations and charge thousands of dollars per family for a safari visit.  India is now a major tourist destination, both for the very large India diaspora and for western tourists.  There is no doubt that eco-tourism can be a

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120 See SC Questions Lax Legal Cover to Tiger Reserves, TIMES OF INDIA, Nov. 13, 2006, http://timesofindia.indiatimes.com/NEWS/India/SC_questions_lax_legal_cover_to_tiger_reserves/articleshow/432044.cms. The Supreme Court recently ordered the Indian Ministry of Environment and Forests to report “why the protection given to national parks and sanctuaries under the Wildlife Act was not extended to forests [designated] as tiger reserves?”  Id.

121 See CATT Alert #40, supra note 48.

122 Banks, supra note 6, at 15; Where Have Tigers Gone, supra note 23.

123 See CATT Alert #40, supra note 48.

124 See Banks, supra note 6, at 15.

125 See Thapar, supra note 60, at 150.

126 See id.

127 See id.

128 See Mitra, supra note 36.

129 See id.

130 See generally INSIGHT GUIDES, supra note 3 (describing, for example, the various eco-tourism opportunities in India).


major draw for such tourists. Sanctuaries such as Corbett National Park and Ranthambore are near enough to the major cities of Delhi and Jaipur to become part of a regular eco-tourist schedule, providing the tourists with the rare experience of seeing the tiger in its natural element. Currently, many tourist lodges exist outside these parks, but, none of them directly benefit the local villagers. The locals simply find some low level employment opportunities at the lodges.

This situation can change dramatically if the local villagers became part owners of the resorts and lodges. Since the parkland is government owned, it would be logical for the state governments to provide land for setting up more resorts and lodges in attractive locations, and make the local villages, acting through their local governments (panchayats), part owners of the resorts along with outside entrepreneurs who would operate them. The situation is analogous to what happens in the oil industry, where state governments that own oil resources share in the revenues through co-ownership with foreign oil companies, which operate the oil fields. Once the villagers start sharing the profits, they will realize the economic value of keeping tigers alive rather than seeing them as the problem.

In addition to ownership, there should be significant occupation taxes (roughly twenty percent) levied on the lodges and resorts, which should be kept and distributed to local communities. This profit

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134 Corbett Park, supra note 133. Corbett is located approximately 270 kilometers north of Delhi. Id. Ranthambore is 132 kilometers from Jaipur. Ranthambore Park, supra note 133.

135 See Thapar, supra note 60, at 150 (decrying the failure of Project Tiger “to take into consideration the plight and concerns of the people living around” Ranthambore).

136 See id. at 153. Thapar notes that “villagers will only give freely of their time and labour if they perceive work to be for their common good and know that the benefits will therefore be shared in a fair and equitable way.” Id.

137 See id. at 150–52 (discussing schemes to “strengthen the links between the people and the wilderness areas they live around”).

138 See id. (advocating dairy co-operatives).


140 See Thapar, supra note 60, at 150.

motive can work very well to protect the tiger because, without the tacit cooperation of the local villagers, the poachers, who are all local, cannot survive. 142 One classic example of a similarly successful scheme is from East Africa, where Masai tribesmen wiped out poaching once they began to share in the taxes from the safaris. 143

Although parks such as Corbett and Ranthambore are near major metropolitan areas, the strategy needs to be implemented for all national parks. 144 Toward this end, local airports should be built near the major parks so that foreign tourists could easily visit such parks from the major hubs of Mumbai, Delhi, Bangalore, Chennai, and Kolkata. 145 India has one of the fastest growing air markets in the world, with a host of new low-cost airlines that aggressively cater to the market. 146 Some flights can be booked for as little as thirty dollars for a 300 mile flight. 147 If state governments were to build airports near tiger reserves, there are likely to be many flights to such parks, carrying tourists who are willing to pay a premium price to visit tiger reserves. 148 Thus, virtually all tiger reserves in the country could become accessible to the high income eco-tourist. 149 The hotels in major Indian resorts routinely charge upwards of $200 per night. 150 The hotel rates in Delhi, Mumbai, and Bangalore are among the highest in the world. 151

Yet another idea would be to reward the rangers who patrol the reserves for an increase in the number of tigers. 152 If the rangers received, for example, a ten percent bonus for every verified increase in
tiger population, they are much more likely to prevent poaching. With the tiger numbers decreasing, such a scheme may be absolutely essential in reversing this depressing trend.

An additional strategy would be to increase educational programs to inform locals about the harms of tiger poaching and use of tiger products. While use of tiger products in Tibet and China are strongly ingrained in culture, educating the Chinese population about the harms of poaching is instrumental in combating the destruction to the wildlife. The Dalai Lama has taken the right step in admonishing Tibetans on the culling of wildlife for materialistic purposes. Yet the Dalai Lama is not a governmental official and his reach is somewhat limited.

Finally, there must be strong cooperation between the Indian and Chinese governments and agencies to combat cross-border smuggling of tiger products. The two nations should hold cabinet level meetings on an annual basis to develop strategies to prevent trade in tiger products.

B. Other General Proposals

The international community can also pressure India and China into action. For example, their most important trading partners, including the United States and the European Union, could enact legislation barring trade or levying significant tariffs on Indian and Chinese exports until those countries become serious about the protection of endangered wildlife, including the tiger. Although drastic, this proposal would immediately alert the lackadaisical governments in New Delhi and Beijing to the urgency of the problem and international sentiments concerning the loss of this vital animal. Furthermore, this

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153 See id.
154 See id.
155 Banks, supra note 6, at 12.
156 See id.
157 See id.
158 See id.
160 See id. Governmental delegates from India, Nepal, and China met under the aegis of TRAFFIC, a joint-venture of the World Wildlife Fund and the World Conservation Union in July 2006. Id. Such efforts are commendable and should be encouraged. See id.
161 See Tigers in Twilight, supra note 3.
162 See id.
163 See id.
idea is not unfathomable, as the U.S. Congress has previously enacted legislation with respect to conservation of tigers and rhinos.  

CONCLUSION

To save the majestic tiger, drastic measures must be taken soon. Tiger poaching is occurring at a devastating pace, with the culling of the entire population of tigers at Sariska National Park in 2004, and the poaching of at least five tigers at Corbett National Park in the last year. Recent legislation by the Indian Parliament is a step in the right direction. Yet, it is only the first step. Several systematic changes must be implemented in order to ensure the success of conservation and anti-poaching programs, and for India and China to be in compliance with international law. Anti-poaching laws must not only be strengthened, but they must be enforced in order to successfully conserve threatened wildlife. Another good option is to send in well-trained professional soldiers to help the forest rangers prevent poaching. Most importantly, in the long-run, it is necessary that the free market be harnessed creatively to save the tiger.

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BRINGING DEAD CAPITAL TO LIFE: INTERNATIONAL MANDATES FOR LAND TITLING IN BRAZIL

JOHN C. MARTIN*

Abstract: Economist Hernando de Soto urges land re-titling programs in developing countries so that squatting farmers and businesspeople may be integrated into a lawful economy. Re-titling programs, however, can go awry, fueling class and racial backlash, and undermining economic stability and trust in property titles. This Note explores the risks and challenges Brazil faces in expropriating and re-titling land occupied by squatters. It addresses the legality of expropriation under international law, draws comparisons with land reform in the United States and Zimbabwe, and addresses the specific hurdles Brazil faces concerning its Constitution, civil code, and judicial system. This Note proposes a legal solution resembling the U.S. Homestead Act. It would involve expropriating land for less than fair market value in order to facilitate a more equal distribution of land and to temper the risk of racial backlash.

INTRODUCTION

On February 12, 2005, Sister Dorothy Stang, a Catholic nun and native of Dayton, Ohio, was shot four times in the chest and head by a pair of gunmen at a rural encampment in Pará, Brazil.1 Since the 1970s, Sister Dorothy, backed by the Pastoral Land Commission of the Roman Catholic Church, had championed land tenure for Brazilian landless peasants.2 The investigation following Stang’s murder found that two land-owning ranchers had hired the gunmen, apparently in retaliation for her years of opposition to their economic and political domination of land interests in Brazil.3

The facts surrounding Sister Dorothy’s murder illustrate the intractable positions of these opposing forces and the inevitable escala-

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1 See Larry Rohter, Brazil Promises Crackdown After Nun’s Shooting Death, N.Y. Times, Feb. 14, 2005, at A3.
2 See id.
tion of their conflict.\textsuperscript{4} Sister Dorothy committed years of her life to the cause of impoverished landless peasants, and finally gave up her life for it.\textsuperscript{5} The Brazilian landowners resorted to the cold-hearted murder of an aged nun—and risked prison and personal ruin for themselves—in their quest to silence all resistance to their powerful monopoly of land use.\textsuperscript{6} For now, the landowners retain their position of control and dominance. Yet, community organizations in Brazil have organized themselves, lobbied governments, and successfully opposed landowners, demonstrating that a “backlash” against the dominant landowning minority in Brazil is on the rise.\textsuperscript{7}

Amy Chua, in \textit{World on Fire}, warned that an explosive backlash might occur in democracies like Brazil, where dominant minorities hold a majority of the country’s wealth, and where politicians might benefit politically from supporting the marginalized majority.\textsuperscript{8} Chua shows how a dramatic, swift, and violent backlash occurred in Zimbabwe against the white landowning elite.\textsuperscript{9} The same could be Brazil’s fate, Chua suggests, if free elections continue and the poor successfully pressure the government to expropriate private property.\textsuperscript{10}

Hernando de Soto offers an alternative to Chua’s scenario in \textit{The Mystery of Capital}.\textsuperscript{11} In a variation of land reform, De Soto recommends land titling schemes as a solution for poverty in developing countries like Brazil and Zimbabwe.\textsuperscript{12}

This Note will summarize Chua’s predictions of backlash in countries like Brazil, and demonstrate how de Soto’s proposals on land titling may serve as a plausible solution. After an examination of international rights to property and standards on expropriation, this Note will explain how Brazil presents a unique challenge for domestic reformers. In Brazil, as in Zimbabwe five years ago, land distribution is so unequal—and past land reform has been so unsuccessful—a violent class and racial backlash to force land redistribution could be just around the corner. The best solution for Brazil, beyond allowing the market to dictate the cost of expropriations, may be to permit expropriation for

\begin{itemize}
\item \textsuperscript{4} See id.
\item \textsuperscript{5} See id.
\item \textsuperscript{6} See id.
\item \textsuperscript{7} See id.
\item \textsuperscript{8} See Amy Chua, \textit{World on Fire} 74 (2003).
\item \textsuperscript{9} See id. at 6–10.
\item \textsuperscript{10} See id. at 127–31.
\item \textsuperscript{11} See id. at 160–62.
\item \textsuperscript{12} See Hernando de Soto, \textit{The Mystery of Capital} 5–7 (2000).
\item \textsuperscript{13} See id.
\end{itemize}
just, but not fair market prices, and to clarify the laws on when land may be expropriated and re-titled to landless squatters.

I. BACKGROUND

A. CHUA AND DE SOTO

Chua warns that when the majority of a state’s population feels disenfranchised vis-à-vis a “market dominant minority,” backlash often results.\textsuperscript{14} Backlash occurred in Zimbabwe with invasions of whites’ farms.\textsuperscript{15} Majority rule voting, Chua observes, may empower strongmen like Robert Mugabe, President of Zimbabwe.\textsuperscript{16} These strongmen rely on widespread hatred of a powerful, but minority sub-group as the basis of their political power.\textsuperscript{17}

De Soto proposes that backlash, among other problems, would best be confronted by land titling programs.\textsuperscript{18} De Soto notes that landowners in the West can easily “tap” their property, because individuals, banks, and courts of law recognize land titles.\textsuperscript{19} Large tracts of property in the developing world are used productively by squatters, but officially belong to large landholders.\textsuperscript{20} Thus this property cannot be “tapped” as collateral for loans and a fuel for savings and investment.\textsuperscript{21} Conversely, land titling programs would unlock more capital than can be given in foreign aid, empower the poor, and reinforce democratic participation.\textsuperscript{22}

As evidence for his claims, de Soto cites the history of land titling in the United States.\textsuperscript{23} The U.S. Homestead Act allowed settlers to buy land for practically nothing, as long as they agreed to settle and cultivate it.\textsuperscript{24} Although it sacrificed strict adherence to property rights, the

\begin{footnotes}
\footnote{14}{See Chua, supra note 8, at 6.}
\footnote{15}{See id. at 127–31.}
\footnote{16}{See id.}
\footnote{17}{See id. at 259–64.}
\footnote{18}{See De Soto, supra note 12, at 5–7.}
\footnote{19}{See id.}
\footnote{20}{See id. at 40.}
\footnote{21}{See id.}
\footnote{22}{See id. at 226–27.}
\footnote{23}{See De Soto, supra note 12, at 107.}
\footnote{24}{See id. at 107–08; see also Amy Callard, Southern Ute Indian Tribe v. Amoco Production Company: A Conflict over What Killed the Canary?, 33 Tulsa L.J. 909, 915–16 (1998) (comparing economic effects of Homestead Act with Coal Lands Act).}
\end{footnotes}
Act encouraged the development of land on the American frontier and empowered individuals with a sense of ownership and identity.25

De Soto suggests that land titling in Brazil might similarly empower Brazilians with a sense of personal ownership, and of membership in a democratic system.26 Like the Homestead Act, land titling could help to stem backlash and reinforce democratic institutions.27

B. Land Reform and Expropriation as a Matter of International Law

The United Nations (U.N.) Declaration of Human Rights declares a universal right to housing,28 and numerous theorists and international forums have agreed that there should be a universal right to property.29 John Locke went as far as saying that defending property rights is the central role and purpose of governments.30

Expropriation means a governmental taking or modification of individual property rights, particularly by eminent domain.31 Expropriation is distinct from redistribution.32 Although a government may expropriate land, say, to save a rain forest from deforestation, it may choose not to redistribute land by re-tiling it to individuals or groups.33

There are many benefits of expropriating land for re-tiling.34 It may lead to increased investment and growth when land is tapped as collateral, increased state tax revenues, a sense of ownership among the people, increased individual participation in the democratic process, and the development of additional rights.35 It may lead to increased

26 See de Soto, supra note 12, at 218–21; see also Carol M. Rose, Privatization—The Road to Democracy? 50 St. Louis U. L.J. 691, 702 (2006) (noting that land titling increases local control over politics).
27 See Chua, supra note 8, at 267–68.
30 See Rose, supra note 26, at 701–02.
33 See, e.g., Brazil Carves out 2 Vast Preserves in the Amazon Rain Forest, N.Y. Times, Feb. 18, 2005, at A5.
34 See de Soto, supra note 12, at 63–64.
35 See Rose, supra note 26, at 704 (discussing creation of agents of democracy through land titling).
productivity of land by removing absent landlords. Finally, it may help to empower agents of democracy when the people pressure governments for land re-titling. International customary law allows expropriation that is: (1) for a public purpose; (2) nondiscriminatory; and (3) justly compensated. Conflicts in international cases and arbitration usually center on whether compensation satisfies the third criterion.

C. Land Reform in Brazil

As early as 1964, during a period of dictatorship in Brazil, the government recognized the need for land reform and passed the Land Statute. The Land Statute provides that the government may expropriate “latifundia,” large landholdings with their roots in colonial grants of land. The statute requires three elements to be satisfied for a lawful expropriation: (1) the land must be unproductive; (2) the expropriation must be in the public interest; (3) the expropriation must be for compensation.

The 1988 Constitution, which followed the overthrow of military dictatorship, further validated government expropriations. Article 184 reads: “[i]t is within the power of the Union to expropriate on account of social interest, for purposes of land reform, the rural property which is not performing its social function.” Article 183 also creates a flexible adverse possession law in urban properties, requiring only five years of adverse possession for title to transfer.

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37 See Rose, *supra* note 26, at 704.
41 See id.
45 See id. art. 183; see also Pindell, *supra* note 25, at 456 (discussing effects of flexible adverse possession law on favela property market).
post-Revolution measure, the City Statute, allows for ownership rights in the favela to shift after brief periods of squatting.46

Complicating matters, the Brazilian Civil Code, which has remained unchanged since 1916, guarantees property rights and treats any infringement on property rights as a compensable taking of property.47 Brazilian courts have relied on the strong defense of private property in Civil Code when adjudicating land disputes, requiring that expropriation be met with fair market compensation.48 This makes expropriations exceedingly expensive, preventing widespread land reform and rendering the Constitution’s plea for expropriations practically meaningless.49

Nevertheless, grassroots organizations have resorted to self-help to enforce the Constitution.50 The Movimento Sem Terra (MST), or Landless Worker’s Movement, is the most organized and disciplined manifestation of a land reform movement.51 The MST routinely makes threats of prolonged land invasions, so-called “red months,” to pressure President Luiz Inácio Lula da Silva (Lula), and the Brazilian government, to step up land reform measures.52 Its stated goal is to pressure the National Institute for Colonization and Agrarian Reform (INCRA) to use its authority under the Constitution to expropriate the land and re-title it to squatting peasants.53

When the MST invades land and sets up squatting communities, INCRA often responds by expropriating more land. The INCRA helped 37,000 families get land in 2003.54 Nevertheless, this falls well below the Lula and Cardoso governments’ stated goals of expropriation and re-titling.55

The landowners have retaliated by challenging INCRA expropriations in court, and by engaging in self-help.56 Violent reprisals against MST land invasions have resulted in arrests, and thousands of alleged “assassinations” of MST activists.57 The MST website reports 969 assassi-

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46 See Pindell, supra note 25, at 452–54.
48 See Mitchell, supra note 39, at 570.
49 See id.
50 See Colby, supra note 29, at 3.
51 See id. at 19.
52 See Romig, supra note 42, at 96.
53 See Mitchell, supra note 39, at 569–70.
54 See Romig, supra note 42, at 98.
55 See id. (noting that State’s goal was 530,000 families resettled by end of Lula’s term).
56 See id. at 94–95.
57 See id.
nations of rural workers and MST activists between 1985 and 1996. On April 17, 1996, the Brazilian police shot into a crowd of peaceful MST protesters, killing 19 and injuring 51. The police shooting and other acts of violence show the bloody side of MST confrontations over land titling policies.

D. Note on Structural Differences Between Zimbabwe and Brazil

Brazilian rule of law, politics, and society differ substantially from Zimbabwe’s, making direct comparisons over-simplistic. Chua calls Mugabe a strongman, who has taken advantage of popular backlash against whites and the weak rule of law to gain power. By defending the rights of a black majority against a white landowning minority, Mugabe wins popular elections and consolidates political power.

Zimbabwe’s judicial branch is weak: the Supreme Court’s declaration that Mugabe’s land grabs were illegal went unheeded. Furthermore, although Mugabe’s modifications of Zimbabwe’s Constitution provided a veneer of legality to expropriations without compensation, the modifications ignore customary international customary law on expropriation.

In contrast, Brazil’s democratic institutions are energized by more than majority voting. Most Brazilians express faith in the judicial system and the rule of law. Participation in elections is high, and grassroots organizations maintain an effective dialogue with the govern-

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60 See Marc Margolis, A Plot on Their Own, Newsweek Int’l, Jan. 21, 2002, at 22.
61 See Colby, supra note 29, at 23–25.
63 See id.
64 See Shirley, supra note 29, at 164–65.
66 See Chua, supra note 8, at 259–60.
ment.\textsuperscript{68} Furthermore, Brazilian domestic rule on expropriation provides greater protection for property rights than the international rule of expropriation requires.\textsuperscript{69}

II. Discussion

A. The Failure of a Constitution to Implement Standards in International Human Rights

The failure of Brazil’s government to expropriate and re-title land effectively may have led to the systematic denial of personal rights granted under international law to landless Brazilians.\textsuperscript{70} International human rights standards ensure the right to housing, food, and a decent living, which are implicitly denied when governmental policies reinforce the concentration of land in the hands of a few.\textsuperscript{71} Although land ownership is less unequal today than in the past, it remains that one half of Brazil’s fertile land is owned by only one percent of the nation’s farmers.\textsuperscript{72} Similarly, the Gini coefficient for Brazil, measuring overall inequality, has been increasing in Brazil over the last few decades (\emph{i.e.} inequality in income has increased).\textsuperscript{73} These numbers suggest that international human rights are being denied to landless Brazilians.\textsuperscript{74}

The Constitution implicitly recognizes international human rights to housing, food, and a living by providing that the government has a right to expropriate land if it is not put to “productive use.”\textsuperscript{75} Yet Brazilian courts have held that landowners can establish “productive use” by clearing the land for cattle grazing.\textsuperscript{76} This rule has resulted in decreased opportunities for expropriation, as well as increased deforestation.\textsuperscript{77} Critics of these decisions point out that they reflect a land

\textsuperscript{68} See Romig, \textit{supra} note 42, at 96–98.
\textsuperscript{69} See Mitchell, \textit{supra} note 39, at 559, 569.
\textsuperscript{70} See Colby, \textit{supra} note 29, at 15.
\textsuperscript{71} See UDHR, \textit{supra} note 28, art. 25; Colby, \textit{supra} note 29, at 15.
\textsuperscript{72} See Mitchell, \textit{supra} note 39, at 564 (largest two percent of landholdings occupy 57 percent of agricultural land, usually along race lines, while smallest 30 percent of farms occupy one percent of agricultural land).
\textsuperscript{73} See Brazilian Gov’t, \textit{Agrarian Reform: Brazil’s Commitment}, http://www.planalto.gov.br/publico/COLECAO/AGRAIN3.HTM (last visited Jan. 26, 2008) \cite{Agrarian Reform}.
\textsuperscript{74} See Ankerson & Ruppert, \textit{supra} note 36, at 70, 88, 102.
\textsuperscript{75} See Colby, \textit{supra} note 29, at 12–13.
\textsuperscript{76} See Romig, \textit{supra} note 42, at 94.
\textsuperscript{77} See id.
reform policy focused more on resettlement and colonization of the Amazon region, than on the redistribution of large land holdings.  

Furthermore, since Brazilian courts uphold the 1916 Civil Code’s protections of existing property rights, insisting on providing only fair market value compensation to large landowners, expropriation actions by INCRA have become prohibitively expensive. Thus, the Constitution’s promise to expropriate any land not put to productive use has been rendered effectively meaningless.

B. Land Cannot Be Tapped as Collateral for Loans, Investment, and Growth

The Brazilian government’s failure to engage in effective land titling programs has left vast tracts of property “untapped” for use as collateral for loans. Currently, there are more than one million squatters in Brazil, the majority of which are small farmers. In de Soto’s terms, the houses on these plots, the parcels of land being worked, and the merchandise being bought and sold by the squatters cannot be put into economic motion. If recognized under legal title, these units of value could be used as collateral for loans, leading to a multiplying effect through added investment, growth in relative value, increased tax revenue, and increased funding for infrastructure. Because the squatters’ land cannot be used as collateral for loans, there is no multiplying effect, and thus the land remains “dead capital.”

C. Improper Land Reform Policies Can Be Counterproductive

Land reform policy, when poorly conceived, can defeat the very economic and philosophical goals it hopes to achieve. This was the case in Zimbabwe, where the economy plummeted due to a lack of confidence in the security of property titles. The transition from commercial to communal farming caused increased land erosion, de-

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78 See Mitchell, supra note 29, at 572.
79 Id. Land reform has cost between $8000 and $57,000 per beneficiary depending on the region. See id.
80 See Colby, supra note 29, at 12–13.
81 See de Soto, supra note 12, at 40.
82 See Agrarian Reform, supra note 73.
83 See de Soto, supra note 12, at 40.
84 See id. at 40–42.
85 See id.
86 In Zimbabwe, agricultural production between 2000 and 2003 declined from between fifty and ninety percent as a result of the departure of skilled farmers and an increase in unused land. See Richardson, supra note 65, at 548–54.
87 See id.
creased production, and forced Zimbabweans into a “subsistence form of living.”

This raises concerns that the same might occur in Brazil.

There are several reasons to question the wisdom of redistributing land into the hands of the MST. The landless often settle on poor quality land that requires expensive technology to develop. Lacking funds, the recently-settled often experience widespread farm failures. Large scale farming operations generally possess the technology, skills, and equipment needed to improve poor quality land, while small farmers usually do not.

In addition, undermining private property rights may defeat the chief purposes for which governments are held to exist, to protect private property. Under command economies, which arose under the doctrines of communism and authoritarianism, property, and hence power, was concentrated in the hands of a few. Concentration of power led to oppression, and eventually many of these regimes failed or were overthrown. By contrast, a democratic system with property rights allows land, and hence power, to be dispersed. This limits the opportunities for elites to oppress individual property owners, and reinforces the legitimacy of the regime.

The hope of any titling program is that it will lead to increases in savings, investment, and land use efficiency. If improperly applied, these very programs may lead to the opposite result. Where private property rights have been the most fluid, the Brazilian favela, investors and property owners alike have lost confidence in land titles, becoming resigned to the presence of squatters. There, year requirements for adverse possession have been eased under the City Statute, and confidence in land titles has been undermined. As a result, favela land-

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88 See id.
89 See id.
90 See id.
91 See Mitchell, supra note 39, at 572.
92 See id.
93 See Richardson, supra note 65, at 551–53.
94 See Ankersen & Ruppert, supra note 36, at 93.
95 See Rose, supra note 26, at 705.
96 See id. at 691–92.
97 See id. at 705–6.
98 See id. at 702.
99 See Richardson, supra note 65, at 543–45.
100 See id. at 548.
101 See Pindell, supra note 25, at 456.
102 See id. at 454.
owners are unlikely to receive loans on their properties. The purposes of a land titling program would certainly not be achieved if property rights were rendered as fluid as those in the Brazilian favela. Furthermore, the political and social pressures land groups apply on the government raise significant questions about the role of grassroots organizations in the democratic process. The MST relies alternatively on lawful mechanisms and self-help. Commentators suggest that the MST’s stated goal of enforcing the government’s policies should not be viewed as social disobedience. Yet, should one overlook the MST’s threats of violence, its lawlessness, and its increasing resort to land invasions? Critics hold that in resorting to self-help, the MST violates property rights and human rights.

**D. The Emerging Backlash**

The race and class backlash against the dominant market minority in Brazil is becoming more pronounced. Brazil has a burgeoning Black Power movement that could fuel racial backlash. Although Brazilians still claim that their “racial democracy” implies the absence of racial distinctions, income inequality between races is increasing.

Will the tension between the landless and the landowners lead to a repeat of the violence that was observed in Zimbabwe in the decades leading up to Mugabe’s land grabs? Like Zimbabweans, Brazilians perceive that white European settlers received broad tracts of land while dark-skinned settlers received nothing. There, resentment against white landowners continued to grow until the situation exploded and widespread land invasions, violence, and evictions oc-

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103 See id. at 456.
104 See id.
105 See Romig, supra note 42, at 94.
106 See Colby, supra note 29, at 23–25.
107 See id.
108 See id.
109 See id; see also Margolis, supra note 60 (describing violence during April 17, 1996 shootings).
110 See CHUA, supra note 8, at 160–62.
111 See id. at 74–75 (describing Brazil’s first-ever Black-only political party and emergence of Black power organizations).
113 See CHUA, supra note 8, at 127.
114 See Colby, supra note 29, at 27 n.132.
curred.\textsuperscript{115} This type of racial backlash has not yet occurred in Brazil, but it might if resentful minorities are not soon appeased.\textsuperscript{116}

Will the MST devolve into a proponent of racial backlash?\textsuperscript{117} On the surface, race does not appear to be a motivating factor for land invasions in Brazil.\textsuperscript{118} Centuries of inter-marriage have blurred racial distinctions, making “Black versus White” backlash less likely.\textsuperscript{119} Nevertheless, race-based groups champion the same causes as the MST, and together engage in acts of social disobedience to pressure the government to expropriate and redistribute land.\textsuperscript{120}

Most importantly for the prospects of backlash, majority sentiment can shape elections in Brazil, just as it did in Zimbabwe.\textsuperscript{121} The MST officially backed Lula as its candidate for land reform during the October 2006 runoff election, and vows to hold him accountable by staging land invasions.\textsuperscript{122} Lula, himself from a very poor family, embodies the class backlash against the rich landowning elite.\textsuperscript{123}

III. Analysis

A. Implementing International Law in Brazil

This Note proposes two changes to Brazilian law that are reasoned to facilitate effective land re-titling and the safeguarding of international human rights standards without undermining the rule of law and faith in property titles. In order for the courts to implement these reforms, the Brazilian legislature would have to revise the Civil Code or clarify how articles 183 and 184 of the Constitution should be interpreted.\textsuperscript{124} First, as environmental and legal scholars have insisted, the rule developed by Brazilian land courts that allows “productive use” to be made out by clear-cutting land should be eliminated.\textsuperscript{125} Squatters

\textsuperscript{115} See Chua, supra note 8, at 127 (noting that Mugabe stated, “Our party [the Zanu-PF] must continue to strike fear in the heart of the white man—our real enemy. The white man is not indigenous to Africa.”).

\textsuperscript{116} See id.

\textsuperscript{117} See Colby, supra note 29, at 23–25.

\textsuperscript{118} See Chua, supra note 8, at 75.

\textsuperscript{119} See id. at 70–71.

\textsuperscript{120} See Colby, supra note 29, at 23–25.


\textsuperscript{122} See Romig, note 42, at 96–97; Langevin & Rosset, supra note 58.

\textsuperscript{123} See Romig, supra note 42, at 81–82.

\textsuperscript{124} See Mitchell, supra note 29, at 582.

\textsuperscript{125} See id. at 572.
should not be precluded from claiming title to land merely because the land has been hastily cleared by a landowner. 126 Allowing the productive use requirement to be satisfied by clearing land not only keeps land in the hands of a few, but provides an incentive for landowners to deforest land. 127

Second, Brazilian legislature should require that expropriations by INCRA be upheld as long as compensation is “just.” 128 The vast inequalities in land ownership, 129 the risk of class and racial backlash, as well as the potential to stimulate savings, investment, and business growth, demand a land re-titling program that the state can realistically pursue. 130 At the same time, a flexible standard for determining “just” compensation must also be developed: such a standard would enable the lawful redistribution of unproductive, unused landholdings, while discouraging unlawful land invasions. 131

Just compensation might be determined by considering the factors that de Soto deems to justify re-titling in the first place: the degree to which squatters use the land productively; the economic value that would be produced by legitimizing title to land; the concentration of landownership relative to the number of squatters; and the fairness of compensation to the particular landowner given the history of latifundia land grants. 132 Such a factor-based standard would admittedly allow for subjective determinations of compensation, and should therefore be replaced with an objective standard as landownership becomes less concentrated and more in line with international human rights standards. 133 A court might also consider whether re-titling the land would legitimate violent land reprisals, and refuse to re-title land cheaply when it would have the effect of encouraging unlawful seizures. 134

Allowing for expropriations to be upheld as long as compensation is “just” would be justified in Brazil even if it would not be in the United States: In Brazil, land is more unequally distributed, the risk of backlash is more pronounced, and the Brazilian Constitution actually

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126 See id. at 567.
127 See id.
128 See id. at 559 (discussing successful land reforms for less than full market value in Japan, Taiwan, South Korea, Mexico, and India).
129 See Pindell, supra note 25, at 444–45.
130 See de Soto, supra note 12, at 49–62 (listing effects of recognizing title to land).
131 See Mitchell, supra note 39, at 578–80 (discussing problems that arise from lack of clear standard for establishing level of appropriate compensation to Brazilian landowners).
134 See Romig, supra note 42, at 95–96.
provides for the redistribution of land. Moreover, many developed countries have had successful land reform policies with less than fair market value compensation for expropriated land. Allowing for “just” compensation would in fact provide for higher compensation than the U.S. Homestead Act, which in many cases allowed settlers to assume title to land without any monetary compensation.

B. Avoiding the Backlash

Redistributing land will decrease the chances for conflict between landowners and dark-skinned landless poor. Diffusing property titles will spread power and ownership among many individuals, making concentration of power and oppression less likely. Because land gives rights, and with it power, Brazilians would not be as vulnerable to landowner reprisals if they actually owned unquestioned title to land. Having title to land would also legitimize democratic government by increasing faith in election outcomes and giving a sense of ownership in the country. Creating Brazilian “agents of democracy,” land titling would liberate the “orphaned” class of landless from their misery by giving them the means to support themselves and their families. Concurrently, international human rights to a decent living, food, and housing, would be secured.

Conversely, if Brazil fails to implement effective re-titling programs, it risks racial backlash. Without land titling, the landless’ viewpoints are less likely to be heard, indigent populations have little buffer between themselves and the State, and little incentive exists to aspire for greater liberties.

The MST is emerging as a powerful voice of backlash. Although they do not cite race as a motivating factor for their land inva-

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135 See Mitchell, supra note 39, at 559; Constituição Federal [C.F.] [Constitution] arts. 183, 184 (1988), supra note 44.
136 See Mitchell, supra note 39, at 559.
137 See de Soto, supra note 12, at 107–08.
138 See Rose, supra note 26, at 765.
139 See id.
140 See Bernadette Atuahene, Land Titling: A Mode of Privatization with the Potential to Deepen Democracy, 50 St. Louis U. L.J. 761, 773–74 (2006) (discussing Zimbabwean evictions of squatters and how land titling would have given squatters power vis à vis the State).
141 See Chua, supra note 8, at 268; Rose, supra note 26, at 714.
142 See Margolis, supra note 60.
143 See Colby, supra note 29, at 14–18.
144 See Chua, supra note e, at 127–30.
145 See Atuahene, supra note 140, at 761–62.
146 See Romig, supra note 42, at 95–96.
sions, Black power organizations champion the same causes as the MST.147 The intersection of causes supported by race-based and class-based groups indicates that they share the same grievances, and that ‘class’ and ‘race’ divisions are readily interchangeable.148 The MST could develop into a mass resistance movement against landowners.149

Comfortingly, a relatively strong judiciary and the majority’s respect for the rule of law prevent the rapid rise of a strongman like Mugabe.150 Nevertheless, as racial conflict increases, legal changes to the property titling system and a loosening of the rule of expropriation would help prevent the backlash that looms.151

C. Expect Resistance from Landowners

Since land reform began with the Land Statute of 1964, landowners have exerted political pressure to prevent reforms from being effective.152 Landowners continue to refute the MST’s interpretation of the Constitution, emphasizing the Constitution’s protection of private property rights.153 Guided by these arguments, landowners have challenged ninety-five percent of INCRA expropriations.154 Yet, if Brazil’s law-makers took strong action to clarify the laws on expropriation and productive use requirements, these costly legal battles could be avoided, and valid expropriations under the Constitution could proceed in spite of landowner resistance.155

D. Encouraging Economic Growth

By re-titling land, Brazil can avoid the failures of Zimbabwe and achieve the increase in economic growth and investment de Soto predicted.156 In Zimbabwe, investors lost confidence in Mugabe’s government after it disregarded the Supreme Court’s declaration of the

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148 See id.
150 See CHUA, supra note 8, at 274.
151 See id.
154 See Mitchell, supra note 39, at 570.
155 See id.
156 See CHUA, supra note 8, at 268–69; de SOTO, supra note e, at 213.
illegality of land seizures. Yet in Brazil, the judicial branch is widely respected. In addition, because Zimbabweans were not given title to the land, but instead forced to lease the land from the government, they could not use the land as collateral for loans and investment. In contrast, direct land titling programs, if properly applied, would give title to individuals, thereby avoiding the problems that doomed the Zimbabwean effort.

Conclusion

Currently, the specter of ethnic conflict in Brazil is testing the State’s devotion to international law, which calls for the implementation of universal norms and procedures. Brazil has hosted international conferences before to establish the political and civil rights of its indigent people, but these discussions, although well-meaning, have not gone far enough. Brazil must now take steps to carry out the promises made in its Constitution to expropriate and re-title land, only then will the mandate of international human rights be satisfied.

157 See Richardson, supra note 65, at 549.
159 See Richardson, supra note 65, at 551.
160 See de Soto, supra note 12, at 213–14, 216.
Abstract: Since 2005, both the U.N. General Assembly and the Security Council have expressed for the first time a clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Though scholars have since debated the legal status of this responsibility, commonly referred to as R2P, it is most accurately described as a declaratory principle rather than a binding rule of international law. Still, recent resolutions by the Security Council, particularly those in reaction to the ongoing atrocities in Darfur, Sudan, explicitly invoke R2P while calling for protective actions in accordance with the principle. If the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future.

Introduction

In the Outcome Document of the 2005 World Summit of the United Nations General Assembly, the international community expressed for the first time a clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.1 The Outcome Document includes in this responsibility taking prompt and decisive collective action, diplomatically if possible, but militarily if peaceful means prove inadequate and national authorities manifestly fail to protect their populations from such crimes.2 The inclusion of the principle, coined

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2 See id.
Among international legal scholars as the “responsibility to protect,” or “R2P,” was due in large part to a seminal report entitled The Responsibility to Protect (R2P Report), published by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) in 2001, and two United Nations (U.N.) reports on reform produced before the 2005 World Summit. In April 2006, the principle was reaffirmed in a resolution by the U.N. Security Council.

Proponents of R2P acknowledge that major challenges remain in implementing and actualizing the responsibility to protect. In particular, the current humanitarian crisis in Darfur, Sudan has been cited as a test case for the U.N.’s commitment to the concept, and demonstrates the many hurdles still standing in the way of effective intervention to protect civilians caught up in armed conflict.

Part I of this Note begins with a short history of the international legal discourse and doctrinal basis that resulted in the formulation of R2P. This section also describes the R2P framework, positing R2P within the ongoing debate regarding moral and legal justifications for humanitarian intervention, and its ultimate adoption by the U.N. This part concludes with a summary of the humanitarian crisis in Darfur and the international community’s reactions to that crisis. Part II discusses responses to the R2P Report and its subsequent adoption by the U.N., and then addresses competing arguments weighing the current legal status of R2P. Finally, Part III contains a prediction of future codification and implementation of the principle, using the Security Coun-

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cil’s reactions to the genocide in Darfur as a basis for predicting the potential crystallization\(^8\) of an international norm.

I. Background

A. Before the International Commission on Intervention and State Sovereignty and the Birth of R2P

The notion of R2P arose from a perceived need to establish international guidance for dealing with imminent or ongoing incidents of ethnic cleansing and genocide.\(^9\) “‘Humanitarian intervention’ has been controversial both when it happens, and when it has failed to happen.”\(^10\) The international community’s failure to prevent or halt either the 100-day genocidal slaughter of 800,000 Rwandan Tutsis in 1994 or the mass-murder of over 8,000 Bosnians by an ethnic Serbian militia in 1995 laid bare the horror of inaction.\(^11\) Whereas in 1999, the North Atlantic Treaty Organization’s war against Serbian forces to halt the ethnic cleansing of Kosovar Albanians raised serious questions about the legitimacy of humanitarian intervention.\(^12\) These three cases occurred at a time of heightened expectations for effective collective action following the end of the Cold War.\(^13\)

The beginning of the R2P Report identifies the entrenched frontlines of the contemporary policy debate surrounding these interventions:

For some, the international community is not intervening enough; for others it is intervening much too often. For some, the only real issue is in ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger. For some, the new interventions herald a new world in which human

\(8\) See Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1969 I.C.J. 3, 38 (Feb. 20); Ian Brownlie, Principles of Public International Law 4–11 (4th ed. 1990). “Crystallization” refers to the process by which a nonbinding principle transforms into a binding rule of international law, for instance, through the evolution of state practice or codification within an international treaty. See Continental Shelf, 1969 I.C.J. at 38; Brownlie, supra.

\(9\) ICISS Report, supra note 3, at vii.

\(10\) Id. at vii, 1.


\(12\) ICISS Report, supra note 3, at 1.

\(13\) Id.
rights trumps state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights.\textsuperscript{14}

This seemingly irreconcilable controversy prompted U.N. Secretary-General Kofi Annan to challenge the international community to “find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.”\textsuperscript{15} In response, the Canadian government sponsored the independent ICISS with the purpose of exploring the whole range of legal, moral, operational and political questions rolled up in this debate, in order to consult with the widest possible range of opinion around the world, and to generate a report that would help the Secretary-General and other concerned parties find some new common ground.\textsuperscript{16}

B. The R2P Framework

After about a year of deliberation, the ICISS published the R2P Report, which was widely praised for moving the debate beyond the impasse while preserving the integrity of the principle of state sovereignty.\textsuperscript{17} The Report reconfigured the terms of the debate, focusing affirmatively on the 

\textit{responsibilities} of sovereignty, including each state’s “primary responsibility for the protection of its people,”\textsuperscript{18} rather than focusing on the \textit{right} of one or more states to intervene in the affairs of another.\textsuperscript{19} Where the individual state is unable or unwilling to carry out this primary responsibility to protect, the Report affirms the responsibility of the international community to ensure protection of populations at risk.\textsuperscript{20}

The R2P Report sets forth three responsibilities: to prevent, react, and rebuild.\textsuperscript{21} The Report highlights the priority of \textit{prevention} of crimes

\textsuperscript{14} Id. at 1–2.
\textsuperscript{15} Id. at 2 (citing Kofi Annan, U.N. Secretary-General, Address to the 54th Session of the U.N. General Assembly).
\textsuperscript{16} Id. at vii.
\textsuperscript{18} ICISS Report, \textit{supra} note 3, at xi, 16.
\textsuperscript{20} ICISS Report, \textit{supra} note 3, at xi.
\textsuperscript{21} Id.
against humanity, and the need for an “early warning system.” Once prevention fails, and crimes against humanity are taking place, states have a responsibility to react. After the crimes have been brought to a stop, the international community has a responsibility to rebuild by assisting in reconstruction and reconciliation, helping to build a durable peace, and promoting good governance and sustainable development.

Additionally, the R2P Report affirms the need for a range of escalating non-coercive and coercive measures to prevent or halt crimes against humanity. The ultimate coercive measure—military intervention—is reserved as a remedy of last resort. The Report establishes specific criteria for military intervention to be justified and specific standards governing how such actions should be conducted. These criteria include “just cause,” “right authority,” “right intention,” “last resort,” “proportional means,” and “reasonable prospects.” The only just cause for military intervention is to halt or revert “large scale loss of life” or “large scale ‘ethnic cleansing.’” The primary purpose, or right intention, of the intervention must be to halt or avert human suffering, regardless of intervening states’ other motives. The scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question, and the means employed must be proportional to the ends sought. There must be reasonable prospects for success in halting or averting the suffering, with the consequences of action not likely to be worse than those of inaction. Finally, the intervention may only proceed with the right authority; Security Council authorization should in all cases be sought prior to any military action. If the Council rejects a proposal or fails to deal with it in a reasonable time, alternative options include consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure, and action by regional

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22 Id. at 19–27.
23 Id. at 29–37.
24 Id. at 39–45.
26 Id. at 36–37.
27 Id. at 31–37.
28 Id. at xii–xiii, 32–37.
29 Id. at xii, 32.
30 ICISS Report, supra note 3, at xii, 35.
31 Id. at xii, 37.
32 Id. at 37.
33 Id. at xii, 50.
or sub-regional organizations, subject to their seeking subsequent authorization from the Security Council.\footnote{Id. at xiii, 53–54.}

Without opining on proposals for future Security Council reform, the Report sought to eliminate Security Council gridlock by proposing a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a humanitarian crisis.\footnote{ICISS Report, supra note 3, at xiii, 51.} In matters where its “vital national interests were not claimed to be involved,” a permanent member would not use its veto to obstruct the passage of what would otherwise be a majority resolution—a “constructive abstention.”\footnote{Id.}

C. United Nations Adoption of R2P

The formation of the ICISS and drafting of the R2P Report coincided with increased interest among the international community, the Security Council, and the Secretary-General about the development of international doctrine addressing the protection of civilians.\footnote{See, e.g., The Secretary-General, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, delivered to the Security Council, U.N. Doc. S/2001/331 (Mar. 30, 2001) [hereinafter 2001 Protection of Civilians Report].} Between 2001 and 2005, the Secretary-General submitted two reports at the request of the Security Council regarding the protection of civilians.\footnote{The Secretary-General, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, delivered to the Security Council, U.N. Doc. S/2005/740 (Nov. 28, 2005); 2001 Protection of Civilians Report, supra note 37.} In particular, the ideas and principles in the R2P Report were endorsed by the Secretary-General’s High-level Panel on Threats, Challenges and Change, which reported to Kofi Annan in December 2004.\footnote{See generally A More Secure World, supra note 4.} The only major divergence between the R2P Report and the High-level Panel Report is that the latter omitted any discussion of a “constructive abstention” by the Permanent Five.\footnote{See Nicholas J. Wheeler, A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit, 2 J. Int’l L. & Int’l Rel. 95, 96 (2005).} Mr. Annan warmly received the High-level Panel Report by incorporating all its proposals relating to the responsibility to protect and the use of force into his own report, In Larger Freedom.\footnote{In Larger Freedom, supra note 4, ¶ 135; see also Wheeler, supra note 40, at 99 (describing endorsement of R2P within successive U.N. reports).} Mr. Annan’s report was distributed in the spring of 2005 for discussion within the General Assembly in preparation for the Summit the following September.\footnote{In Larger Freedom, supra note 4, ¶ 3; Wheeler, supra note 40, at 99.}
After much debate at the 2005 World Summit, it was agreed that the Outcome Document would contain two paragraphs under the heading “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”43 The first paragraph affirmed that each state has the responsibility to protect its populations from genocide, war crimes, and crimes against humanity, while highlighting that such a responsibility entails the prevention of such crimes by appropriate means.44 Additionally, this paragraph acknowledged that the international community should encourage and help states to exercise this responsibility and should support the U.N. in establishing an early warning capability.45

The second paragraph affirmed that the international community, through the U.N., “[H]as the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”46 If peaceful means are inadequate and national authorities are manifestly failing to protect their populations from such crimes, the international community declared that it is prepared to take collective military action through the Security Council in a timely and decisive manner.47 Finally, the General Assembly stressed the need for it to “continue consideration of the responsibility to protect . . . and its implications, bearing in mind the principles of the [U.N.] Charter and international law.”48

Official endorsement of R2P culminated when the Security Council passed Resolution 1674 on April 28, 2006.49 This resolution “Reaffirms the provisions . . . of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”50

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44 Outcome Document, supra note 1, ¶ 138.
46 Outcome Document, supra note 1, ¶ 139.
47 See id.
48 Id.
49 See S.C. Res. 1674, supra note 5, ¶ 4.
50 Id.
D. The Humanitarian Crisis in Darfur and the International Community’s Reactions

The current humanitarian crisis in Darfur has been cited by several commentators as a test case for the international community’s commitment to R2P.\(^{51}\) The U.N. considers the Darfur conflict to be one of the world’s worst ongoing humanitarian crises.\(^{52}\) Since 2003, the Sudanese government and its proxy militia have waged a brutal campaign against the people of Darfur, a region in Western Sudan about the size of Texas.\(^{53}\) Several hundred thousand people have been killed or badly injured.\(^{54}\) The conflict has displaced more than two million people, who now live in displaced-persons camps in Sudan or in refugee camps in Chad, and more than 3.5 million people are reliant on international aid for survival.\(^{55}\)

The Darfur conflict stems from long-term disputes over resources between the region’s farmers and herders.\(^{56}\) “This conflict grew out of opposition to the Sudanese government by two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), which primarily draw their support from the Fur, Masalit and Zaghawa ethnic groups.”\(^{57}\) The SLA and JEM aim to compel the government of Sudan to address underdevelopment and the political marginalization of non-Arabs in Darfur.\(^{58}\) In response, the Sudanese armed forces and a government-backed militia known as the Janjaweed—largely composed of fighters of Arab background—have attacked civilian populations suspected of supporting the rebels.\(^{59}\) The Janjaweed and Sudanese military, paramilitary, and police have employed a wide range of tactics against civilians, including aerial bombings, heavy shelling, ground attacks, bulldozing and burning of villages, arrests and extrajudicial execution, kidnapping, torture, and rape.\(^{60}\) The violence against Darfur’s civilian population has been

\(^{51}\) See Khan et al., supra note 7.


\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Human Rights First—About the Crisis, supra note 53.

\(^{59}\) Id.

\(^{60}\) Id.
widely recognized as genocide.\textsuperscript{61} Unfortunately, despite the signing of a series of ceasefire and peace agreements, there has been increased violence including credible allegations of torture and attacks on civilians by signatories and non-signatories alike.\textsuperscript{62} This violence makes it dangerous, if not impossible, for most of the millions of displaced persons to return home.\textsuperscript{63}

In 2004, the African Union established the African Union Mission in Sudan (AMIS) with the primary mission of performing peacekeeping operations related to the Darfur conflict.\textsuperscript{64} A series of U.N. Security Council resolutions in 2004 and 2005 established the United Nations Mission in Sudan (UNMIS), and since then the crisis has remained on the Council’s agenda.\textsuperscript{65} UNMIS oversees all U.N. military, humanitarian, and diplomatic activity in Sudan and works with AMIS in its efforts to establish peace and stability in Darfur, though none of its military personnel operate in Darfur.\textsuperscript{66} Due to limited human and financial resources, AMIS has been unable to either secure effective implementation of the most recent peace agreement or even stem the escalating violence.\textsuperscript{67} In 2006, Security Council resolutions called for an extension of UNMIS to include a robust military force to take over peacekeeping operations from AMIS.\textsuperscript{68} A transition, however, was made contingent on the Sudanese government’s consent, which was adamantly withheld until a year of threats and negotiations led to its acceptance of an “AU/UN Hybrid operation in Darfur” (UNAMID) consisting predominantly of African troops, which should be operating by the end of 2007.\textsuperscript{69}


\textsuperscript{62} Human Rights First—About the Crisis, \textit{supra} note 53.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} See African Union Mission in Sudan, Mandate, \url{http://www.amis-sudan.org/amismandate.html} (last visited Jan. 25, 2008).

\textsuperscript{65} See U.N. Mission in Sudan, Mission Background, \url{http://www.unmis.org/english/background.htm} (last visited Jan. 25, 2008); Darfur and the Peacebuilding, \textit{supra} note 52.


\textsuperscript{67} See Khan et al., \textit{supra} note 7.


II. Discussion

A. Responses to the R2P Report and Its Subsequent Adoption by the U.N.

Among scholars, responses to the R2P Report have varied widely.\textsuperscript{70} Many scholars view R2P as the most comprehensive framework for approaching humanitarian intervention ever put forth.\textsuperscript{71} Some commentators are skeptical of the R2P Report and consider it dangerously disrespectful of current international law.\textsuperscript{72} Others claim that it merely legitimizes the status quo by relying on the Security Council as the primary authorizing body.\textsuperscript{73}

Much of the criticism of the R2P Report mirrors that which underlies the preexisting debate about humanitarian intervention.\textsuperscript{74} Some argue that a simple change in language from “humanitarian intervention” to the “responsibility to protect” does not circumvent the necessity of resolving the debates that have always existed regarding intervention.\textsuperscript{75}

There are also significant fears that R2P principles are simply a “cover for legitimating the neo-colonialist tendencies of major powers.”\textsuperscript{76} Some scholars maintain that “such proposals have no impact on the realpolitik driving actual decision making.”\textsuperscript{77} In particular, a fundamental problem is that no matter what criteria are established for a justifiable intervention, the decisive factors will always be “authority, political will, and operational capacity . . . .”\textsuperscript{78} Nonetheless, within just five years after its publication, the R2P Report gained enough significance that its framing of the issues and its language infiltrated discussions of humanitarian crises to such an extent that both the General

\textsuperscript{74} \textit{See id.}
\textsuperscript{75} Hamilton, \textit{supra} note 70, at 292 (citing Mohammed Ayoob, \textit{Third World Perspectives on Humanitarian Intervention and International Administration}, 10 \textit{Global Governance} 99, 115 (2004)).
\textsuperscript{76} \textit{Id.} at 291.
\textsuperscript{77} \textit{Id.} at 291.
\textsuperscript{78} \textit{See} MacFarlane et al., \textit{supra} note 6, at 980.
Assembly and Security Council have affirmed the international responsibility to protect.\textsuperscript{79}

U.N. adoption was met with criticism because of aspects of the R2P framework it failed to include.\textsuperscript{80} For example, the two paragraphs of the Outcome Document make no mention of a Security Council “constructive abstention.”\textsuperscript{81} Additionally, it does not refer explicitly to a responsibility to use military force; it merely expresses that the international community is prepared to use military force when appropriate.\textsuperscript{82}

\textbf{B. The Legal Status of R2P}

At the time of the publication of the R2P Report, experts on the Commission were clear: the international obligations of R2P are not part of what is considered “binding” international law.\textsuperscript{83} Rather, R2P was described specifically as “the emerging guiding principle . . . grounded in a miscellany of legal foundations (human rights treaty provisions, the Genocide Convention, Geneva Conventions, International Criminal Court statute and the like), growing state practice—and the Security Council’s own practice.”\textsuperscript{84} The Commission noted, however, that if the Security Council continues to give further credence to R2P and its doctrinal basis, that “it may eventually be that a new rule of customary international law to this effect comes to be recognized . . . .”\textsuperscript{85}

Since publication of the R2P Report, the General Assembly and Security Council resolutions described above have undoubtedly enhanced the force of R2P, moving the principle further along the continuum toward binding law.\textsuperscript{86} Security Council resolutions sometimes have the force of binding international law, so one could argue that the Council’s formal adoption has crystallized a new norm of binding in-

\begin{itemize}
  \item \textsuperscript{79} See Outcome Document, \textit{supra} note 1, ¶¶ 138–139; S.C. Res. 1674, \textit{supra} note 5, ¶ 4; Hamilton, \textit{supra} note 70, at 293.
  \item \textsuperscript{80} See Wheeler, \textit{supra} note 40, at 96, 102.
  \item \textsuperscript{81} See Outcome Document, \textit{supra} note 1, ¶¶ 138–139; \textit{see also} ICISS Report, \textit{supra} note 3, at 51 (proposing a “constructive abstention”); Wheeler, \textit{supra} note 40, at 96 (criticizing the Outcome Document for not discussing what should occur if the Security Council was unable or unwilling to act).
  \item \textsuperscript{82} See Outcome Document, \textit{supra} note 1, ¶ 139.
  \item \textsuperscript{83} See ICISS Report, \textit{supra} note 3, at 15, 50.
  \item \textsuperscript{84} Id. at 50.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} See Outcome Document, \textit{supra} note 1, ¶¶ 138–139; S.C. Res. 1674, \textit{supra} note 5, ¶ 4; ICISS Report, \textit{supra} note 3, at 50.
\end{itemize}
ternational law. Such a view, however, is uncorroborated when considered in light of the clear language of the authors of the R2P Report: “we have already acknowledged it would be quite premature to make any claim about the existence now of such a rule.” Implicitly, further codification or implementation of R2P would be necessary before the principle crystallizes into “binding” international law.

III. Analysis

Two key questions must be addressed to discern whether international reactions to the Darfur crisis foretell crystallization of R2P. First, to what extent have international reactions to the crisis demonstrated implementation of R2P? Second, and more specifically, was the Security Council’s attempt to secure the Sudanese government’s consent before deploying international troops consistent with the R2P framework?

A. Security Council Implementation of R2P

As described above, the international community has been actively involved in Darfur. In this context, there are several indications that the Security Council is implementing the R2P framework. For example, the same day the Security Council reaffirmed R2P, it passed Resolution 1672, placing sanctions on individual Sudanese officials responsible for crimes against humanity in Darfur. Sanctions on individuals are one of the reactive measures included within R2P short of military force.

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87 See U.N. Charter art. 25.  
88 See ICISS Report, supra note 3, at 50.  
89 See id.  
90 See id.  
91 See generally Darfur and the Peacebuilding, supra note 52 (discussing U.N. involvement in Darfur).  
93 See generally Darfur and the Peacebuilding, supra note 52 (discussing U.N. involvement in Darfur).  
Prior to the adoption of R2P, the U.N. had been in Darfur for several years without the Security Council calling for an international military force to intervene, but almost immediately after affirming R2P in Resolution 1674, it called for such a force. On May 16, 2006, less than a month after Resolution 1674, the Security Council passed Resolution 1679 calling for the transition of military operations in Darfur from AMIS to UNMIS and for an assessment team to visit the region to prepare for this transition.

The preamble of Resolution 1679 explicitly recalls Resolution 1674 on the protection of civilians in armed conflict. Thus, this is the first example of the Security Council invoking its responsibility to protect civilians from crimes against humanity while simultaneously acting in accordance with that responsibility. Such consistency was repeated on August 31, 2006, when the Security Council passed Resolution 1706, further specifying the nature of the U.N. force which will replace AMIS. Resolution 1706 recalls Resolution 1674 on the protection of civilians in armed conflict with the exact same language employed in Resolution 1679, therefore constituting a second example of the Security Council directly invoking R2P while calling for actions within the principle’s framework.

While gradually increasing pressure on Sudan to accept a U.N. deployment, the Security Council reaffirmed R2P in a resolution on April 30, 2007 that extended the mandate of UNMIS. As soon as Sudan succumbed to international will and consented to a hybrid force, the Security Council invoked R2P on July 31, 2007 in the resolution authorizing that force. Resolution 1769 signifies an even greater endorsement of R2P than the previous three resolutions by further emphasizing the need to focus on finalizing “preparations for reconstruction and development.” This illustrates the Security Council’s endorsement of its responsibility to protect civilians, while

98 See S.C. Res. 1679, supra note 68, ¶ 3.
99 Id., pmbl.
100 Id., pmbl., ¶ 3.
101 See S.C. Res. 1706, supra note 69, ¶ 3.
102 See id., pmbl., ¶¶ 1–6.
104 See S.C. Res. 1769, supra note 69, pmbl. ¶ 3.
105 See id., pmbl., ¶ 20.
calling for measures that coincide with multiple principles in the R2P framework: to react and, then, rebuild.\textsuperscript{106}

Despite much preparation, a robust international force has not yet been sent to Darfur, while violence continues to escalate.\textsuperscript{107} Critics emphasize that the crisis is a textbook case of a government being unwilling or unable to fulfill its responsibility and that the international community’s failure to end the genocide signifies this R2P test case’s failure.\textsuperscript{108} Such an assertion, however, overlooks the complex framework of R2P.\textsuperscript{109} Though the Security Council has yet to end the crisis in Darfur, its resolutions discussed above demonstrate support of the R2P framework.\textsuperscript{110} While it is perhaps too early to call these resolutions a trend, the references to R2P suggest that the Security Council may be taking its responsibility to protect seriously and will continue to act accordingly.\textsuperscript{111} Proponents of R2P, even those who regret that the Security Council has not taken a more aggressive stance, should be reassured that R2P is showing—in the case of Darfur—such immediate signs of implementation.\textsuperscript{112}

\textbf{B. The Issue of Consent}

Advocates of U.N. intervention in Darfur have criticized the Security Council for leaving deployment dependent on the consent of the government of Sudan.\textsuperscript{113} Requiring consent before deployment may represent a half-hearted adoption of R2P, making the test case of Darfur indicative of a less than favorable future for the principle’s legal status.\textsuperscript{114}

Contrarily, there is nothing inherently adverse to the R2P framework about seeking government consent prior to sending an inter-

\textsuperscript{106} See id.; ICISS Report, supra note 3, at xi, 29–45.
\textsuperscript{107} See Apiku, supra note 69.
\textsuperscript{109} See ICISS Report, supra note 3, at 29–37 (discussing wide range of reactive measures and precautionary criteria).
\textsuperscript{110} See S.C. Res. 1706, supra note 69, pmbl., ¶ 1–6; S.C. Res. 1679, supra note 68, pmbl., ¶ 3; ICISS Report, supra note 3.
\textsuperscript{111} See S.C. Res. 1706, supra note 69, pmbl., ¶ 1–6; S.C. Res. 1679, supra note 68, pmbl., ¶ 3; ICISS Report, supra note 3.
\textsuperscript{112} See S.C. Res. 1706, supra note 69, pmbl., ¶ 1–6; S.C. Res. 1679, supra note 68, pmbl., ¶ 3; ICISS Report, supra note 3.
\textsuperscript{114} See id.
ventionist force. In fact, much of the R2P framework suggests that the international community should, as much as possible, work with the governments of states in which crimes against humanity are taking place (or are about to occur), in an effort to stop the violence. This aspect of R2P shows that the State has the primary responsibility to protect and is in the best position to fulfill that responsibility. Implicitly, the U.N. will be most successful in fulfilling its responsibility to protect when it has secured cooperation of the state’s government.

Viewing the current political, military, and diplomatic situation involving Darfur in light of the R2P framework, government consent before deployment is arguably more in line with R2P than immediate intervention. The conflict in Darfur is complicated, involving fighting amongst numerous armed groups, several of whom are perpetrating crimes against humanity. The situation is such that a U.N.-backed force would probably be necessary to stop the violence, even if the government honored the ceasefire. Securing the Sudanese government’s consent before deploying an international force in Darfur avoids the potentially catastrophic prospect of blue helmets engaged in combat with the Sudanese Armed Forces. Accordingly, securing the consent of the government will allow the peacekeeping force to carry out its mandate more effectively. Finally, seeking consent before deployment is consistent with the “reasonable prospects” and “proportional means” criteria for R2P interventions, since an intervention in Darfur is more likely to be successful and of a lower intensity if the Sudanese Army is not obstructing the U.N. force.

Providing a modest glimmer of hope for the people of Darfur (and certainly some relief to diplomats and humanitarians), the government of Sudan recently consented to the hybrid deployment au

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115 See ICISS Report, supra note 3.
117 See ICISS Report, supra note 3, at 17.
118 See id.
119 See id. at 17, 37.
120 Human Rights First—About the Crisis, supra note 53.
121 See id. (stating that Janjaweed militia, and not only Sudanese government, are perpetrating crimes against humanity in Darfur).
123 See id.
124 See ICISS Report, supra note 3, at 37.
authorized by the Security Council.\textsuperscript{125} This, however, raises the crucial question of whether the Security Council would be willing to authorize the use of force if the government of Sudan retracts and withholds its consent.\textsuperscript{126} This currently cannot be predicted with any certainty.\textsuperscript{127}

\textbf{Conclusion}

Future implementation of the Responsibility to Protect will not save the hundreds of thousands already killed in Darfur; for them, the international community has already failed. It is now crucial that this does not lead to the collapse of R2P.

The fact that the international community has not yet stopped the violence against civilians in Darfur is evidence that \textit{realpolitik} considerations, lack of political will, and limited military capacity may continue to be the most substantial obstacles facing further implementation and enhancement of R2P. Nonetheless, Security Council resolutions show that the U.N. is implementing R2P to a certain extent. By calling for an international military force to end the violence in Darfur in resolutions that explicitly invoke R2P, the Security Council is adding further credence to the principle’s legal weight. If a trend develops, either in the case of Darfur or generally, then a new rule of “binding” international law to this effect may eventually come to fruition. Because the spirit and letter of R2P require that the U.N. work with state governments toward its implementation, seeking Sudan’s consent does not represent a shirking of the U.N.’s responsibility to protect. With consent given, the biggest test will be whether UNAMID becomes operational and fulfills its mandate.

The international reaction to Darfur may be too little too late, justifying much of the abundant criticism. Nonetheless, this should not blind scholars to the slow but discernable emergence of an international endorsement of a responsibility to protect populations from the world’s worst crimes.

\textsuperscript{125} See Apiku, \textit{supra} note 69.

\textsuperscript{126} See O’Neill, \textit{supra} note 92, at 9.

\textsuperscript{127} See, \textit{e.g.}, \textit{id.} (advocating that the Security Council send international troops to Darfur even without the Sudanese government’s consent, implying that the likelihood is uncertain).
ONE LAW TO CONTROL THEM ALL:  
INTERNATIONAL MERGER ANALYSIS IN 
THE WAKE OF GE/HONEYWELL

Kyle Robertson*

Abstract: The proposed merger of General Electric and Honeywell International, two U.S. owned and operated companies, was blocked on an international level by the European Commission even after its domestic approval. Despite the closeness of U.S. and EU antitrust laws, regulators in both countries reached opposite conclusions regarding the effects of the merger. This case highlights the complexities of international merger analysis in the absence of a global competition policy and the dangers that inherently exist in the current regulatory landscape. This has made it clear that countries with restrictive merger guidelines can become the gatekeepers for large scale international mergers. Specifically, China has recently enacted antitrust legislation that may grant them the power of ultimate decision in mergers that cross their boundaries, even if Chinese involvement is only a small component of the overall merger.

INTRODUCTION

On July 3, 2001, the European Commission (Commission) blocked a proposed merger between General Electric (GE) and Honeywell International, two U.S. owned and operated corporations.¹ GE/Honeywell was the first U.S. based merger cleared by the United States and prohibited by the European Union (EU).² Despite the striking similarities between U.S. and EU antitrust laws,³ the initial prohibition of the merger was upheld on appeal by the European Court of First Instance

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¹ See Case T–210/01, Gen. Elec. Co. v. Comm’n, 2005 ECR II-5575. The European Court of First Instance also announced a judgment in a separate Honeywell appeal (Case T-209/01), which was dismissed largely on technical grounds. George Stephanov Georgiev, Bridging the Divide? The European Court of First Instance Judgment in GE/Honeywell, 31 Yale J. Int’l L. 518, 518 (2006).


This decision was based on aspects of the merger that were considered potentially pro-competitive by U.S. authorities, but viewed as monopolistic by the European court. The net effect of the EU decision was that GE and Honeywell were prevented from merging in both the United States and in the European Union, highlighting the economic pitfalls that can result from even slight differences in States’ competition policies.

This Note provides an overview of the differing merger analyses performed within the United States and the European Union in regards to the GE/Honeywell case, with particular attention to how divergent findings can occur in states with such similar competition laws. It next considers how other major economic players, such as China, are currently developing their competition policies, and how such policies may affect U.S. corporations domestically and abroad. Lastly, this Note analyzes the hypothetical dangers that surround a State’s ability to enact strict antitrust regulations in an effort to become the baseline regulator of international mergers. Given these concerns, the best solution to such a “hold-up” scenario may be extensive development of global competition policy facilitated through the World Trade Organization (WTO).

I. Background

There is no global agreement on competition policy with regard to merger analysis, leaving states to regulate their own economies through individualized antitrust regulations. Because a multinational corporation is subject to the laws of every state in which it operates, a multinational merger is subject to an analysis by the regulating authorities in each state in which it will be conducted. These merger analyses are

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4 See Fox, supra note 2. The appellate judgment upheld the prohibition of the merger in several respects, which brought EU competition analysis closer to that of the United States. See Georgiev, supra note 1, at 520.
5 See Fox, supra note 2. The merger of GE and Honeywell had the potential to allow for bundled combinations of their products, at potentially lowered prices. The U.S. approach viewed the merged entities’ economic incentive to reduce prices as favorable and pro-competitive. Alternatively, the European Union took a different stance and determined that the lowered prices that may have resulted from strategic behavior were not considered efficiencies, but instead were anticompetitive. See Donna E. Patterson & Carl Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons, 1 (Nov. 12, 2001), http://faculty.haas.berkeley.edu/shapiro/divergence.pdf.
7 See Fox, supra note 2; Drozdiak, supra note 6.
8 See Harbour, supra note 3, at 4.
9 See Drozdiak, supra note 6.
conducted independently within each state, in accordance with their own unique concerns, policies, and laws.\textsuperscript{10} There is no obligation of deference to the antitrust decision of another state regarding the same merger, even if that State is the home of one or both corporations.\textsuperscript{11} When one state determines that the proposed merger would be anti-competitive and potentially pose an economic detriment to its own market, the effect of this decision stretches beyond its jurisdiction and will preclude the merger globally.\textsuperscript{12}

A. Transatlantic Divergence: GE/Honeywell

The proposed merger between GE and Honeywell is a prominent example of the divergent routes a merger analysis may take in different states.\textsuperscript{13} Despite numerous cases of transatlantic cooperation during merger analyses, the United States and the European Union rendered contradictory evaluations.\textsuperscript{14} The facts surrounding the corporations’ roles in their respective markets led the United States and the European Union to differing interpretations in their competition analyses.\textsuperscript{15} GE was the primary manufacturer of engines for large commercial aircraft, and Honeywell was a leading supplier of certain equipment used in jet aircraft.\textsuperscript{16} One of the products Honeywell supplied was jet engine starters, a necessary component for commercial jet engine manufacturers such as GE.\textsuperscript{17} Furthermore, GE Capital’s leasing subsidiary was the world’s largest purchaser of airplanes.\textsuperscript{18} This subsidiary had a policy of buying only airplanes that were fitted with GE engines.\textsuperscript{19}

The U.S. Department of Justice (DOJ) looked at these facts and found none of the problems that the CFI considered serious enough to prohibit the merger.\textsuperscript{20} The CFI upheld the prohibition in part by considering its potential to facilitate leveraging and package discount-

\textsuperscript{10} See Harbour, supra note 3, at 4.
\textsuperscript{11} See Fox, supra note 2, at 80.
\textsuperscript{12} See Drozdiak, supra note 6.
\textsuperscript{13} See Georgiev, supra note 1.
\textsuperscript{14} See id.
\textsuperscript{15} See Fox, supra note 2, at 78.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} William Kolasky, GE/Honeywell: Narrowing, but Not Closing, the Gap, 20 SPG ANTITRUST 69, 71 (2006).
ing. The DOJ approved the GE/Honeywell merger, dismissing fears of competitive harm that would form the basis of the EU decision. In fact, the DOJ viewed these effects of package discounting and reduced pricing to be efficient and competitive. In a major divergence, the facts concerning GE’s classification as “market dominant” in the European Union did not support a similar finding in the United States. Although the statutory language for classification as “market dominant” is strikingly similar between these states, the differing interpretations and applications highlight the separation between regulation in theory and in practice. The EU decision prohibited the GE/Honeywell merger both in the European Union and in the United States, which is particularly disturbing when considering the closeness of their antitrust regulations in an international context.

B. Developing Antitrust Regulations Worldwide

Despite the absence of definitive international antitrust regulations, there exists a network of cooperative agreements that touch on important aspects of competition policy. These agreements tend to focus on restrictive business practices that are considered harmful to international trade. Some WTO agreements, in particular the General Agreement on Tariffs and Trade (GATT), have possible applications to anti-competitive business practices. Unfortunately, significant drawbacks in using these provisions as an alternative to a framework agreement by the WTO have limited their applicability as a

22 See Fox, supra note 2, at 78.
23 See id.; Georgiev, supra note 1, at 519.
24 See Fox, supra note 2, at 79.
25 See infra Part II.A.
26 See Kolasky, supra note 20, at 72; Patterson & Shapiro, supra note 5, at 7; infra Part II.A.
27 See infra Part II.A. The standards of merger review in the European Union were changed after the decision in GE/Honeywell to bring them in line with the merger review standards in the U.S. Clayton Act. Harbour, supra note 3, at 8.
29 Id.
30 Id.
global competition policy. Most notably, attempts to apply the GATT in such a manner have forced the WTO to judge the acceptability of states’ individual competition laws, ultimately leading to failed applications. Further, none of these agreements offer guidelines or procedures for analyzing a merger or its effects on competition. Therefore, the responsibility for regulation of competition policy has ultimately been left to individual states.

Unlike the United States and the European Union, which have established antitrust regimes, many states lack full-scale competition policies. Often, these states rely on scattered laws, regulations, and provisional rules to provide interim antitrust regulation. China is one such state that employed provisional measures while attempting to bring its full-scale Anti-Monopoly Law into effect. China’s interim framework for antitrust regulation, known as the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Provisional Rules), added important sections as recently as 2003. The full-scale Anti-Monopoly Law entered the drafting stages in 1994, with the hope of becoming the official competition policy of China by the end of 2006. The Anti-Monopoly Law came into effect in September of 2006, but has yet to be thoroughly tested as compared to the Provisional Rules.

31 Id.
32 Id.
33 See Woolcook, supra note 32, § 3.0.
34 See Harbour, supra note 3, at 4.
36 See id.
38 Schaeffer et al., supra note 35, at 166.
39 Patrick M. Norton & Howard Chao, Mergers and Acquisitions in China 1, 2 (2003) (on file with author).
40 Schaeffer et al., supra note 35, at 167.
II. Discussion

A. U.S. and EU Domestic Antitrust Policies

In the absence of a global competition policy, individual states set their own standards for merger review.42 In the United States, the primary statutory basis for antitrust regulation is the Sherman Antitrust Act.43 Since its inception, U.S. courts have routinely interpreted and applied the Act, resulting in settled applications of its principles.44 Under U.S. law, monopoly power is defined as “the power to control prices or exclude competition.”45 In applying this definition, case law indicates that although a ninety percent market share is sufficient to give a firm monopoly power, “[I]t is doubtful whether sixty or sixty-four percent would be enough.”46

In analyzing a prospective merger, the U.S. process focuses on law enforcement and emphasizes “such concepts as independence of the decision maker from the investigative process, knowledge of and an opportunity to rebut the evidence arrayed against the transaction, burdens of proof, and the weight to be given to specific types of evidence and economic theories.”47 The DOJ enters into a dialogue with the merging entities during the investigative process, giving them opportunities to respond to concerns and allegations.48 Finally, the DOJ must obtain an order from an independent judicial authority prior to blocking a transaction.49

The European Union has developed a similar definition of “market dominance” under its relevant antitrust regulation, article 82.50 EU law defines dominance as “a position of economic strength which enables [an undertaking] to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers, and, ultimately, consumers.”51 EU case law applies a less stringent require-

42 See Harbour, supra note 3, at 4.
45 Grinnell, 384 U.S. at 571.
46 ALCOA, 148 F.2d at 424; Kolasky, supra note 20, at 72.
47 Patterson & Shapiro, supra note 5, at 9.
48 See id.
49 Id. at 11.
50 See Kolasky, supra note 20, at 71–72.
51 Id.
ment for percentage share of the market to classify as dominant, with a 52 percent share, as held by GE, being considered enough to behave “independently of its competitors, customers, and ultimately, consumers.”

The EU procedure for evaluating a merger focuses on regulation and, in theory, includes some of the same checks and balances as the U.S. system. The standard of proof is, however, much lower in practice. This allowed the Commission to block the merger because, on examining a “balance of probabilities,” it was more likely than not to be anti-competitive. In such situations, the Commission is able to enjoin the merger without seeking court approval or bearing the burden of convincing an independent judiciary that the transaction would in fact be anticompetitive. The Commission’s centralized power to investigate and adjudicate is, in application, quite different from the distributed nature of duties in the U.S. system.

B. Similar Theories Can Yield Dissimilar Applications

At its core, the divergence exposed in the GE/Honeywell merger appears to be rooted in fundamental substantive and economic doctrinal differences. These differences surfaced in the interpretations extracted from very similar regulatory language. In particular, GE/Honeywell makes clear that EU regulators will invoke “portfolio effects theory” to block deals that they fear will cause leading firms to become even more effective competitors. In contrast, in the United

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52 Id. at 72.
53 Patterson & Shapiro, supra note 5, at 9.
54 See Georgiev, supra note 1, at 519.
55 Id. at 520.
56 See id. at 519–20.
57 See id. at 520.
58 Patterson & Shapiro, supra note 5, at 1.
59 See Kolasky, supra note 20, at 71.
60 The “portfolio effects” theory, also known as the “portfolio power” or “range effects” theory, was first introduced by the Commission in 1996–97. By this time, authorities in the United States had already rejected this theory as economically unsound. The anti-competitive likelihood of portfolio effects is based on the assumption that the combined portfolio of products enjoyed by a merged entity allows them to impose exclusive contracts on retailers or to force retailers to buy complete lines of products. This portfolio could be used to impose brands that a retailer would otherwise not be willing to buy, or allow a complete range of products to take up more space on retail shelves in order to limit space available to competitors. See Thibaud Verge, Portfolio Effects and Merger Control: Full-line Forcing as an Entry-Deterrence Strategy 2 (Univ. of Southampton CMPO Working Paper, No. 02/046, Oct. 2003), available at http://www.bris.ac.uk/cmpo/workingpapers/wp46.pdf (last visited Jan. 25, 2008).
States, lower prices resulting from mergers are welcome, even when they are predicted to cause leading firms to gain market share.\textsuperscript{61} Although the substantive basis for the analysis of the merger was similar, the procedures in place in the EU greatly contributed to the ability of the Commission to block the merger on the grounds of dubious economic theory and a weak evidentiary basis.\textsuperscript{62}

The theoretical differences underlying U.S. and EU antitrust regimes percolated to the surface through the procedures used in the GE/Honeywell analysis.\textsuperscript{63} The EU decision rested firmly on the belief that GE enjoyed a dominant position in the market for jet engines, and the European Union used a very different mode of analysis than the United States in reaching this conclusion.\textsuperscript{64} In the United States, the DOJ and the Federal Trade Commission followed a generally accepted set of economic inquiries\textsuperscript{65} in assessing a firm’s competitive strength in a market.\textsuperscript{66} Instead of following such a procedural analysis, the European Union assessed GE as dominant due to GE’s recent acquisition of more bidding orders than its competitors, despite the aggressiveness of bidding in the market.\textsuperscript{67} This ad hoc analysis of GE’s market strength allowed the European Union to find dominance in a bidding market that necessitated such aggressive bidding.\textsuperscript{68} “In contrast, in the United States, dominance would be found in bidding markets when rivals were unable to offer credible, attractive alternatives so that the firm in question was not forced to compete aggres-

\begin{itemize}
\item \textsuperscript{61}Patterson & Shapiro, \textit{supra} note 5, at 1.
\item \textsuperscript{62}Id. at 2.
\item \textsuperscript{63}See id. at 9.
\item \textsuperscript{64}Id. at 5.
\item \textsuperscript{65}This economic inquiry depends greatly on the frequency of bidding events in the market, as evaluation of competition in a market with dozens of bidding events per year is quite different from evaluation in a market with one major event every few years. To determine if a supplier has a clear advantage in a bidding market, economists ask a series of questions. The typical questions posed are:
\begin{enumerate}
\item Do multiple suppliers typically enter the bidding competition? (2) Do customers consider these suppliers capable of offering good alternatives? (3) Have suppliers historically preserved their strengths and capabilities despite setbacks? (4) Is bidding vigorous? Are there multiple rounds of bidding in which the bids move significantly? Do suppliers offer major concessions to win the bidding? (5) Have multiple suppliers shown the ability actually to win bids with regularity? and (6) Are multiple suppliers positioned technically to remain capable and attractive for upcoming bidding events?
\end{enumerate}
\item \textsuperscript{66}See Patterson & Shapiro, \textit{supra} note 5, at 6.
\item \textsuperscript{67}Id.
\item \textsuperscript{68}See id. at 7.
\end{itemize}
sively to win.” Of these differing approaches to evaluating GE’s market dominance, it is the U.S. approach that is considered to be grounded in solid economics. Thus, despite theoretical similarities, “[I]n practice [the Commission] was able unilaterally to block the GE/Honeywell merger based on dubious and controversial policy grounds, demonstrably erroneous economic theory, and speculation contrary to the weight of the evidence.”

C. Chinese Antitrust Regulations: Concerns Regarding Mergers

Even established antitrust regimes can have difficulty in consistently analyzing mergers, and the consistency of application is only worsened under more primitive competition policies. The practice of antitrust merger review in China under the Provisional Rules, and potentially under its successor Anti-Monopoly Law, is generally perceived as rudimentary. A particularly important section of the Provisional Rules extended the Chinese government’s power to regulate not only domestic mergers, but also proposed offshore mergers subject to specific conditions. The term “offshore merger” is left undefined in the Provisional Rules, as are many other important aspects, theoretically expanding China’s jurisdiction to include offshore transactions where the merger itself bears no relation to China.

Additionally, the definition of market dominance, a key concept in the GE/Honeywell merger, was also left undefined in the Provisional Rules. Theoretically, the inference of market dominance should be determined by an economic analysis, including market share in the relevant market, substitutionability of relevant products, and applicable barriers to entry into that specific market. Yet, the Provisional Rules merely stipulate that mergers and acquisitions may not “result in excessive concentration and exclusion or restriction of competition and may not disturb the social or economic order or

69 Id.
70 Id.; see Kolasky, supra note 20, at 72.
71 Patterson & Shapiro, supra note 5, at 9.
72 See id.
73 Schaeffer et al., supra note 35, at 166.
74 Id. at 166–67.
75 Id. at 167.
76 Id.
77 See id.
harm public interests.”78 The current Anti-Monopoly Law does not clarify these ambiguities surrounding merger review.79

Another problem results from the Anti-Monopoly Law’s absence of any details outlining procedures for competition review, including a lack of information on how foreign corporations may answer the concerns of Chinese regulators.80 Chinese markets have experienced dramatic growth recently, making them a hot target for potential acquisitions.81 Although the market seems welcoming to mergers and restructuring, the legal implications are significant.82 State ownership and control of many large sectors of the economy inject both political and social issues into transactions.83 Many of the Anti-Monopoly Law’s interpretations and subsequent applications remain untested, making China a continually challenging and unpredictable market for merger analysis.84 Such ambiguities in the Anti-Monopoly Law allow for the defining of market aspects by regulators, giving rise to the potential for “undesirable and excessive government intervention on antitrust grounds, even where no genuine competitive issue exists.”85 The fundamental concern emanating from developing antitrust regimes such as China is underscored by GE/Honeywell: if two statutorily similar antitrust regimes can reach diametrically opposed conclusions based on theoretically similar underpinnings, what is to be inferred from an antitrust regime that leaves defining core competition terms to the whim of the government’s statutory interpretation?86

D. A Global “Hold-Up” Situation

A multinational corporation is subject to the laws of every state in which it operates.87 Thus, particularly troublesome situations may arise in the event of international mergers.88 When individual states analyze mergers subject only to their own policies and regulations, and the prohibition of a merger by any one state can block the transaction globally, corporations become effectively bound by the strictest anti-

78 New Chinese Merger, supra note 37, at 1.
79 See Schaeffer et al., supra note 35.
80 See New Chinese Merger, supra note 37, at 2.
81 See Norton & Chao, supra note 39, at 1.
82 See id.
83 Id.
84 See id.
85 Schaeffer et al., supra note 35, at 167.
86 See Fox, supra note 2, at 80; Harbour, supra note 3, at 4.
87 See Drozdiak, supra note 6.
88 See id.
trust regime to which they are subject. In recognizing this, a state could theoretically obtain exclusive power over regulating international mergers by enacting unnecessarily restrictive or artificially ambiguous competition policies regarding merger analysis. This possibility would create, in effect, a “hold-up” situation forcing a corporation to choose between forsaking a merger, paying a potentially extortionate fine, or ceasing operation within the state altogether.

The possibility of such a scenario could create large incentives for states to artificially interpret their antitrust regulations or to enact ever more restrictive competition policies. This incentive is derived from the ability to control the global arena for mergers, the ability to generate revenue from merger prohibiting fines, and the ability to protect a state’s own businesses via regulatory attacks on foreign corporations operating domestically. This ability to regulate international mergers may grant a state the ability to dictate the growth strategies of U.S. corporations both at home and abroad. The real dangers posed by this problem are exemplified by GE/Honeywell, which painfully demonstrated the potential problems that can occur with even the most similar of competition policies and cooperating regulatory authorities.

III. Analysis

It is generally in the best interest of all states that restrictions on global mergers not become yet another tool of international economic diplomacy. If there were no costs, there would likely be unwavering support for WTO-sponsored antitrust policies, especially in light of such an international merger bottleneck. Unfortunately, the costs of an international competition policy are not negligible: concerns exist regarding a bevy of issues such as transparency, existing regimes, and developing nations. Even given these costs, “It is not so much a question of whether but what type of coverage there should be of competition in the WTO.” With this in mind, support for fur-

89 See id.
90 See Woolcock, supra note 28, at 9.
91 See id.
92 See id.
93 See id.
94 See id.
95 See Harbour, supra note 3, at 8.
96 See Georgiev, supra note 1, at 523.
97 See Woolcock, supra note 28.
98 See id.
99 Id.
thering the regulatory strength of the WTO in regard to international mergers must be weighed against the drawbacks.\textsuperscript{100}

Although \textit{GE/Honeywell} illustrated the potential threat of global merger restriction, there is no concrete evidence that national competition policies or pre-existing agreements, such as the GATT, cannot cope with international markets and mergers.\textsuperscript{101} Additionally, different states have differing needs, depending on their level of development and particular idiosyncrasies.\textsuperscript{102} Countries that have already developed their antitrust policies will also be unlikely to simply cede their sovereignty to an international entity.\textsuperscript{103} Finally, a strong rationale underlies claims that the WTO should cover trade issues only, and that merger regulation may fall outside its purview.\textsuperscript{104} Given these substantial criticisms, it seems that a comprehensive antitrust framework inside the WTO would face a long and potentially futile battle.\textsuperscript{105}

In light of these concerns, perhaps a thorough competition policy is outside the reach of the WTO, at least in the foreseeable future.\textsuperscript{106} As more states finalize their antitrust regulations, they become less amenable to ceding power to an international regulator.\textsuperscript{107} Given the only worsening problem of inconsistent merger review between states and the efficiencies gained through formulating international antitrust policies before each state finalizes their own regimes, it behooves the WTO to take immediate action.\textsuperscript{108} The WTO should attempt to overcome the criticisms blocking international merger regulation; this would grant corporations, and thereby consumers, the benefits resulting from an environment of global economic stability and uniformity.\textsuperscript{109}

The solution to \textit{GE/Honeywell} and the global “hold-up” situation of merger preclusion may not be found in developing substantive antitrust regulations at all.\textsuperscript{110} At the core of \textit{GE/Honeywell}, despite all of the similarities, lay theoretical differences on how to promote economic

\textsuperscript{100} See \textit{id}.
\textsuperscript{101} See \textit{id}.
\textsuperscript{102} See Woolcock, \textit{supra} note 28, at 6.
\textsuperscript{103} See \textit{id}.
\textsuperscript{104} See \textit{id}.
\textsuperscript{105} See \textit{id}.
\textsuperscript{106} See \textit{id}.
\textsuperscript{107} See Woolcock, \textit{supra} note 28, at 6.
\textsuperscript{108} See \textit{id}.
\textsuperscript{109} See \textit{id}.
\textsuperscript{110} See Patterson & Shapiro, \textit{supra} note 5, at 10.
efficiency.\textsuperscript{111} It seems unlikely that a large majority of states could agree on the theoretical basis for such regulation, let alone the actual language of the policies themselves.\textsuperscript{112} What then is left for an international antitrust framework when the criticisms against such regulations seem so valid?\textsuperscript{113} An approach focusing simply on the procedural analysis of mergers, while eschewing any global substantive requirements, is one possibility.\textsuperscript{114}

Differences in procedure, ranging from corporate-regulator interaction to the application of market dominance theories, were a key source of the differences in GE/Honeywell.\textsuperscript{115} Further, despite strong attempts between U.S. and EU regulators, voluntary cooperation has been shown to be inadequate in dealing with policy differences in merger analysis.\textsuperscript{116} To solve these inadequacies, the procedural analysis of corporate mergers might best be facilitated via a WTO-regulation committee.\textsuperscript{117} Such a committee would ideally consist of representatives from each state directly impacted by the proposed merger, chaired by a permanently appointed official.\textsuperscript{118} This procedural framework could be adapted from states with settled antitrust regimes, hopefully blending the most desirable aspects from each.\textsuperscript{119} To hasten the development and implementation of such a procedural review committee, no attempt at developing a substantive body of antitrust law should be made.\textsuperscript{120} Instead, the substantive regulations to be applied could be analogized to a traditional conflict of laws problem, substituting the applicable states for adversarial parties.\textsuperscript{121}

The importance of procedure was immediately recognized following GE/Honeywell, as the European Union pushed through changes to their merger analysis procedure in an attempt to bring it

\textsuperscript{111} See id.
\textsuperscript{112} See Woolcock, supra note 28, at 9.
\textsuperscript{113} See id.
\textsuperscript{114} See Fox, supra note 2, at 77; Patterson & Shapiro, supra note 5, at 10.
\textsuperscript{115} See Patterson & Shapiro, supra note 5, at 2.
\textsuperscript{116} See Woolcock, supra note 28, at 9.
\textsuperscript{117} See id.
\textsuperscript{118} See generally Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 25, 2008) (discussing principles and procedures for dispute resolution) [hereinafter Understanding the WTO].
\textsuperscript{119} See Woolcock, supra note 28, at 9. See generally Understanding the WTO, supra note 118 (discussing the WTO’s principles and procedures for dispute resolution).
\textsuperscript{120} See Woolcock, supra note 28, at 9. See generally Understanding the WTO, supra note 118 (discussing the WTO’s principles and procedures for dispute resolution).
into conformity with U.S. practices. Such advancements included alterations to the evidentiary standards necessary for determining the market dominance of a corporation, modernizing the actual enforcement of EU antitrust regulations and introducing stronger procedural guarantees and legal certainty.

Similar gains in legal certainty and global uniformity can be gained through basic procedural developments by the WTO. Such a procedural framework would side-step many of the strong criticisms facing substantive antitrust policies, and could remedy the difficulties arising from the patchwork of multi-lateral agreements that include elements of competition policy. Continued usage of such multi-party agreements does not alleviate the problems raised through the development of state-centric competition policies. Instead, filling the vacuum left in the absence of a WTO competition policy with multi-party agreements only bolsters conflict between national policies and competing multi-party agreements. The effect of these conflicts is exhibited by the mounting costs of compliance for multinational corporations.

Most importantly, procedural regulations for merger analysis are an obtainable goal for the WTO, whereas substantive regulatory measures seem much less likely to succeed. There is a growing variance in national policies regarding merger analysis, with many states using merger policy as an instrument in national economic strategy. States, such as China, may develop competition policies that allow for strategic blocking of foreign mergers in order to protect governmental interests in certain sensitive or strategic sectors populated by State-controlled enterprises. Procedural regulations will, at a minimum, prevent the dangers resulting from such a “hold-up” scenario. Ideally, results from such a procedural framework would allow for global legal certainty regarding merger analysis, ease tensions related to globalization, increase corporate planning, and eventually promote

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122 See Georgiev, supra note 1, at 522.
123 Id.
124 See id.; Woolcock, supra note 28, at 6.
125 See Woolcock, supra note 28, at 6.
126 See id.
127 See id.
128 Id.
129 See id.
130 See Woolcock, supra note 28, at 9.
131 See id.
132 See Patterson & Shapiro, supra note 5, at 2.
efficient and lively competition within markets, passing along savings to consumers.¹³³ That is, after all, the main goal sought by both substantive and procedural competition policies.¹³⁴

**Conclusion**

This analysis of the economically and politically damaging results of individualized state merger regulation illustrates the necessity of global antitrust regulations. The differing interpretations of the highly similar U.S. and EU antitrust regulations, as applied in the *GE/Honeywell* case, serve to highlight the dangers that exist in the absence of a global competition policy. The potential for enterprising states to take advantage of potential “hold-up” situations in key markets through cleverly crafted laws and restrictive merger regulation should signal a wake-up call to those resisting attempts at antitrust regulation by the WTO. Procedural regulations should be enacted that give certainty to corporations regarding mergers and efficient business structuring to ultimately benefit consumers in today’s global marketplace.

Japanese Rice Protectionism: A Challenge for the Development of Agricultural Trade Laws

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Abstract: The Japanese government has failed to contribute meaningfully to agricultural trade negotiations. Japan’s extreme negotiation posture primarily stems from a disinclination to make concessions in its domestic rice market. It is also a result of the ability of Japan, and other developed nations, to take advantage of the rule structure outlined by the Agreement on Agriculture. Under current agricultural laws, Japan is able to maintain many domestic measures that provide support for rice farmers while also charging prohibitively high tariffs. Japan’s reluctance to limit its support for domestic rice farmers is based on the premise that rice plays a central role in Japanese culture, and without protection, the industry would collapse. What Japan has failed to realize, however, is that the bases of its arguments have little merit today. Perhaps more importantly, Japanese resistance to agricultural trade reform seriously undermines the legitimacy of the WTO.

Introduction

On July 24, 2006, the World Trade Organization’s (WTO) Director-General, Pascal Lamy, announced that trade negotiations would be suspended primarily because of a failure to reach an agreement on agriculture.¹ The United States and the European Union (EU) are generally attributed much of the blame for the impasse because of their perceived hard-line positions on agricultural protectionism.² This allocation of responsibility is not a surprise considering that the U.S. and EU agendas generally drive the negotiating process for-
ward. Given this situation, it is easy to overlook the fact that Japan has failed to play a positive role in agricultural negotiations because of a reluctance to make concessions in its domestic rice market.

During an interview at the WTO’s round of negotiations in Cancun, Mexico, a western diplomat was quoted as saying, “Japanese rice is seen as an icon of cultural protectionism around the world.” This comment reflects a fundamental frustration in the way that many countries view Japan’s disinclination to reduce its enormous rice support measures. In fact, Japanese rice farmers receive approximately $2.8 billion dollars in domestic government assistance annually. The Japanese government’s intervention, from a global perspective, is “unprecedented in its degree.”

The delicate balance of agricultural protectionism and the WTO’s stated goal to “ensure that trade flows as smoothly, predictably and freely as possible” have coexisted since the creation of the WTO in 1994. In fact, the agreement reached in 1994 is credited with “having taken the first and most important steps forward in the process of integrating agriculture into the mainstream of rules in the international trading system.” The 1994 agreement was certainly not a perfect resolution, and many countries were dissatisfied with its provisions throughout the negotiating process. Perhaps this tension can be explained by the negative political implications of agricultural re-

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6 See id.
10 See Melaku Geboye Desta, Agriculture and the Doha Development Agenda: Any Hopes for Improvement?, in Essays on the Future of the WTO 149, 150 (Kim Van der Borght et al. eds., 2003).
In any event, agriculture remains a vitally important issue in international trade.\textsuperscript{13}

Part I of this Note summarizes the development of agricultural trade agreements and Japan’s reasons for resisting reduction of their current protectionist policies on rice. Part II explores some of the provisions of the 1994 Agreement on Agriculture (AoA), the exceptions Japan has used to avoid its obligations within the AoA, and Japan’s domestic rice policies. Part III focuses on potential revisions to the AoA and offers reasons why Japan should change its current negotiating position.

I. Background

The rules governing the international trading system were originally codified in the 1947 General Agreement on Tariffs and Trade (GATT).\textsuperscript{14} This multilateral treaty sought to create a system that established core principles in international trade.\textsuperscript{15} A series of successive rounds of trade negotiations followed, focusing on the reform of import tariffs and quotas.\textsuperscript{16} These negotiations, however, had limited participation and avoided significant agricultural reform.\textsuperscript{17} The Uruguay Round of negotiations, which lasted from 1986–1994, was the first to adopt a comprehensive set of reform measures in international trade since the inception of the GATT.\textsuperscript{18} Arguably the most important result of this historic event was the Marrakesh agreement creating the WTO.\textsuperscript{19}

The AoA, contained within the Marrakesh agreement, focused on achieving binding commitments in multiple areas, including promoting market access and limiting domestic support.\textsuperscript{20} The combination of market access restrictions and domestic support measures was considered to distort the free trade of agricultural goods.\textsuperscript{21} While rec-

\textsuperscript{12} See Wyn Grant, The Politics of Agricultural Trade, in Agriculture and International Trade Law, Policy and the WTO 49, 49 (Michael Cardwell et al. eds., 2003) [hereinafter Agriculture and International Trade Law].
\textsuperscript{13} See id.
\textsuperscript{14} Jawara & Kwa, supra note 3, at 5.
\textsuperscript{15} See id. at 7.
\textsuperscript{16} See id. at 8.
\textsuperscript{17} See id.
\textsuperscript{18} See id.
\textsuperscript{19} See Jawara & Kwa, supra note 3, at 9.
\textsuperscript{20} See Results, supra note 9, at 39.
\textsuperscript{21} See id.
ognized as a significant step, the conclusion of the AoA was but one stage in the process of trade reform.\(^{22}\)

Although many countries considered the AoA to be a significant accomplishment, developing countries have viewed it as one of the most inequitable agreements in the WTO.\(^{23}\) In effect, the AoA provides preferential treatment for developed countries that use their superior bargaining power to push their own agendas.\(^{24}\) The most developed countries in the world successfully incorporated “loopholes” into the agreement that significantly reduced its potential impact on international trade reform.\(^{25}\) One such loophole is the “green box” measures that allow countries to classify broad swaths of agricultural support as having no trade distorting effects, when they in fact impact trade significantly.\(^{26}\)

In signing the AoA, developed countries were interested in producing a carefully designed agreement that would minimize the number of changes required in their overall agricultural support policies.\(^{27}\) In these developed nations, farmers are highly reliant on subsidies, tariffs, and other support measures.\(^{28}\) Thus, these farm interests lobby vigorously for the maintenance of government support.\(^{29}\) Therefore, loopholes such as the “green box” measures allow developed countries to satisfy their agricultural industry while appearing to support global trade.\(^{30}\)

On the other hand, developing nations were primarily concerned with fair competition that allows them to gain access to developed countries’ markets, and prevent cheaper subsidized goods from entering their own countries.\(^{31}\) Under the current system, farmers in developing nations “cannot compete and go out of business” with the influx of foreign goods, often destroying overall agricultural production.\(^{32}\) In particular, agricultural subsidies in developed countries lead to overproduction of certain agricultural goods on the world market, thereby


\(^{24}\) See id. at 50.

\(^{25}\) Id. at 27.

\(^{26}\) See id.

\(^{27}\) See id.

\(^{28}\) See Grant, *supra* note 12, at 49.

\(^{29}\) Id. at 50.

\(^{30}\) See id.

\(^{31}\) See Jawara & Kwa, *supra* note 3, at 29.

\(^{32}\) See id.
depressing prices.\textsuperscript{33} Thus, given this situation, developing nations were in favor of eliminating subsidies and promoting market access.\textsuperscript{34}

The most recent round of multilateral negotiations began in Doha, Qatar in 2001 with a comprehensive set of goals.\textsuperscript{35} To date, no agreement has been reached because of a stark contrast in the positions of the participants.\textsuperscript{36} Most developing countries came to the negotiating table unwilling to support further agricultural trade reform, but preferred to focus on implementation of issues from the previous round.\textsuperscript{37} Developed countries, on the other hand, have continued to cling to arguments relating to food supply, stable farm income, political influence and cultural values to justify giving agriculture special treatment.\textsuperscript{38} Two of these arguments have particular significance in the case of Japanese rice: (1) culture and (2) self-sufficiency.

A. Culture

Domestically produced rice has occupied a central place in Japanese culture for centuries.\textsuperscript{39} Although rice might not be considered “the staple food” of the Japanese diet since its introduction to Japan, it has maintained crucial symbolic significance.\textsuperscript{40} Of all grains, rice alone was believed to have a soul and it alone required ritual performances.\textsuperscript{41} Core imperial rituals in ancient Japan were officiated by the emperor and all related to rice harvesting.\textsuperscript{42} In addition, rice has had significance in issues of wealth, power, and aesthetics.\textsuperscript{43} Most citizens in contemporary Japan would not claim that rice has a soul or is a deity, but its significance in Japanese history is still recognized.\textsuperscript{44} A statement made by a Japanese agricultural union embodied this belief: “[r]ice farming in Japan, with a history of 2300 years behind it, has greatly influenced all areas of national life, including social order

\textsuperscript{33} See id. at 27.  
\textsuperscript{34} See id.  
\textsuperscript{35} See Thacker, supra note 2, at 722.  
\textsuperscript{36} See Jawara & Kwa, supra note 3, at 53–56.  
\textsuperscript{37} See id. at 54.  
\textsuperscript{38} Margaret Rosso Grossman, The Uruguay Round Agreement on Agriculture and Domestic Support, in Agriculture and International Trade Law, supra note 12, 27, 29.  
\textsuperscript{39} See Ohnuki-Tierney, supra note 8, at 109.  
\textsuperscript{40} See id. at 4.  
\textsuperscript{41} Id. at 44.  
\textsuperscript{42} See id. at 46.  
\textsuperscript{43} See id. at 63.  
\textsuperscript{44} See Ohnuki-Tierney, supra note 8, at 108.
[and] religious worship . . . thus molding the prototype of Japanese culture.”

Japanese citizens insist that locally grown short-grain rice is superior to the long-grain version grown in places such as California and Southeast Asia. Many Japanese cite the widespread use of chemicals and pesticides as evidence of the impurity of California rice. Thus, there has traditionally been a great deal of domestic tolerance for the artificially high price of rice within Japan. As one commentator has noted, “Despite the massive transfer of funds from consumer to rice producer, there has not been a serious consumer movement in Japan to force the removal of rice subsidies.”

B. Self-Sufficiency

Japanese statesmen have consistently advanced the argument that rice protectionist measures are necessary to ensure that Japan can feed its own population. A prevailing view is that Japan should remain self-sufficient in the production of rice because it plays such an important role in the Japanese diet. The Japanese also emphasize the necessity of rice subsidies by claiming that their domestic rice industry is on the verge of collapsing in spite of governmental support. Japan’s shrinking rural population and aging farmers exacerbate the problem. In contemporary Japan, the older generation farms rice part-time while the younger generation primarily works in Japanese cities.

Japan has asserted that food security is one of the most serious concerns among Japanese consumers because it is the largest net-importer of food in the world. Given this situation, Japan claims,

45 See id. at 109.
46 See id. at 110. Japonica rice, or short grain type, has shorter, rounder, more translucent grains than long-grain rice and becomes sticky when cooked. See id. at 13.
47 See id. at 110.
48 See id. at 22.
51 Gordon, supra note 49, at 951.
53 See OHNUKI-TIERNEY, supra note 8, at 17.
54 See id.
55 See Negotiating Proposal, supra note 50.
“[W]e should gain as much food as possible that one can produce in one’s country, giving thanks to the blessing of the earth.”\textsuperscript{56} Furthermore, Japan has continued to emphasize the importance of securing a stable food supply in their WTO negotiating proposals.\textsuperscript{57}

The weight of this argument has lessened as an influx of foreign dishes has consistently diminished the demand for rice.\textsuperscript{58} In 1990, rice production could have far exceeded consumption if all agricultural land was used for rice cultivation.\textsuperscript{59}

\textbf{II. Discussion}

The AoA embodied the culmination of years of arduous negotiations between multiple countries.\textsuperscript{60} Despite its perceived shortcomings, the AoA established a comprehensive legal framework to promote the liberalization\textsuperscript{61} of agricultural trade.\textsuperscript{62} The AoA begins by stating, “[The parties’] long-term objective . . . is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support . . . .”\textsuperscript{63} In order to achieve this objective, members agreed to binding commitments in market access, export competition, and domestic support.\textsuperscript{64} These commitments were not absolute and took into consideration non-trade concerns such as food security and environmental protection.\textsuperscript{65} In addition, members recognized “that trade reform was an ongoing process” and agreed that negotiations for continued agricultural reform would begin in 2000.\textsuperscript{66}

The scope of the AoA was unique in that it recognized domestic policies should be regulated in addition to policies governing international trade such as tariffs and quotas.\textsuperscript{67} The members signing the agreement were aware that domestic agricultural policies are closely

\begin{itemize}
  \item \textsuperscript{57}See Negotiating Proposal, supra note 50.
  \item \textsuperscript{58}See Ohnuki-Tierney, supra note 8, at 16.
  \item \textsuperscript{59}See id.
  \item \textsuperscript{60}See Rodgers & Cardwell, supra note 22, at 3.
  \item \textsuperscript{61}Results, supra note 9. The concept of liberalization refers to reductions in domestic subsidies and protectionist measures such as tariffs in order to create a system that conforms more closely with market forces. See Grossman, supra note 38, at 30.
  \item \textsuperscript{62}See Rodgers & Cardwell, supra note 22, at 1.
  \item \textsuperscript{63}Results, supra note 9, at 39.
  \item \textsuperscript{64}Id.
  \item \textsuperscript{65}Grossman, supra note 38, at 30.
  \item \textsuperscript{66}Id. at 31.
  \item \textsuperscript{67}See id. at 33.
\end{itemize}
linked to international trade.\textsuperscript{68} Thus, the AoA covered both border measures and domestic policies.\textsuperscript{69} Border measures refer to the set of policies which are crafted to specifically target trade flows and prices by the use of import quotas and tariffs.\textsuperscript{70} “Domestic support policies include all other agricultural measures within a country that aim to influence farm incomes, resource use, production, consumption, or environmental impacts.”\textsuperscript{71}

Under the AoA, domestic agricultural support is divided into two categories: those that distort trade and those that do not.\textsuperscript{72} By moving domestic agricultural support to categories exempt from reduction, WTO members have successfully met their reduction commitments without actually reducing overall domestic support.\textsuperscript{73}

A. The Agreement on Agriculture: Provisions

The AoA provides different rule structures for different types of domestic agricultural support.\textsuperscript{74} Domestic measures are generally classified within “boxes.”\textsuperscript{75} As described by one scholar, “The ‘amber box’ contains policies that are trade distorting and are subject to reduction; the ‘green box’ contains policies that have a minimal effect on trade; and the ‘blue box’ provides for an exemption for payments that would otherwise fit within the ‘amber box.’”\textsuperscript{76} Amber box support measures are reported within each country’s “Aggregate Measurement of Support” (AMS), which is defined in article (1)(a).\textsuperscript{77} Beginning in 1999, Japan has consistently met its obligation under the AoA by reporting an AMS of zero.\textsuperscript{78} This result is misleading because Japan continues to subsidize its domestic rice market by classifying many support policies

\textsuperscript{68} See id.

\textsuperscript{69} Betina Demaranan et al., \textit{OECD Domestic Support and Developing Countries}, in \textit{THE WTO, DEVELOPING COUNTRIES AND THE DOHA DEVELOPMENT AGENDA} 63, 63 (Basudeb Guha-Kasnobis ed., 2004) [hereinafter \textit{Doha Development Agenda}].

\textsuperscript{70} See Grossman, \textit{supra} note 38, at 33.

\textsuperscript{71} Id. at 33.

\textsuperscript{72} See id. at 34.

\textsuperscript{73} See id. at 33.

\textsuperscript{74} See id. at 34.

\textsuperscript{75} Grossman, \textit{supra} note 38, at 34.

\textsuperscript{76} Id.

\textsuperscript{77} See Results, \textit{supra} note 9, at 40. Aggregate Measurement of Support and “AMS” refer to the annual level of support, expressed in monetary terms, provided for an agricultural product in favor of the producers in general, other that the support provided under the programmes that qualify as exempt from reduction under Annex 2. See id.

\textsuperscript{78} See Rice Sector Policies, \textit{supra} note 7, at 11.
as non-trade distorting “green box” measures. Japan also protects its domestic rice industry by erecting substantial tariff barriers for imported rice contrary to the AoA’s stated objectives.

1. The Green Box

A country may avoid reporting its domestic agricultural support under the AMS by classifying it as a “green box” measure. There are numerous exemptions allowed as long as they meet the requirements of Annex 2 of the agreement. According to Annex 2(1): “[d]omestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at least minimal, trade distorting effects on production.” Under Annex 2, a country may provide domestic subsidies for: food security, domestic food aid, environmental preservation, research, pest control, structural adjustment assistance, and many other reasons. As long as Japan meets the requirements set out in Annex 2, it is free to classify broad swaths of domestic agricultural support as trade-neutral “green box” measures.

One “green box” policy that Japan employs is rice paddy diversion payments. Rice farmers are offered payments if they use their land for purposes other than growing rice. Although Japan’s main purpose in enacting this policy is to reduce supply, it is reported as a “green box” measure based on preservation of the land in an environmentally useful condition. Japan also classifies payments for relief during natural disasters, land consolidation, and interest concessions for agricultural loans as “green box” measures. Although these measures are justified under Annex 2 of the AoA, they serve to subsidize Japanese farmers. This reveals a basic flaw with the “green box” in general: countries are able to continue to manipulate their domes-

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79 See id. at 6.
80 See Results, supra note 9, at 39; WTO on a Sticky Wicket Against Japan’s Rice Bowlers, supra note 5.
81 See Results, supra note 9, at 40.
82 See id. at 56–62.
83 Id. at 56.
84 See id. at 56–62.
85 See Desta, supra, note 10, at 177.
86 See Rice Sector Policies, supra note 7, at 6.
87 See id. at 5, 7.
88 See id. at 7.
89 See id.
90 See id.
tic agriculture market through direct payments and disguised financial transfers.\textsuperscript{91} Furthermore, most economists agree that no domestic support can ever be trade-neutral.\textsuperscript{92}

2. Market Access

The AoA took significant strides in promoting market access by limiting ways that countries can protect their agricultural producers from foreign competition.\textsuperscript{93} According to articles 4, 5 and Annex 5, countries are prohibited from assessing non-tariff barriers to trade in agricultural products.\textsuperscript{94} The AoA requires that member countries convert preexisting non-tariff barriers into tariffs through a process known as “tariffication.”\textsuperscript{95} The AoA then called for tariffs to be reduced by an average of thirty-six percent worldwide during the course of a six year implementation period.\textsuperscript{96} This process was left at the discretion of member nations and many tariffs remain substantial.\textsuperscript{97}

Japan, like other developed countries, has continued to maintain incredibly high tariffs in particular agricultural sectors.\textsuperscript{98} For instance, Japan’s tariffs for rice remain around five times the overall price of rice.\textsuperscript{99} Under the AoA, Japan is required to import a certain amount of foreign rice each year under what is known as the Tariff Rate Quota (TRQ).\textsuperscript{100} In 2001, Japan’s import quota for rice and rice products was 682,000 tons.\textsuperscript{101} Within this quota, rice imports are not subject to tariffs.\textsuperscript{102} Any amount outside of the quota was assessed a tariff of $2819/ton in 2001.\textsuperscript{103} This prohibitively high amount essentially eliminated the possibility that foreign rice would enter the Japanese market.\textsuperscript{104} Furthermore, a large percentage of imported rice within the TRQ is not sold within Japan’s domestic market, as the AoA intended,

\textsuperscript{91} See Rice Sector Policies, supra note 7, at 6.
\textsuperscript{92} See Desta, supra note 10, at 177.
\textsuperscript{93} Id.
\textsuperscript{94} See Results, supra note 9, at 42–45, 65–68.
\textsuperscript{95} See Desta, supra note 10, at 156.
\textsuperscript{96} See id.
\textsuperscript{97} See id.
\textsuperscript{98} See Rice Sector Policies, supra note 7, at 13.
\textsuperscript{99} See WTO on a Sticky Wicket Against Japan’s Rice Bowlers, supra note 5.
\textsuperscript{100} See Rice Sector Policies, supra note 7, at 12.
\textsuperscript{101} See id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} See id.
but is donated as food aid. Thus, Japanese rice farmers are shielded from all foreign competition.

B. Japanese Domestic Laws

The legal foundation for Japan’s domestic agricultural policies was originally codified in the 1961 Basic Law on Food, Agriculture and Rural Areas (Basic Law). The Basic Law specifically sought to promote agricultural productivity and provide income support for Japanese farmers.

The stated objective of the Basic Law is found in article 1: “[t]he objective of this law is to improve people’s lifestyle and to develop the natural economy through comprehensively and systematically implementing policies on food . . . by means of establishing basic principles and basic matters for realizing them . . . .” The Basic Law gives broad authority to the government to manage the Japanese agricultural industry through environmental measures, direct subsidies, and payments during times of emergencies. The driving force behind the Basic Law was to address the substantial difference in income between agriculture and industry. The Japanese government was expected to control agricultural markets in order to guarantee that farmers could make an income similar to those employed in other industries and to provide an incentive for them to remain in the agricultural sector.

Under the new rules set out in the AoA, Japan instituted the Law for Stabilization of Supply-Demand and Price of Staple Food (Staple Food Law). This law still allows the Japanese government to ensure the stabilization of supply, demand, and the price of rice. One major change initiated by the Staple Food Law was the increased deregul-

\[\text{\footnotesize 105 See Rice Sector Policies, supra note 7, at 2–3.}\]
\[\text{\footnotesize 106 See id.}\]
\[\text{\footnotesize 109 See Basic Law, supra note 107.}\]
\[\text{\footnotesize 110 See id.}\]
\[\text{\footnotesize 111 See Moore, supra note 108, at 279.}\]
\[\text{\footnotesize 112 Id.}\]
\[\text{\footnotesize 113 See id. at 287.}\]
\[\text{\footnotesize 114 Id. at 288.}\]
lation of the distribution of rice. The government no longer requires rice farmers to sell their rice directly to the government but allows them in certain cases to sell rice to registered shippers. The Minister of Agriculture determines the government purchase price of rice by taking into account production conditions, commodity prices, and rice sold on the free market. This system allows the Japanese government to partially deregulate the rice market while still guaranteeing that rice farmers receive a fair price.

III. Analysis

Any future changes in the WTO rule structure will necessarily require unanimous agreement of all member nations. This consensus is exceedingly difficult to achieve when there are well over a hundred ministers present at the negotiating table with conflicting interests and agendas. The highly politicized issue of agriculture compounds the problem of consensus-building. Despite these difficulties, Japan’s ability to circumvent its obligations through the “green box” and tariff loopholes is overwhelming evidence of a need for change. In order to address these deficiencies, the loopholes built into the AoA will have to be limited or eliminated. This will require Japan to be more conciliatory in its negotiating position by asserting a willingness to consider reducing its rice protectionist measures.

There are currently no limits on the amount of subsidies that can fall within the “green box.” In fact, between 1986 and 1995, “green box” support measures increased by fifty-four percent worldwide. One commentator notes that various proposals have been presented to amend the “green box” including: (1) abolish the box altogether; (2) place a cap on the amount of money that can be spent within the box; and (3) narrow the scope of the measures covered.
It is unlikely that the box will be eliminated altogether considering that it serves important goals such as improving sustainable agriculture and supporting rural development.\textsuperscript{128} In addition, the European Union and Japan have been opposed to the imposition of a cap on “green box” expenditures.\textsuperscript{129} Thus, as one commentator notes, “[T]he most important issue is whether the exemptions should be tightened.”\textsuperscript{130}

The most logical approach for tightening the “green box” would be to minimize the near exhaustive list of exceptions left to the judgment of individual nations.\textsuperscript{131} For example, Japan pays rice farmers diversion payments when they use part of their land for growing crops other than rice.\textsuperscript{132} These payments are justified by the preservation of Japan’s paddies in an environmentally useful condition.\textsuperscript{133} In effect, this provides Japanese rice farmers with a subsidy while allowing the Japanese government to control the supply of rice.\textsuperscript{134} Thus, the “green box” should be restructured to limit the ability of governments to justify domestic support by resorting to the “green box.”\textsuperscript{135}

Any future changes to the market access provisions of the AoA will be concerned with the extent of tariff reduction and the process used to achieve the reduction targets.\textsuperscript{136} The European Union has recommended a similar approach to that taken in the Uruguay Round of negotiations, which called for a thirty-six percent reduction per tariff.\textsuperscript{137} The United States even went so far as to suggest that the parties set a date for the eventual elimination of all tariffs.\textsuperscript{138} Japan has been much more cautious in its approach.\textsuperscript{139} It has stated that, “[I]t is essential that an appropriate tariff level be determined, considering the situation surrounding each product and the negotiating

\textsuperscript{128} See id.; Grossman, supra note 38, at 41.
\textsuperscript{129} See Grossman, supra note 38, at 43. In a proposal submitted in July of 2002, the United states advocated for significant reforms for “non-exempt support” while leaving the “green box” criteria unchanged. See id.
\textsuperscript{130} See Desta, supra note 10, at 178.
\textsuperscript{131} See Results, supra note 9, at 56–62.
\textsuperscript{132} See Rice Sector Policies, supra note 7, at 7 (explaining how diversion payments are calculated based on several factors including the type of commodity grown).
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
\textsuperscript{136} See Desta, supra note 10, at 157.
\textsuperscript{137} See id. at 158.
\textsuperscript{138} See id.
\textsuperscript{139} See Negotiating Proposal, supra note 50.
history, thereby providing flexibility for each product."\textsuperscript{140} Given this negotiating posture, it is reasonable to infer that Japan is unwilling to allow rice tariffs to become subject to major reduction.\textsuperscript{141}

It is in Japan’s best interest to rethink this strategy by allowing rice to become part of the market access dialogue.\textsuperscript{142} Once Japan abandons the notion that rice is exempt from tariff reduction, it can gradually become integrated into a long term reform process.\textsuperscript{143} One can argue that Japan’s domestic rice producers would be able to survive tariff reductions by carefully considering the initial tariff rates and controlling the speed of their reduction.\textsuperscript{144} The case of Japanese beef is illustrative.\textsuperscript{145} Japanese beef became subject to tarrification as a result of bilateral United States-Japanese negotiations in 1991.\textsuperscript{146} This agreement did not result in rapid importation of beef, as many people fear will happen in the case of rice, but rather beef imports decreased overall compared to previous years.\textsuperscript{147} Additionally, domestic beef production remained stable.\textsuperscript{148} Thus, the process of tarrification of rice, as mandated by the AoA, could have similar results in the case of Japanese rice.\textsuperscript{149}

Notwithstanding the cultural significance of rice in Japanese history, there is evidence to suggest that Japanese consumers are becoming increasingly ambivalent toward its cultural role.\textsuperscript{150} Japan’s formal trade policy appears to presuppose that the Japanese citizenry is starkly opposed to an open market for their rice.\textsuperscript{151} Even before the signing of the original AoA, however, there were indications that Japanese citizens no longer support a hard-line approach toward rice protectionism.\textsuperscript{152} A poll conducted by a major Japanese newspaper in April of 1990, found that public support for partial liberalization of

\begin{itemize}
\item \textsuperscript{140} See id.
\item \textsuperscript{141} See id.
\item \textsuperscript{142} See id.
\item \textsuperscript{143} See id.
\item \textsuperscript{144} See Hayami & Godo, \textit{supra} note 4, at 7.
\item \textsuperscript{145} See id.
\item \textsuperscript{146} See id.
\item \textsuperscript{147} See id. at 5, 7. Over five years that quotas were in effect, beef imports grew at a rate of approximately twenty-percent while the annual growth rate averaged under thirteen-percent during the four years after tarrification. See id. at 7.
\item \textsuperscript{148} See id. at 7.
\item \textsuperscript{149} See Hayami & Godo, \textit{supra} note 4, at 7.
\item \textsuperscript{150} See Gordon, \textit{supra} note 49, at 949.
\item \textsuperscript{151} See Negotiating Proposal, \textit{supra} note 50 (arguing that the international community should respect each country’s values and cultural backgrounds).
\item \textsuperscript{152} See Gordon, \textit{supra} note 49, at 952.
\end{itemize}
the rice market was up to sixty-five percent; while twenty-one percent favored full liberalization, only thirty percent thought Conversely, land titling programs would unlock more capital than can be given in foreign aid, empower the poor, and reinforce democratic participation the rice market should maintain the same level of protection.\(^{153}\)

Japan should also consider that their current position on rice protectionism could imperil agreements on non-agricultural issues.\(^{154}\) Market access of non-agicultural products is often referred to as “the core business” of the WTO, since the original tariff negotiations forming the basis of the GATT were on non-agricultural products.\(^{155}\) Additionally, agriculture has significantly declined as an economic industry in developed countries.\(^{156}\) Thus, with the declining significance of agriculture, and the wide range of non-agricultural issues the WTO addresses, it is difficult to justify the fact that agriculture remains one of the main issues dividing countries.\(^ {157}\) Yet, ironically, the failure to reach an agreement on agriculture has been the main reason for the overall failure of recent WTO negotiations.\(^ {158}\)

Japan can make significant progress in reaching an agreement on their overall trade goals by recognizing that their rice protectionist policies cripple the negotiating process.\(^ {159}\) Indeed, it will be necessary for both the European Union and the United States to offer similar concessions for a new agreement to be successful.\(^ {160}\) Both have presented agricultural proposals that are much more conciliatory than Japan’s.\(^ {161}\) In order for Japan to endorse these proposals, it will have to be both willing to initiate broad reforms in its domestic rice policies and subject imported rice to meaningful tariff reduction.\(^ {162}\)

**Conclusion**

The future legitimacy of the WTO may rest on the ability of the member nations to reach a new agreement on agriculture. Japan’s rice protectionist measures have, in large part, driven it away from the ne-

\(^{153}\) *Id.*

\(^{154}\) *See Negotiating Proposal, supra* note 50.

\(^{155}\) Mark Bacchetta & Bijit Bora, *Industrial Tariffs, LDCs and the Doha Development Agenda, in Doha Development Agenda, supra* note 69, at 161.

\(^{156}\) *Id.* at 49.

\(^{157}\) *See id.* at 49.

\(^{158}\) *See Thacker, supra* note 2, at 722.

\(^{159}\) *See Negotiating Proposal, supra* note 50.

\(^{160}\) *See id.*

\(^{161}\) *See Desta, supra* note 10, at 158.

\(^{162}\) *See Negotiating Proposal, supra* note 50.
gotiating table and thwarted a possible resolution to agricultural reform. The foregoing analysis has shown how multilateral negotiations involving multiple issues and parties are difficult processes. Nonetheless, there is a great deal of potential for significant changes to be made in the current AoA in terms of domestic support and market access. Japan’s protectionist rice policies no longer have the cultural significance they once did and subjecting the rice market to external competition would be unlikely to destroy domestic Japanese rice production. Finally, it will be important for Japan to consider that their hard-line position on rice protectionism could seriously undermine the entire process of trade reform for both agricultural and non-agricultural products.