What is the best way to protect geographical food names such as Roquefort cheese, Parma ham, and Swiss chocolate whose very mention connotes a reputation known to consumers around the world?

Would a Cheese by Any Other Name Smell the Same?

Should the World Trade Organization set up an international registry to protect these names, or would the result be an ineffective global bureaucracy? (See page 2)
Does the World Need a Global Registry to Protect Geographical Food Names?

What is the best way to protect the names of well-known products such as Roquefort cheese, Chianti wine, Parma ham, and Idaho potatoes that have reputations that are known to consumers around the world? Do current international rules provide sufficient safeguards or should governments implement another system of protection?

Under a proposal from the European Union (EU) and several of its supporters, the World Trade Organization (WTO) would protect geographical food names through a newly-created international registry modeled after EU domestic regulation. Supporters argue that this registry, by prohibiting others from unscrupulously marketing goods of lower quality while using the same name, would aid farmers and developing countries while ensuring that consumers obtain the reputable goods they desire.

But opponents of the registry say that implementing such a proposal will involve burdensome procedures and impose substantial costs which could actually hurt developing countries and consumers alike. They argue that current global rules provide adequate protection for well-known goods from specific geographical regions around the world. Opponents also point out that while the EU is proposing an international registry modeled after its own domestic regulation, other countries argue that this regulation itself violates international trade rules.

A buffet of intellectual property protection

Although this current debate may seem to revolve around food, its main focus centers on the concept of intellectual property, which is often defined as the creation of a person’s mind or the product of his invention. How do countries around the world protect intellectual property? Governments protect such property by giving the creator – such as the designer of a computer program or the writer of a song – the exclusive rights to use the product and control its use by others. Some of these rights include patents, copyrights, and trademarks. Even before the WTO implemented global standards for intellectual property protection in 1995, most industrialized and developing nations already had their own domestic regulations and international conventions protecting intellectual property.

The United States, for example, provides intellectual property protection (for both domestic and foreign producers) through various statutes, and several government agencies help to administer and enforce these laws. For instance, the US Patent and Trademark Office (USPTO), as its name suggests, registers patents and trademarks.

Most nations offer similar methods of protection, although the specific procedures vary from nation to nation. In general, if an individual or company wanted to protect its intellectual property, it would have to apply for protection within the distinct legal system of every country. (At the present time, the relevant international conventions fall short of a comprehensive intellectual property registry at the global level.) Each nation oversees protection through a series of its own application and registration procedures.

While many countries have long had intellectual property laws, legal analysts say that standards of protection varied widely among different jurisdictions. Some countries, they note, often didn’t provide enough resources to enforce their laws. Still, others allowed their citizens to violate them outright so that certain domestic industries could gain a foothold in a particular overseas market. Experts note that as trade and commerce in intellectual property grew in importance, this disparity in the protection and enforcement of intellectual property rights became a “source of tension in international economic relations.”

One standard under the World Trade Organization

In 1995, when the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (better known by its acronym “TRIPS”) came into effect, it helped to reduce these tensions by requiring every WTO member to provide minimum standards within its own legal system to protect and enforce intellectual property rights. (The WTO sets the

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rules for global trade amongst its 148 members. In addition to administering the TRIPS agreement, the WTO also administers other major trade agreements regulating the trade of goods and services. Experts say that these WTO agreements – in addition to the WTO dispute settlement system – serve as the foundation for international commerce.)

Although the TRIPS agreement requires WTO member nations to implement minimum standards of protection for intellectual property, it does not require them to have the same intellectual property laws. In fact, they are free to “implement laws that give more extensive protection than is required in the agreement.”

All agreements administered by the WTO – including the TRIPS agreement – operate under the principles of “most-favored-nation” (MFN) status and “national treatment.” The MFN clause requires that when one WTO member nation grants a trade advantage to another member, it must do the same for all other members. Under the principle of national treatment, a member nation must accord another member nation’s goods and services the same treatment it accords to its own goods and services. So how do these principles apply to the TRIPS agreement? Under, say, national treatment, one WTO member nation must offer the same protection to the intellectual property of nationals from other WTO members as it would to the intellectual property of its own nationals. Under the principle of MFN, a WTO member nation cannot decide which particular countries will benefit from its intellectual property protection laws. They must all receive MFN protection.

**Copyrights, Patents, and . . . Geographical Indications?**

In addition to covering copyrights, trademarks, and patents, the TRIPS agreement also contains guidelines for an intellectual property right called a geographical indication (popularly known by its acronym “GI”). A GI is a name that identifies the geographical origin of a product, and where the product’s unique quality and characteristics are directly linked to its place of creation. Some examples of GIs include Florida orange juice, Swiss chocolate, Napa Valley wine, and Parma ham. So a GI not only tells the consumer that the orange juice originates in Florida, but that it also contains the unique qualities that result from being produced in that state. As these examples imply, GIs were created largely to protect foodstuffs, including wine.

Legal analysts say that the purpose of GIs is to protect original producers from having their products mimicked and sold by others while, at the same time, protecting the incentive for others to create region-specific goods. Industry experts also point out that GIs benefit consumers as well by providing minimum standards of protection for these well-known goods and that a new bureaucracy will be ineffective.

The European Union is proposing the creation of a global registry to protect an intellectual property right called a “geographical indication,” which includes product names such as Roquefort cheese and Napa valley wine (see pictures on the facing page). But critics, including the United States, say that current international rules already provide sufficient intellectual property protection for these well-known goods and international agreement to require standards for GI protection. More specifically, Article 22 of the TRIPS agreement details the minimum protection that each WTO member nation must have in its domestic legal system for protecting and enforcing GIs. Article 22 states that “members shall provide the legal means for interested parties to prevent the use of a geographical indication that suggests a false place of origin in a manner which misleads the public.”

While Article 22 calls for every WTO member to provide minimum standards of protection for GIs, Article 23 specifically requires WTO members to negotiate and create a “multilateral system of notification and registration of geographical indications for wines [and spirits].” Although there is considerable debate as to why these products, in particular, received special mention as opposed to all other foodstuffs, many believe that the EU and its large wine industries lobbied the WTO to call Article 23 to sign the TRIPS agreement. Article 23 also requires WTO member nations to implement the legal means to protect the GIs of wines and spirits.

Although the TRIPS agreement requires protection for GIs, there are exceptions, as set out in Article 24. Generic terms, for one, are not protected under the TRIPS agreement. For example, many nations – such as the US – don’t protect the term “Chablis” as a GI (which originated as a white wine in the Chablis region of France) because they believe that it has become a generic term referring to any white table wine in those countries. However, while American producers are able to produce and distribute “Chablis” in the US, they would be unable to export that wine to any country which protected “Chablis” as a GI unless they used another name to describe that wine. In the event that several WTO members disagree as to whether a certain GI has become a generic term, the TRIPS agreement calls on these countries to conduct negotiations to resolve their differences under the auspices of the WTO.

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GLOBALIZATION MEETS THE FIRST AMENDMENT: DO MULTINATIONAL CORPORATIONS HAVE A RIGHT TO FREE SPEECH?

Should Nike, a multinational sports apparel giant, and other companies be held liable for making allegedly false claims during the course of public debate concerning highly-charged issues such as whether businesses are using sweatshops to make their goods and other products? Recently, Nike settled a lawsuit brought by an individual activist accusing the company of making false and misleading statements concerning its labor practices abroad. Some legal experts say that this development could adversely affect freedom of speech and even harm global economic growth. Yet others argue that the settlement could force companies to improve their labor practices abroad.

In a new attack on corporate interests, anti-globalization protestors and labor groups say that the First Amendment’s freedom of speech clause does not fully protect American companies from liability when making misleading or false statements about their business operations. They say that those statements – even when made during the course of public debate – should be viewed as purely commercial speech (such as a sales pitch or an advertisement), which is subject to broad government regulation. Critics have accused Nike of making false statements concerning its alleged use of sweatshop labor in other countries, and say that the company should be held liable under state laws prohibiting fraudulent claims and business practices.

On the other hand, an alliance of businesses and civil libertarians argues that Nike’s corporate statements should be considered political (or noncommercial) speech and, therefore, should receive full protection under the First Amendment. Such a determination would generally prevent others from holding the company liable for statements that later prove to be inaccurate or false. Supporters argue that holding one side of a debate to a much higher standard of accuracy when airing its views would discourage a full and open discussion on issues of public concern. They also say that a ruling against Nike could expose a variety of businesses to similar lawsuits which, in turn, could dampen international commerce – especially in developing countries that depend on foreign investment for economic growth.

Although the US Supreme Court agreed to hear the case concerning Nike, it later decided not to issue a ruling and left standing a decision from the Supreme Court of California declaring Nike’s statements to be in the realm of commercial speech and, thus, subject to that state’s fraudulent business practices law. The company eventually decided to settle the case. But it leaves standing the California Supreme Court’s new precedent in defining commercial speech. The settlement also worries First Amendment experts who argue that such a decision will chill free speech.

Turning a blind eye on allegations of sweatshop labor?

Industry analysts say that, since the early-1990s, many American companies such as Nike have been moving their operations to developing countries in order to take advantage of lower labor costs and less stringent business regulations. They also note that Nike, like many other businesses, often dealt with contractors in countries such as China, Thailand, and Indonesia to manufacture its products.

But human rights advocates and labor rights groups have accused these contractors of using sweatshop labor and mistreating their workers. According to some reports, factory managers paid their workers substandard wages, subjected them to physical violence, and exposed them to dangerous working conditions. Nike defended itself by arguing that it was in several isolated cases that some contractors had violated written agreements to treat their workers properly and to comply with local laws regulating wages and working conditions. A Nike spokesperson said that the company had terminated its relationship with these contractors and later hired auditors to ensure that existing contractors carried out the terms of their agreements.

Still, in 1996 and 1997, a series of media reports suggested that Nike’s contractors continued to mistreat their workers and violate local labor and environmental regulations. Several advocacy groups accused the company of not taking measures to prevent these labor abuses and, later, began a widely-publicized campaign encouraging

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consumers to boycott Nike products. Nike, in turn, began its own public relations campaign – through a series of press releases, letters to the editor, and other public statements – defending itself against charges that its contractors systematically mistreated their workers.

**Taking the law into his own hands**

In 1998, California resident and activist Marc Kasky (see photo at right) sued Nike for unfair competition and fraud under that state’s unfair business practices law – also known as the Business and Professions Code – which prohibits a business from engaging in “unfair competition,” including the dissemination of deceptive, untrue, or misleading practices or advertising. Legal analysts note that the state’s Business and Professions Code allows “an individual to sue as a ‘private attorney general’ on behalf of all of the state’s residents without a need to show that anyone has been injured.” In fact, when filing his lawsuit, Mr. Kasky conceded that Nike’s business operations had not injured him or his interests in any way.

In his lawsuit, Mr. Kasky said that Nike’s public statements should first be considered commercial speech (such as advertising or a sales pitch) used to lure customers into buying its products. During the company’s public relations campaign defending its labor practices, Mr. Kasky claimed to have found “six misrepresentations about its employees’ pay and working conditions in nine separate communications, all directed toward reassuring customers that it was an ethical company that deserved their continued loyalty.” Mr. Kasky then argued that Nike violated California’s unfair business practices law when it made its alleged false claims, and that the company should give up its profits made in California (estimated to be in the hundreds of millions of dollars) as a result of making these statements.

Nike responded by saying that its public statements weren’t commercial speech but, instead, political (or noncommercial) speech, and that it was contributing to the public debate about its overseas labor practices and the use of low-wage foreign labor in general. The company pointed out that its campaign did not propose a commercial transaction or even mention a specific product. Instead, said a spokesman, Nike had vigorously responded to those critics accusing the company of deliberately using contractors who operated sweatshops. Nike said that because its statements were political in nature, they were entitled to the full protection of the First Amendment and, thus, couldn’t “be the subject of unfair business practice or false advertising charges,” which applies only to commercial speech.

Legal analysts say that the outcome of this debate hinges on how the courts interpret the free speech rights of businesses under the First Amendment of the US Constitution. How have previous courts defined and distinguished political from commercial speech, and to what extent can businesses engage in political speech? Although there are no definitive answers to these questions, the courts have provided some guidelines in this area of the law.

**Some speech is more equal than others**

The First Amendment of the Constitution restricts the government from regulating speech and other forms of expression. It simply states: "Congress shall make no law ... abridging the freedom of speech ..." Legal scholars note that there is a long-running debate concerning the meaning of the word speech, and that its definition has evolved (and continues to change) through decades of court decisions and developments in society. Although there are many different kinds of speech, the courts have generally divided that term into two broad categories – political and commercial speech.

Despite its wording, the term political (or noncommercial) speech encompasses more than just speech concerning actual politics. It may include ideas, arguments, opinions, and other expressions of thought (even those not verbally articulated) disseminated in the proverbial “marketplace of ideas.” Legal scholars say that, under the

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realm of political speech, several US Supreme Court decisions have given all sides of a 
public debate some room (or “breathing space”) to make factual errors during the course 
of debate. But they also note that the Supreme Court has never explicitly conferred an 
absolute “right to lie” under the First Amendment. In a 1974 decision, the Supreme 
Court ruled: “[U]ntruthful speech, commercial or otherwise, has never been protected 
for its own sake.” There are, of course, limits on political speech. The high court has 
allowed restrictions on such speech in cases such as libel, obscenity, and fighting words. 
But, at the same time, it also set high standards for those trying to limit political speech 
or even claim damages resulting from such speech.

While the courts have given political speech robust protection from undue 
restrictions, the same cannot be said about commercial speech, which the US Supreme 
Court defines as speech which does “no more than propose a commercial transaction.” 
Some examples include advertisements, product labels, sales pitches, packaging, and 
other “profit-motivated communications” promoting a particular product or service. It 
wasn’t until the 1970s that the US Supreme Court had first defined and given some 
protection to commercial speech made by entities such as businesses and corporations. 
Legal experts also note that, in addition to protecting commercial speech made by 
businesses, the US Supreme Court also gave them the right to make political speech 
under the First Amendment. Said one legal commentator: “The Supreme Court held that 
the fact that the corporation is the speaker does not limit the scope of its interests in free 
expression, as the scope of First Amendment protection turns on the nature of the 
speech, not the identity of the speaker.”

Although the US Supreme Court has ruled that commercial speech is deserving of 
protection under the First Amendment, it didn’t confer the same kind of protection 
afforded to political speech where individuals are given some leeway to make factual 
errors. In fact, existing regulations generally ban commercial speech that is “false, 
deceptive, or misleading.”

According to the US Supreme Court, why does the Constitution give greater 
protection to political speech than commercial speech? The high court reasoned that a 
commercial speaker is in the best position to verify the accuracy of its claims (i.e. its 
commercial speech) since that speaker is talking about its own product or service. 
Therefore, it should be subject to penalties if its statements aren’t true. On the other 
hand, if political speech were held to the same standard of accuracy, it would discourage 
a full and open debate on public issues because only true experts would be able to back 
up their claims. Civil libertarians say that lay people would then be chilled into silence if 
they could be held liable for making inaccurate statements in public.

Furthermore, the Court argued that commercial speech is more resilient than its 
counterpart (i.e. commercial speech can thrive even when subject to tighter government 
regulation). For example, regulations prohibiting false or misleading commercial speech 
have not discouraged commercial speech; there are companies which can comply with 
such regulations and still successfully carry on their business.

What are the characteristics of commercial speech? Legal analysts say that while the 
US Supreme Court has not formulated an all-purpose and definitive test in identifying 
commercial speech, legal circles look to a 1983 decision (Bolger v. Youngs Drug 
Products Corp.), which lists three characteristics identifying commercial speech – the 
presence of an advertising format, a reference to a product, and the presence of 
commercial motivation on the part of the speaker. In that same decision, though, the 
Court also ruled that each characteristic by itself does not render the communication 
commercial speech, and that all three characteristics must exist.

A right to lie or a right to speak?

In recent years, many say that it has become increasingly difficult to distinguish 
political from commercial speech. For example, industry analysts cite clothing 
advertisements which seem to combine elements of both kinds of speech. Furthermore,
some critics accuse businesses of trying to hide behind the rubric of political speech in order to disguise statements that are actually commercial speech.

In the case of Nike and its public relations campaign, opponents argue that the company’s statements concerning its labor practices and business operations (which they claim to be false) should be viewed as commercial speech subject to California’s fraudulent business practices laws, even when these statements are made during the course of public debate. Mr. Kasky, who filed the original lawsuit, argued that Nike’s public relations campaign became commercial speech when the company tried to convince consumers that the company acted responsibly when dealing with its contractors and that they should continue buying its products.

Anti-corporate interests also say that Nike is trying to promote a view that people have a “right to lie” under the First Amendment, an assertion which the company adamantly denies. Under this scenario, a company can deliberately lie about its operations and then describe its misrepresentations as “political speech,” which is given far greater protection under the First Amendment.

On the other hand, supporters of Nike’s position include a broad spectrum of various industries and civil liberties groups, including several influential newspapers (such as The New York Times and The Wall Street Journal), advertisers, public relations firms, large corporations, the American Civil Liberties Union, and even some large labor unions (including the AFL-CIO), who argue that Nike’s statements should be considered political speech and that the company has a right to rebut its critics without fear of being held liable for its assertions, even if some of them turn out to be false. They generally argue that holding one side more accountable to the accuracy of its statements would chill a hearty debate concerning the effects of globalization.

New standards for commercial speech

In February 1999, a San Francisco Superior Court judge threw out Mr. Kasky’s lawsuit without a written opinion. A year later, a California appeals court affirmed the trial court’s dismissal, ruling that statements made by Nike during its public relations campaign in defending its labor practices amounted to political speech and, thus, had the full protection of the First Amendment.

The appeals court ruled that Nike’s statements did not satisfy two of the three characteristics of commercial speech as set out in the US Supreme Court’s Bolger decision. It noted that Nike’s statements were not in the form of an advertisement promoting a specific product. Instead, said the court, the company was trying to protect its corporate image. In addressing the third part of the Bolger test (the presence of commercial motivation), the court wrote that while Nike may have had an economic interest in its campaign, it concluded that “the fact that Nike had an economic motivation in defending its corporate image from . . . criticism does not alter the significance of the speech to its listeners.” Mr. Kasky’s attorneys later appealed the decision to the state Supreme Court, “arguing that public relations campaigns could [still] amount to false advertising.”

In May 2003, the California State Supreme Court ruled (in a 4-3 decision) that Mr. Kasky’s lawsuit should not have been dismissed by the trial court because Nike’s claims concerning its labor practices abroad were, indeed, commercial in nature and not fully protected by the First Amendment, especially if its claims were fraudulent.

In its decision, the majority devised another test for identifying commercial speech, which – like the US Supreme Court’s Bolger decision – contains three elements: (i) a speaker who is someone likely to be engaged in commerce, (ii) an intended audience who are actual or potential buyers of the speaker’s goods and services, and (iii) representations of fact of a commercial nature, which includes descriptions and statements about a company’s “business operations, products, or services made for the sole purpose of promoting sales . . .” Such representations of fact, said the court, may also include “statements about the manner in which the products are manufactured,

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A new standard: Under a newly-devised test, the Supreme Court of California ruled that Nike’s statements concerning its labor practices constituted commercial speech and, thus, were subject to that state’s unfair business practices law. On the other hand, the minority opinion said: “Corporate speech, the [US Supreme] Court noted, did not deserve less protection simply because of its sources. In Nike’s case, based on [this] majority’s holding, it does.”

An uncertain future for free speech: Although the US Supreme Court heard oral arguments in the Nike case earlier this year, it later decided not to issue a ruling. Nike later settled the lawsuit and agreed to donate over $1 million to a labor watchdog group, but did not concede that its statements were false. The settlement leaves standing the California State Supreme Court’s new standard in defining commercial speech.

distributed, or sold.”

The California Supreme Court concluded that Nike’s statements satisfied all three elements of this new test and, thus, should be considered commercial speech for the purpose of determining whether Nike violated California’s false advertising laws. In regard to the third part of the test, the court further explained that when a commercial speaker makes representations of fact concerning only its business operations in order to promote sales, such statements must be truthful (and the speaker held to this higher standard) because their accuracy can, in fact, be verified by the speaker.

The court also dismissed Nike’s arguments that statements made during its public relations campaign should be considered political speech simply because they were part of “an international media debate on issues of intense public interest.” The court ruled that “Nike’s speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech.”

While the court did not explicitly say that the Bolger test was no longer applicable in identifying commercial speech, it argued that the Bolger test itself was open to adjustments: “The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment.” It also said that the US Supreme Court “not only rejected the notion that any of the factors [in the Bolger decision] is sufficient by itself [in identifying commercial speech], but it also declined to hold that all of these factors in combination, or any one of them individually, is necessary to support a commercial speech characterization.”

Mindful that people may interpret its opinion as inhibiting businesses from airing any views on public issues, the majority said that its ruling did not “prohibit any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices.” Instead, the court said, its decision “means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.”

A settlement that leaves open many questions

Nike later appealed the court’s decision to the US Supreme Court, arguing that the statements made during its public relations campaign were improperly characterized as commercial speech. Although the US Supreme Court announced in January 2003 that it would hear Nike’s appeal and, later, even heard oral arguments from both sides, it announced in June 2003 that the appeal was “improvidently granted,” meaning that “the court changed its mind about taking the case,” according to court watchers. Some legal experts say that the US Supreme Court did not render a final ruling because the Nike case had arrived as a “pretrial appeal” (i.e. no court had yet determined whether Nike had, indeed, made false statements during its public relations campaign).

In September 2003, Nike decided to settle the lawsuit by agreeing to donate $1.5 million to the Fair Labor Association, a group that monitors labor practices abroad. But, under the terms of the settlement, the company did not concede that its public statements were false. Because the case will not be going to trial, the legal character of Nike’s statements remains unresolved. The settlement also leaves intact the California Supreme Court’s decision that Nike’s public statements should be considered commercial speech under that court’s new standards (although many legal experts believe that these standards won’t be able to withstand greater scrutiny). A Nike spokesman said that the company decided to settle the case because it wanted to avoid years of litigation and because there was no guarantee that the US Supreme Court would hear the case again.

Several First Amendment experts say that the settlement has already chilled corporate speech. Nike announced that its employees will be prohibited from discussing the company’s labor practices in California and during academic conferences; and that the company will no longer make public its annual corporate responsibility report concerning labor practices. Other experts say that, under the California Supreme Court’s precedent, businesses across the country will now have to monitor public statements carefully to avoid potential lawsuits. Said one legal expert, the settlement is “a cloud that, I’m afraid, can last for quite a while.” ❖
How do the US and the EU protect their GIs?

The US legal system does not have a specific law concerning GIs. Instead, the USPTO provides a manufacturer with a “certificate of origin” to protect its unique product. In order to qualify for this certificate, the product name must be distinctive and clearly identify the source of the product without confusion. At the same time, there must also be a link between the origin and the characteristics of the product.

Groups of producers (both domestic and foreign) have applied for and received “certificates of origin” for their products, including Idaho potatoes, Roquefort cheese, Parmesan, and Swiss Chocolate. The USPTO carries out a formal review process before approving or rejecting an application for a certificate of origin. Any person may object to the registration of a certificate by filing an objection form.

Unlike the US, the EU has a regulation (adopted in 1992) that specifically protects GIs. Called the “Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs” (or simply Regulation 2081/92), it requires EU member states to prevent the use of any geographical designation that does not represent the product’s true place of origin. Thus, only ham from Parma, Italy, may be marketed and sold as “Parma ham.” Generic terms are excluded from protection.

In comparison to the US system of registering a GI, legal analysts say that the EU regulation involves a much more comprehensive inspection and oversight process whereby comments and objections to a proposed GI must be sent to every EU national government before receiving approval from the EU Commission (the EU executive). Under this process, those parties wishing to receive GI protection in the EU must first send an application to the member state where the product originates. That member state will investigate and then forward the approved application to the European Commission, which will, in turn, make a final decision after its own investigation and after consulting with other EU member governments. The EU currently protects over 600 foodstuffs and over 2,000 wines and spirits using GIs.

For an applicant who is not an EU national and who would like to register a GI in the EU, the regulation offers protection only if the applicant’s home country provides GI protection equivalent to that found in the EU.

A Global Registry: More Protection or Bureaucracy?

WTO member nations are currently trying to devise a GI registration system for the protection of wines and spirits as mandated by Article 23 of the TRIPS agreement. While some nations such as the US have proposed a voluntary registry, the EU and several other countries have proposed a mandatory system with more extensive oversight. Discussions are still underway, and the participants have yet to reach a compromise.

As part of this debate, the EU and several supporters – such as India, Kenya, Nigeria, and Thailand – have expressed an interest in creating an international GI registry not just for wines and spirits, but for all agricultural products. The EU has suggested that its own GI regulation (2081/92) should serve as a model for such an international registry, which would be overseen by a central authority in the WTO, and would involve a more comprehensive vetting process whereby potentially every WTO member and interested party would give comments on (or oppose the adoption of) a newly-proposed GI.

The EU and its advocates argue that such an international registry will maintain the high quality of traditional products perfected over time and also protect the economic interests of the producers that manufacture such goods. The EU says that the current system of protection for all foodstuffs (under Article 22 of the TRIPS agreement) puts an impossible burden on small groups of regional producers who are required to apply for protection in each individual country where they are seeking protection for their goods. If regional producers are unable to register their GI in every market, advocates say, foreign companies would be able to market and sell their products using the very same name.

Opponents, such as the US, Canada, Argentina, El Salvador, and the Philippines, say that while an international registry protecting all foodstuffs may sound appealing, it raises many potential problems. First, they argue an international registry is not necessary because Article 22 of the TRIPS agreement already provides sufficient GI protection for all foodstuffs. Specifically, they point to the successful protection of products such as Roquefort cheese and Parma ham, which are European GIs protected in the US after their producers filed for certificates of origin with the USPTO. They also say that many countries have simply not resorted to using Article 22 in protecting their products.

Second, while the EU and other advocates claim that an international registry would benefit all WTO members (especially developing countries), opponents counter that developing countries have few domestic GIs and would, instead, find themselves having to provide extensive legal protection for a large number of foreign GIs. Furthermore, opponents argue that the EU’s proposal will not offer protection to nearly as many products as the EU had stated because many of these product names have become generic terms (which don’t receive GI protection under the TRIPS agreement).

Third, opponents claim that a global registry would impose major costs on producers and consumers. An international registry, they say, will force companies to analyze every export market to ensure that their product names are not illegally using a protected GI under an international registry. A business using a GI protected under the registry could be forced to rename and repack its goods, the costs of which might be passed along to consumers in the form of higher prices.

Finally, they point out that the EU has had numerous problems with its own domestic GI regulation, and suggest the WTO first create an international registry for wines, evaluate its effectiveness, and then discuss the possibility of creating an international registry for all other foodstuffs.

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Name and Year: Seth Cohen ’00

Title: Captain, United States Army, Judge Advocate General’s (JAG) Corps, Camp Zama (Japan)

My work and responsibilities: The US Army JAG Corps is a tremendous team of very talented and knowledgeable attorneys, paralegals, and staff. The Army places some of its most intelligent and professional people in the JAG Corps, and JAG attorneys are seen as having a special job in the Army. I became interested in the JAG Corps after speaking to Judge Evan Wallach of the US Court of International Trade (who teaches the “Law of War” at New York Law School) and also to my externship supervisor, Adjunct Professor Gary Tidwell, at the National Association of Securities Dealers. They were both in the JAG Corps and recommended the program to me. I didn’t have any prior military experience before joining JAG.

Once you are commissioned as a JAG attorney and get to your unit, you receive immediate responsibilities. Depending upon your job, you may be thrown into court, begin consulting with clients about their marital problems, or process client claims for damages to their household goods when they move from one base to the next. Or you may become the legal advisor to a commander who needs advice in spending funds or flying a distinguished visitor on a US military aircraft.

The Office of the Staff Judge Advocate at every Army facility in the world works together to provide timely and accurate legal services to the command, soldiers, and civilians. There is a good deal of mentorship in the JAG Corps – coming from within the office and throughout the world wherever JAG officers are based. The JAG Corps is a relatively small community, and we keep running into each other either at conferences or on-line.

When I arrived in Camp Zama, Japan, I was placed in the administrative law section of the JAG office. The attorneys in this section act as advisors to commanders who may have many legal questions concerning, for example, the use of official funds, Freedom of Information Act requests, environmental law, federal travel and ethics regulations, international law (namely questions concerning the Status of Forces Agreement and Security Treaty that the US signed with Japan), bilateral activities, and the rules of engagement for our security personnel.

I am currently Acting Chief of Client Services (also known as “Legal Assistance”) and Chief of Claims. Legal assistance is the grassroots of legal practice, and virtually everyone on the base (enlisted personnel, unit commanders, and high-ranking officers) is a potential client. Although JAG officers are popularly known for their roles during court martials, I help both soldiers and Defense Department civilian employees with their legal problems, including divorce, separation, and child custody issues, immigration, tax, finance, retiree benefits, landlord/tenant issues, federal benefits (such as social security), international issues, wills, administrative military matters, and anything else that comes up. I am also the tax officer, voting officer, and alternate ethics attorney in my section. In short, I am the only lawyer in a small town whom people can turn to for their personal legal problems. On occasion, I also assist sailors from nearby US naval facilities.

Since legal assistance covers such a wide array of issues, there is no one area of law that I practice everyday. However, there are a few issues that come up more regularly than others such as questions concerning wills, divorce and separation, post access, immigration, and claims that occur off-post (e.g., US personnel may sometimes damage property outside of the base in their line of duty).

On a daily basis, I consult with clients on their various problems. I must also make sure that my staff members are properly trained and that they do not violate any ethical obligations to our clients. I also ensure that they follow army regulations concerning the services that the JAG Corps provides to the clients. But above all, our mission in JAG is to take care of the personal legal problems of our clients, which consists of the entire Camp Zama community.

The Basic Course: Before a person becomes a JAG attorney, he or she must attend the Basic Course, which has two components – Phase I is going through Army basic training (which lasts approximately for 4 weeks) and Phase II is attending JAG School (known formerly as The Judge Advocate General’s School of the Army or TJAGSA), which is located next to the University of Virginia Law School in Charlottesville, Virginia. It’s a really nice school, and is the only military law school accredited by the American Bar Association. Phase II lasts about 10 weeks.

There is a different kind of intensity at the TJAGSA than at law school. While there are long hours of military training (learning to become a soldier can be tiring), the TJAGSA component is not as cut-throat as some of the horror stories you hear about in law school. Rather, all of the students attending TJAGSA have already passed a bar exam, and they are there to learn law which they will apply in the field. Everyone joins the JAG Corps out of a sense of patriotism and the desire to help those who are defending the US and its allies. Because we’re all on the same team, a strong camaraderie binds the classmates.

There is also the physical component to the JAG Corps. The Army Physical Fitness Test is more strenuous than those administered by the Air Force or the Navy. You

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have to do a certain number of push-ups, sit-ups, and a two-mile run in a specified amount of time. (The exact requirements are based on your age and gender.) Good physical conditioning is very important in the Army. Not only is it good for your own personal health, but your clients (both individual soldiers and the commanding officers) will give you more respect if you stay fit and perform well on physical tests.

Every JAG officer is commissioned as a 1st Lieutenant. Approximately six months later, the Army promotes active duty JAG officers to the rank of Captain. The next promotion (to Major) occurs in approximately seven to ten years. JAG attorneys can then enroll in graduate work (such as studying for an LL.M. in military law). After a few more years, some JAG attorneys advance to the rank of Lieutenant Colonel, followed by Colonel. By this time, many JAG officers have put in 20 years of service and are eligible for retirement from the military. Because the JAG Corps is small, only a handful of people become generals.

Advice on joining the JAG Corps: The JAG Corps is rather competitive to join. While I did not have the best grades in law school, I focused on gaining practical experience and demonstrating my dedication to public service. During my summers during law school, I worked for the Port Authority of New York and New Jersey, and I also volunteered at the Legal Aid Society’s Bankruptcy Assistance Program. I also clerked for a judge in bankruptcy court before joining the JAG Corps.

Courses: Now that I have some perspective, I would have taken more administrative law courses (such as tax, immigration, and administrative law). Furthermore, because JAG attorneys are confronted with ethics issues everyday (either with individual clients or with the command), taking a course in legal ethics will be useful. I also recommend taking a legal writing course that focuses on drafting legal documents, such as contracts, wills, and correspondence to clients. It is possible that you may have to draft a marital separation agreement, a contract between two soldiers, and, of course, wills. As a JAG Corps officer, you are not going to write a legal brief to advise a commander or soldier of what they can or cannot do – JAG attorneys provide both written and oral advice. Throw in a course in electronic legal research and you’ll have yourself a well-rounded education, and one that will prepare you for the actual practice of law.

Moot court and clinics: I also recommend participating in a moot court competition because it forces you to think quickly on your feet. I advanced to the Octo Round of the Froesssel Competition, and was also a member of the Jessup International Law Moot Court team. Clinics are important because they provide practical experience and teach you how to deal with your future clients. My time working at the Bankruptcy Assistance Program taught me how to treat people with similar problems that I now see in the JAG Corps. The ability to listen to client’s problems (which aren't always legal) is important in gaining their trust. I wish I had become involved in a few more clinics such as the immigration and defense clinics during law school.

Foreign Experience: Before entering law school, I taught English in Japan, and this gave me a basis for working and living in Japan as a JAG attorney. Living in Japan before joining JAG Corps has helped tremendously during bilateral functions with Japanese prosecutors and other Japanese JAG officers. I requested to work in Japan and, luckily, the branch manager felt that I was qualified to work here.

Final Thoughts: I shouldn't have stressed out so much during law school. There is only one law test to stress over – the bar exam. If you pass the bar exam, you become an attorney. For the JAG Corps, you are going to learn much of the actual law either during a bar review course or on the job doing research for clients.

The JAG Corps has been very rewarding for me so far. Having a young soldier, retiree, or a senior officer thank me for helping them with their legal problems is very rewarding. Having a young private stand up and salute me at the end of an interview is an honor. Knowing that these people can go back to their jobs with one less thing on their minds is positive reinforcement as to why I entered the military. The JAG Corps has also given me the opportunity to travel to Hawaii, Korea, Japan, and back to the US for conferences all within my first year of joining the Corps.

In the beginning, my inexperience with the Army and my being a “new” attorney presented some initial challenges. The JAG Corps also pays less than the big law firms. But the positive aspects of working for JAG Corps far outweigh these negative aspects. The JAG Corps is a wonderful place to learn, grow, and actually help people. Those people are doing a very important job, and, in some cases, have volunteered to put their lives at risk. That’s what public service is about – helping other people. And that’s what the JAG Corps is about.

For those students interested in the JAG Corps, I recommend its summer internship program. Although I didn’t participate in this internship program before joining the JAG Corps, I did have two interns working for me over the past two summers. For them, it was a great exposure to the JAG Corps and the different kinds of law practiced by its attorneys. I recommend visiting the following website: www.jagnet.army.mil/GoArmyJAG. Although it is a recruiting tool, it also provides useful information.

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READ MORE ALUMNI PROFILES ON THE CENTER'S HOMEPAGE
www.nyls.edu/pages/350.asp
The Alien Tort Claims Act: A One-Sentence Sling-Shot against Corporate Goliaths?

Since the 1980s, many foreign nationals have filed lawsuits in American courts against other foreigners for alleged violations of international law committed outside the United States. In one case, Philippine citizens filed suit in California against the estate of Ferdinand Marcos, former president of the Philippines, for human rights abuses committed in the Philippines under his regime. In another case, a Paraguayan citizen brought suit in New York against a Paraguayan police inspector for the torture and murder of a family member in Paraguay. Federal courts later awarded large judgments to the plaintiffs in both cases.

Foreign plaintiffs have filed these suits against former government officials and heads-of-state under a one-sentence federal statute called the Alien Tort Claims Act (ATCA). More troubling for the private sector, foreign nationals are now filing similar suits under the ATCA against corporations (including several American companies) that have set up operations in countries with a history of human rights abuses. The plaintiffs accuse the companies of contributing to and benefiting from alleged human rights violations committed by the host governments, and argue that these companies should be held legally responsible for these abuses.

In a recent case, a federal appeals court ruled that plaintiffs can now benefit from a lower standard of liability under the ATCA to hold these companies responsible for violations they themselves did not carry out. Representatives of the business community fear that this lower standard could open a door to a wave of claims of human rights violations when they invest in overseas markets. They ask to what extent foreign nationals can hold companies responsible for various abuses committed by the host governments. On the other hand, human rights and labor groups say that the ATCA is a valuable tool in curbing questionable corporate practices abroad and in softening the rough edges of globalization.

Greater access for foreign nationals in American courts?

The first US Congress passed the ATCA in 1789, which simply read: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Legal circles today are still debating the actual intent of the statute. For example, while some legal scholars say that the ATCA simply grants US district courts “jurisdiction to the kinds of cases it covers,” others point out that prior court decisions have already created an actionable claim under the ATCA (i.e. the statute furnishes a foreign national with the legal ground to file a lawsuit in the US).

The statute was largely ignored until 1980 when a Paraguayan woman filed suit in federal court in New York against a Paraguayan police inspector under the ATCA for the torture and murder of her brother years earlier in Paraguay. In that case (Filartiga v. Pena-Irala), the plaintiff argued that, by murdering and torturing her brother under “color of state authority” (i.e. under the official authority of or assistance from the state), the police inspector violated international norms prohibiting such torture, and that the ATCA allowed her to bring a claim against the defendant in the US, even though the alleged actions took place in another country and didn’t involve any American citizens.

In its decision, the US Second Circuit Court of Appeals ruled that federal courts did have jurisdiction under the ATCA if a case satisfied three conditions: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e. international law). While the plaintiff provided evidence that clearly satisfied the first two conditions, jurists at the time said that the plaintiff faced the more difficult task of proving that the actions of the police inspector did, indeed, violate some norm of international law. In its decision, the appeals court ruled that torture carried out by a government against its own citizens did violate international law, and that a consensus of domestic and international legal experts supported this view.

The case eventually went to trial, and the court awarded a default judgment of $10 million dollars against the Paraguayan police inspector. Although the judgment was never enforced, jurists say that the case opened a new door into US courtrooms for foreign victims of official torture.

Although proponents concede that the Filartiga decision did not explicitly say whether the ATCA allows an actionable claim, they argue that “subsequent authorities have taken Filartiga to stand for this idea.” Another practitioner adds: “More recent opinions in several district courts appear to accept Filartiga, and provide . . . a private cause of action under the Alien Tort Statute.” Yet others still forcefully argue that this precedent should be reversed, and debate continues around this issue.

Furthermore, legal analysts say that while the Filartiga decision provided a roadmap for foreign plaintiffs filing suit against state actors under the ATCA, it remained silent as to whether the statute applied to private parties such as individuals and even companies.

Suing under the ATCA

Since the Filartiga decision, several suits brought by foreign plaintiffs under the ATCA have worked their way through the US legal system. Plaintiffs have faced different challenges depending upon the identity of the actual defendant.

Foreign sovereigns (i.e. state actors) and their agencies are generally immune from suit in US courts under the Foreign Sovereign Immunities Act (FSIA), which was passed by Congress in 1976 in order to prevent domestic lawsuits from straining diplomatic relations with other countries. The US Supreme Court ruled that the FSIA is the only source of jurisdiction over foreign sovereigns and their agents. But the

Continued on next page
The United States courtroom: A welcome doormat for the entire world? The Alien Tort Claims Act (ATCA) allows foreign plaintiffs to redress violations of international human rights – many of which occurred outside of the United States and were committed by non-Americans – in an American federal court. Critics say that a recent court decision under the ATCA could open a floodgate of lawsuits against businesses having operations in countries with questionable human rights records.

FSIA encompasses many exceptions, and a plaintiff wanting to bring suit against a foreign sovereign under the ATCA in a federal court must prove that an exception applies. One scholar said: “Only when one of these exceptions has been established can the ATCA be invoked as a source of jurisdiction.”

International law experts now generally agree that certain acts committed by a foreign sovereign and its agents violate international law, and that they could be held legally responsible for these acts under the ATCA. Some of those acts include genocide, slavery or the slave trade, the murder or disappearance of people, and torture (including rape).

While the Filartiga decision is silent as to whether the ATCA applies to private actors, later courts allowed plaintiffs to file suit against private parties under that statute, but only if they first established “color of state authority.” In other words, plaintiffs had to show that a private defendant acted under the auspices of or received assistance from the state in order for a certain act to be considered a violation of international law. Why did courts require plaintiffs to first establish color of state authority before proceeding with the actual case?

Many jurists once held the common belief that only state actors and their agents were capable of violating international law. This idea derives from a long-standing principle which defined international law as strictly limited to relations between states. International law, they reasoned, could not apply to individuals. So, under this view, the actions of a purely private actor – such as someone committing murder, rape, and torture under his own capacity – could not be considered a violation of international law unless that individual acted under state authority.

Although plaintiffs must still establish color of state authority when filing suit under the ATCA, later courts have ruled that certain acts committed by a private actor not acting under state authority can now be considered a violation of international law. A 1984 decision, Tel Oren v. Libyan Arab Republic, ruled that plaintiffs bringing suit against a private defendant under the ATCA did not need to establish state authority if the private defendant committed such acts as genocide, slavery (including forced labor), and war crimes. Furthermore, in 1995, a federal appeals court (in Karadzic v. Karadzic) ruled that plaintiffs don’t have to demonstrate state authority for crimes such as murder, rape, and torture if these crimes were “committed in furtherance of other crimes like genocide, slave trading, or war crimes.”

A new twist under the Alien Tort Claims Act

In all of these past ATCA cases, foreign plaintiffs simply sued those parties (whether they were foreign sovereigns or private individuals) that actually carried out the alleged abuses against the plaintiffs.

But in recent years, foreign plaintiffs have filed new ATCA cases with a twist. They argue that corporations and businesses should be held legally responsible for human rights abuses directly committed by the host governments in connection with current projects in those countries. For example, in one case, plaintiffs allege that a host government forced local villagers to work on a joint pipeline project (with an American company) without any compensation and under threat of physical violence. These foreign plaintiffs acknowledge that no company employee had committed any of the alleged human rights violations; however, they argue that the company should be held legally responsible for the government’s actions because it was complicit in and benefited from these alleged acts.

Experts say that the courts are now trying to decide at what point a private defendant should become legally responsible for any alleged abuses committed by a host government in connection with these projects. Many note that there is no settled standard in domestic tort law to establish liability in these new kinds of cases. Indeed, one scholar said: “One problem in determining whether a company might potentially be liable for its actions abroad is that there is no federal statute that squarely addresses the answer to this question.” For example, should a company be held liable for the bad acts of a host government if its representatives simply sign, say, a business contract with that government? Or should there be a much deeper level of involvement?

Many jurists also point out that because the US Supreme Court has yet to review any case concerning the ATCA, these issues remain unresolved and are still working themselves through the legal system today. But they say that the outcome of one particular case may provide further guidance (or add more confusion) to these issues.

The Unocal case: Setting new standards for liability

In an ongoing ATCA case (John Doe v. Unocal), which began in 1996, nationals of Myanmar (formerly Burma) sued Unocal Corp. under the ATCA in federal district court in California for alleged abuses carried out by the Myanmar military in connection with the building of a natural gas pipeline. Unocal, a California energy exploration and

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In a recent case filed under the Alien Tort Claims Act, plaintiffs from Myanmar allege that Unocal – an American company working on a joint pipeline project with the government of Myanmar – should be held responsible for human rights abuses committed by Myanmar officials in connection with that project.

development company, had signed a joint agreement with the government of Myanmar to build the pipeline in that country. Plaintiffs alleged that the Myanmar military forced the villagers to assist them in clearing forests, building camps, and carrying equipment. They also claimed that those who resisted were subject to torture, rape, and execution. In their suit, plaintiffs argued that Unocal bore legal responsibility for the acts committed by the Myanmar military since it allegedly hired and gave assistance to the military, and since the company supposedly knew about the alleged abuses and benefited from them.

In August 2000, a district court granted Unocal’s request for summary judgment and dismissed the case (i.e. the judge resolved the lawsuit in favor of one party before it went to trial). The court first had to decide whether any of the alleged acts could be considered a violation of international law under the ATCA if committed by a private actor. It then had to decide whether to hold Unocal legally responsible for these acts (which, again, were committed by Myanmar).

In its decision, the district court held that for the acts of murder, torture, and rape, Unocal could only be held liable for these acts if they were committed under color of state authority. The plaintiffs argued that the very existence of the joint pipeline project proved that Unocal was acting under the auspices of the government. But the court ruled that because Unocal neither controlled nor conspired with the Myanmar military in committing the alleged abuses, plaintiffs had failed to show that the company acted under color of state authority.

On the other hand, the district court determined that (under the ATCA) private parties can be held legally responsible for acts of forced labor (which, as mentioned earlier, does not require plaintiffs to show that a private party acted under color of state authority). The court then devised a standard to determine whether Unocal should be held legally responsible for these acts which were, again, carried out by the Myanmar military. In its decision, the court said that Unocal could only be held responsible for the actions of the Myanmar military if the company “actively participated” in the acts of forced labor. It said that while the evidence suggests that Unocal knew about the use of forced labor in the building of the pipeline and that the company benefited from this practice, this was not sufficient to hold the company liable. The court said that there were no facts to suggest that Unocal sought to employ forced labor. Because Unocal could not be held liable under this “active participation” standard, the district court dismissed the case.

The plaintiffs later appealed the decision.

In September 2002, a three-judge panel of the Ninth Circuit Court of Appeals held that Unocal could be held liable as a private actor for all of the alleged acts (murder, torture, rape, and forced labor) without a showing of color of state authority. The appeals court argued that because the acts of murder, rape, and torture were committed in furtherance of forced labor, plaintiffs did not have to establish color of state authority.

A majority of the panel also held that the trial court had erred in requiring the plaintiffs to show that Unocal had actively participated in the alleged abuses. Instead, to determine whether Unocal should be held liable for the actions of Myanmar officials, it adopted a modified standard established by the International Criminal Tribunals for the former Yugoslavia and Rwanda: “We hold that the standard for aiding and abetting under the ATCA is . . . knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime” and “actual or constructive knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.”

The court then held that, under these new standards, the plaintiffs had presented enough evidence to survive summary judgment and also to persuade a reasonable jury to find Unocal responsible for the actions of the Myanmar military. The appeals court said that the evidence showed that Unocal hired and compensated the Myanmar military, and also provided photos, surveys, and maps showing where to provide security for the pipeline project. In addition, the court noted that there was evidence that Unocal knew that Myanmar was using forced labor and that the project was benefiting from these acts.

Unocal requested and later received a re-hearing by a full panel of 11 justices of the Ninth Circuit on June 11, 2003. Legal commentators say that the full panel of the appeals court will decide whether to uphold the internationally-based standards adopted by the original three-justice panel, and that it may be several months before it renders its decision.

Implications of the Unocal decision

There has been a wide range of reactions to the appeals
court decision. Representatives of the business community (at home and abroad) claim that the decision will have a negative effect on the global economy because it could open the door to a wave of lawsuits against multinational companies with any kind of operations abroad. They say that holding businesses responsible for the human rights practices of host governments (by guilt through association) will hardly strengthen respect for human rights around the world, and will, instead, discourage badly-needed foreign investment, especially in developing countries.

Unocal also maintains that its pipeline project has, in fact, had a positive effect on the economy in Myanmar and also on the lives of its citizens. A company discussion paper notes several educational, health, and farming initiatives that began with the construction of the pipeline, and that lawsuits such as those filed under the ATCA will only discourage these efforts in the future, especially if the company decides to end its operations in Myanmar.

On the other hand, human rights lawyers and labor groups say they are satisfied with the court’s decision because, as one commentator notes, it “lowers the bar significantly for overseas plaintiffs to sue US corporations in US courts.” They argue that companies that somehow assist other governments in violating the rights of their citizens in connection with an overseas project should naturally be held responsible for their actions, and that the district court initially set the standard of liability too high. They also say that the decision could force multinational corporations to pressure host governments to improve their human rights practices before they make any investments.

Several US government agencies also hold a variety of views concerning the decision and the use of the ATCA statute itself. For example, in its brief to the Ninth Circuit, the US Justice Department argued that allowing foreign plaintiffs to file lawsuits under the ATCA could interfere with diplomacy and subject American allies to baseless lawsuits. It called for the Ninth Circuit to interpret narrowly the ATCA’s purpose as giving only a jurisdictional grant to the courts while removing its implied cause of action. Critics say that such a narrow interpretation will effectively reverse two decades of precedent beginning with the Filartiga case.

The US Department of State, however, has declined to intervene on behalf of Unocal. Officials there say that while the lawsuit may adversely affect the pipeline project, it will not be (in their opinion) a detriment to American foreign relations. Political analysts note that the State Department, in its annual human rights report, is highly critical of the government of Myanmar (which it still calls Burma) and its human rights practices.

Court watchers say that the Ninth Circuit’s widely anticipated decision (which some say will be released in the coming months) represents just another step in a longer journey to clarify the intent of the ATCA and its effects on global investment and the practice of human and labor rights in other countries. They also say that whatever decision the court renders in the coming months, it will likely be appealed until it eventually reaches the US Supreme Court.

The EU Proposal: A Bad Model for Protecting GIs?

While the EU is proposing the creation of a registry for all foodstuffs, other nations are challenging the very blueprint for this registry (i.e. the EU regulation on GIs). In 1999, the US alleged that the EU regulation protecting GIs violated a central principle of global trade rules.

Specifically, the US argued that the EU regulation’s reciprocity requirement violates the national treatment principle. Under its current system, the EU will provide GI protection for products from non-EU countries only if these countries offer GI protection equivalent to those found in the EU. As a result of this requirement, the EU has refused to give GI protection to American products such as Florida orange juice and Idaho potatoes. The US argues that the WTO rules require the EU to afford the same GI protection (as required by the TRIPS agreement) to non-EU states that it offers its own nationals — regardless of whether the non-EU nation has similar GI standards.

Invoking the first step to resolving a trade dispute at the WTO, the US has requested private consultations with the EU before deciding whether to initiate formal dispute settlement proceedings.

A dead-end in Cancun, Mexico?

In April 2003, the US amended its complaint, alleging that the EU regulation on GIs also violated the MFN principle of the TRIPS agreement, as well as the national treatment and MFN principles of another WTO agreement, the General Agreement on Tariffs and Trade. Fifteen WTO members have joined the consultations.

The dispute over the EU regulation on GI protection is currently nearing the end of the mandated consultation phase. If the WTO members are unable to reach a settlement, it is likely that the US will ask the WTO to create a dispute settlement panel, which will then hear formal arguments and request evidence before rendering a final decision.

In September 2003, the WTO held a ministerial meeting in Cancun, Mexico (see article on next page). During the meeting, WTO members did not adopt a system for the registration and notification of GIs for wine and spirits. They also did not make significant headway concerning the EU proposal to extend GI protection to all other agricultural products. These setbacks did not surprise trade experts who had already predicted that, because of the controversy surrounding the EU’s proposals, the WTO members would make little progress on this issue. They expect further discussions to take place in the coming year.

Past issues of the newsletter are available online
www.nyls.edu/pages/272.asp
Global Trade and Financial Round-up

WTO in Cancun: No party in vacation capital

Who would associate the Western Hemisphere’s vacation capital of Cancun, Mexico (with its famed beaches and nightlife) with international disagreement and acrimony? At the moment, it would be the 148 member nations of the World Trade Organization (WTO). During the latest round of global trade talks held in Cancun, WTO members were unable to reach consensus on several major issues, and this led to a breakdown in negotiations.

In November 2001, during a meeting in Doha, Qatar, the 144 (now 148) member nations of the WTO agreed to begin their latest round of global trade talks – dubbed the Doha Round – to bring down tariffs and other barriers to global trade in such areas as agriculture, services, intellectual property, investment, and competition policy. (The WTO is the premier organization setting the rules for international trade and the settlement of trade disputes.) Economists estimate that a successful conclusion of these talks (scheduled for January 1, 2005) could increase world prosperity by almost $3 trillion by the year 2015. The last major trade round (called the Uruguay Round) was completed in 1993 and reformed the world trading system.

Under WTO rules, member nations must hold periodic meetings (also called ministerial conferences because the participants are trade ministers from member nations) at least once every two years to discuss the progress of their latest round of negotiations. The most recent meeting took place in Cancun September 10-14, 2003. But trade experts say that these talks broke down because the WTO member nations couldn’t reach a consensus in several areas of negotiations.

Analysts point out that the Doha Round negotiations are a “single undertaking,” meaning that WTO member nations have to agree on every issue in order to conclude the round. Experts say that while the WTO members reached agreement in some areas of negotiation, several other issues led to a breakdown in the talks.

Agriculture: Officials say that agricultural trade is particularly sensitive in both developing and industrialized countries and still represents the biggest stumbling block in the current round. Observers note that over 80 percent of WTO member nations are developing countries, and that many depend on their agricultural exports for economic growth. On the other hand, political analysts say that farmers in the industrialized world have no qualms about exerting their political influence to keep out agricultural goods from the developing world.

Economists estimate that industrialized countries – mainly the United States and the European Union (EU) – provide over $300 billion in subsidies to their farmers every year (an amount which greatly exceeds foreign assistance to the developing world), and that these subsidies encourage farmers to overproduce and flood the world market with cheap food. Developing countries complain that they cannot compete against such subsidies, and that trade barriers in the industrialized world keep out their agricultural goods.

These countries also point out that they had agreed to begin the Doha Round only after the industrialized nations of the WTO had promised to make major reductions in their agricultural subsidies during the course of negotiations. They say that these promises remain unfulfilled, and that they have little incentive to make progress in other areas of particular concern for industrialized countries.

Trade observers also note that the industrialized countries themselves disagree as to how quickly they should reduce their subsidies and to what extent they should reduce trade barriers blocking agricultural imports from developing countries. While the US, Canada, and Brazil want WTO member nations to reduce quickly agricultural tariffs and subsidies, the EU and Japan want to retain some subsidies and preserve several tariffs in order to protect what they describe as their food security and rural development.

In late-August 2003, officials announced that the US and the EU had reached a preliminary agreement on a framework to reduce subsidies and tariffs. But many developing countries say that this agreement simply committed the US and the EU to reduce their subsidies and tariffs (which they had already promised to do) but didn’t provide any specific proposals or even a timeline to implement an agreement. During actual negotiations in Cancun, the WTO member nations failed to make further progress in this contentious area, which led several developing countries to walk out of the talks hours before it was scheduled to conclude.

Patents on essential medicines: After months of negotiations, WTO members reached an agreement to allow developing countries royalty-free use of patented pharmaceuticals in order to import generic (and cheaper) versions of drugs for diseases such as AIDS, which health experts say are ravaging the developing world. While many, such as the pharmaceutical industry, were opposed to such a policy, others argued that WTO rules allowed member nations to override drug patents during genuine public health emergencies.

Many criticized the US for being the only country to oppose an initial agreement reached in December 2002 to allow developing countries to override patent protection in order to import generic versions of expensive drugs. But the US countered that many developing countries wanted to import generic drugs for any health problem (and not just for epidemics). They argued that such a policy would destroy any incentive for companies to produce new drugs. In late-August 2003, the WTO member nations reached an

Continued on next page
agreement which would provide exemptions to developing countries with genuine public health emergencies to import generic drugs. In return, the recipient countries agreed not to use these generic drugs to pursue commercial objectives such as re-selling the drugs to another country.

Other areas of talks: Industrialized countries offered to give further consideration to reducing their agricultural subsidies, but only if the developing countries first committed themselves to begin negotiations concerning, for example, global investment rules. Several countries such as the US and the EU also demanded that the developing world lower their tariffs on manufactured goods in return for greater concessions in the agricultural negotiations. (Experts say that developing countries impose tariffs ranging from an average of 16 to 36 percent on manufactured goods. On the other hand, the US tariffs average around five percent.) Many trade ministers from the developing countries refused to begin negotiations in any other area of talks until progress was made in reducing agricultural subsidies.

While some trade officials say that a breakdown in the talks could inhibit world economic growth, others point out that delays are nothing new in global trade talks. (The largest trade round in history – the Uruguay Round – was supposed to take 4 years, but actually required 7½ years.) Political analysts also note that an alliance of over 22 developing nations prevented wealthier and more influential members such as the US and the EU from pushing their interests forward during the negotiations.

While some trade officials say that a breakdown in the talks could inhibit world economic growth, others point out that delays are nothing new in global trade talks. (The largest trade round in history – the Uruguay Round – was supposed to take 4 years, but actually required 7½ years.) Political analysts also note that an alliance of over 22 developing nations prevented wealthier and more influential members such as the US and the EU from pushing their interests forward during the negotiations.

Many analysts say that the WTO will most likely have to revise its January 1, 2005, deadline for concluding the Doha Round because the organization is taking on many contentious issues. Some say that the talks could go through 2007. What will happen if WTO member nations don’t conclude the Doha Round by the 2005 deadline? Some argue that this could lead to more trade disputes. Others predict that individual WTO members, frustrated with the slow pace of talks, will sign more bilateral trade agreements outside the purview of the WTO. Still, others say that the world won’t see any dire consequences and simply call for more patience in the latest round of global trade talks. Negotiations are expected to begin in WTO headquarters in Geneva early next year.

A united Europe under a single constitution?

How far will the European Union (EU) go to reinvent itself? Earlier this year, it formalized plans to become a 25-member union whose economy and population could soon surpass that of the United States. It has adopted a common currency (the euro), a single European anthem (Beethoven’s “Ode to Joy”), a Europe Day (May 9), and even a European motto (“United in Diversity”). So is a European constitution far behind?

As it stands today, the EU is a union of 15 nations bound together through a series of complex international treaties. These treaties created common institutions to manage certain political and economic areas of mutual concern such as trade and finance, environmental protection, and agricultural policy. Some include the European Commission, which proposes legislation; the European Council, which is composed of the heads of EU national governments, and enacts EU laws proposed by the Commission; and the European Parliament, a body elected by European citizens and which serves as a check on the work of the Council.

In June 2003, delegates to the “Convention on the Future of Europe” presented a draft constitutional treaty to the leaders of the EU member nations. Led by former President Giscard d’Estaing of France, the 105 delegates (representing national governments and institutions) met over a period of 16 months to discuss and compromise on a text which many consider to be a starting point for a formal EU constitution. Although referred to as a constitution, the draft text is actually a treaty. Unlike, say, the US Constitution which binds a single nation, the proposed EU constitution will be an agreement among sovereign nations still retaining a large measure of control over their internal affairs.

Close to 250 pages in length (as opposed to the US Constitution’s 16 pages), the draft EU constitution is divided into four sections: a statement of objectives, powers, and institutions; a Charter of Fundamental Rights; a section on union policies; and procedures for amending the constitution.

Why is the EU drafting a constitutional treaty? Political and legal experts argue that, with the accession of 10 additional members next year, the EU must streamline its decision-making process, and that one single, all-encompassing constitutional treaty will help toward reaching this goal. Some scholars believe that an EU constitution will give the general European population a greater understanding of the division of powers between their national governments and EU institutions. Many analysts also say that certain proposals in the draft text will allow the EU to speak in a single voice in many policy areas which, in turn, could provide the union with greater legitimacy in world affairs.

Legal experts say that the much of the draft constitution is simply a combination of the various EU treaties already in existence, and that – in practical terms – it will have little effect on the daily lives of Europeans. In fact, a poll conducted by the European Commission in June 2003 found that 55 percent of Europeans had never heard of the convention and that even fewer knew it was crafting a constitution. However, experts note that several new proposals in the draft constitution are encountering varying degrees of resistance from current member nations.

For example, in the past, the European Council usually created legislation through a process of consensus among EU member nations – any nation that did not support a proposed piece of legislation could kill it by casting a veto. But under the draft constitution, Council decision-making in many areas of governance will be changed to “qualified majority
voting” whereby a majority of member nations may adopt a certain piece of legislation if that majority represents at least 60 percent of the EU population. Some of these areas include criminal law, immigration policies, and asylum procedures.

But many countries are reluctant to give up their veto power. Smaller nations, in particular, worry that they will never be able to attain a qualified majority on their own because France, Germany, Britain, Italy, and Spain account for 74 percent of the enlarged EU’s population. Should all 20 of the smaller nations support certain legislation, it would be impossible to pass it without support from at least two of the larger member nations. Meanwhile, some of the larger nations are currently unwilling to give up their veto on proposed common policy, such as Germany’s insistence that it retain a veto on asylum policy.

Another contested issue concerns the presidency of the European Council. Currently, the presidency rotates to a different EU member nation every six months. Under the draft constitution, a qualified majority in the Council would elect an EU President for a period of 2½ years. While larger nations support this change as a means of endowing the EU President with greater clout, smaller nations are reluctant to give up their six-month turn at the Council leadership. They also believe that any person elected by qualified majority to the presidency will most likely come from one of the larger nations, and that this person will ultimately push the agendas of these countries.

The draft constitution will change little regarding trade with other countries because the EU already serves as a single trading block. However, the draft constitution does call for the creation of a single foreign minister who will speak on behalf of the EU on various international issues. Analysts say that having one EU representative at international organizations (as it does in the World Trade Organization, for example) will give the union greater legitimacy than if every member nation voiced its own opinions and policies.

The EU member nations will begin further discussions on the draft constitution in October 2003, and many expect several changes to the text. The goal is to complete a final text by May 2004, which is the same time that 10 new members will officially join the EU. In order for the constitution to take effect, it must be ratified by every member nation.

What will happen if one or more nations failed to ratify the constitution? (Recently, the citizens of Sweden decisively rejected a referendum to adopt the euro, and political analysts say that the same fate could await a greater undertaking such as adopting an EU constitution.) Some say that the EU could negotiate a compromise in order to appease the concerns of any holdout nations. The EU could also decide to ignore the concerns of the holdout nations and simply start a new union based on the proposed constitution. But many political observers say that many EU member nations could reject the draft constitution and continue to operate under the current treaties underlying the union.

How tough is the global economy? In the past several years alone, several events – including a major financial crisis in East Asia, terrorist attacks in New York and Washington, corporate governance scandals in the United States, and, most recently, the US invasion and occupation of Iraq – have threatened to dampen global economic growth and, some say, throw the world into a recession. But economists note that the global economy has proven to be surprisingly resilient in the face of such adversity.

Just a few months ago, the global economy faced yet another challenge in the form of a virus which quickly became a worldwide epidemic killing hundreds of people and affecting thousands of others. Fortunately, health officials say that they have contained the spread of the virus which causes severe acute respiratory syndrome (SARS). While economists say that the spread of the SARS virus has caused economic disruptions in many industries, they note that its effects, while still costly, have been mostly short-lived.

Scientists say that SARS is a complex respiratory illness caused by a virus which most likely originated in southern China. Its symptoms include high temperatures and headaches. The first known case of SARS occurred in November 2002 in southern China before it spread to Hong Kong a few months later. By mid-March 2003, even before health officials had identified SARS, the virus was already making its way around the world.

China, Taiwan, and Hong Kong have been the areas hardest hit by the SARS virus. Other affected countries included Indonesia, the Philippines, Singapore, Thailand, and Vietnam. Canada (mainly the city of Toronto) was the only area outside of Asia to be significantly affected by SARS. While China had the largest number of cases overall, Hong Kong had the highest number of cases relative to the population. Potential SARS cases also appeared in Europe, the US, Africa, and even South America.

Government officials and business representatives say that the SARS epidemic caused significant economic disruptions in East Asia and other areas around the world. They note that businesses in the hardest hit areas began to experience economic downturns as the public avoided public places such as retail stores, restaurants, movie theaters, and outdoor cafes. Several governments closed schools for weeks at a time to curb the spread of the virus. China even closed one of its largest stock exchanges. While most people still reported to work, sudden factory closings caused by potential SARS cases among workers created delays in production schedules.

Analysts say that the SARS epidemic mainly affected the tourism, hospitality, and airline industries. For example,

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Vietnam reported a 30 percent drop in visitors in April 2003. Thailand reported a 40 percent drop compared to the same time last year. International airports normally crowded with tourists and business travelers were soon deserted, and many airlines soon requested financial assistance from the government to pay for basic operating costs. Toronto’s hotel industry reported losses of $125 million, and approximately 12,000 hotel workers lost their jobs because of the downturn caused by the SARS virus. Analysts predict that the airline industry will lose $4 billion in 2003 because of the effects of the SARS virus.

The World Health Organization (WHO) took an aggressive stance in combating the spread of the SARS virus by issuing a world-wide health alert in March 2003. Several governments also implemented strict public health measures, which helped to break the virus’s chain of transmission and increase market confidence across the region. For example, Singapore imposed quarantines on suspected SARS cases and also initiated a system of thermal-imaging of airline passengers to test for high fevers. Taiwan imposed a mandatory ten-day quarantine period for those arriving from areas with a high incidence of SARS. As of July 2003, officials say that SARS had infected 8,437 people worldwide and was responsible for 813 deaths.

The quick containment of SARS soon forced market analysts to revise downward their estimate of worldwide losses (originally in the $15-30 billion dollar range) caused by the virus. The tourism industry, though hard hit, is predicting significant recovery for the second half of 2003.

While many have praised the WHO and some governments for taking quick action to control the epidemic, critics say that the attention lavished on SARS could hamper efforts to treat more prevalent diseases such as malaria, cholera, dysentery, AIDS, tuberculosis, and hepatitis, all of which continue to kill millions of people every year. WHO officials defended their precautionary measures, saying that they wanted to prevent SARS from entrenching itself.

People also criticized the Chinese government for failing to report the early cases of SARS and for even underreporting the number of cases in major cities. Though not completely optimistic, some political observers are hopeful that the SARS epidemic will serve as a catalyst for new standards of government disclosure in China and also result in political reforms.

Scientists say that a vaccine is still years away from development and that the SARS virus will be active again during the winter months and early spring. Visitors to East Asia also point out that many countries (such as China and Hong Kong) are still in the process of recovering from the epidemic. Analysts say the SARS epidemic has also raised many legal issues. For example, the Equal Opportunities Commission in Hong Kong is receiving hundreds of complaints about SARS-related discrimination. In a typical case, an employer retracted a job offer after learning that the prospective employee lived in a building where there had been several cases of SARS.

**Breaking the Bank? Rebuilding Iraq’s Financial System**

After ousting Saddam Hussein from power, the US government – with assistance from international agencies such as the International Monetary Fund – is rebuilding Iraq’s financial and banking system.

Economists say that even before the US began its offensive in Iraq in March 2003, decades of widespread corruption and mismanagement had already weakened Iraq’s banking system and that country’s currency, the dinar. And in the days after the war, Iraqi finance officials reported that looters had emptied most banks around the country.

Analysts say that it is vital for the US to restore a credible banking system as part of its efforts to stabilize Iraq. Economists generally agree that without a sound banking system, economic activity and growth cannot take place in any country. They point out that a country’s banking sector is responsible for providing an array of services such as providing a method to make payments and a place to keep valuables safe. Without a more secure banking system, they say, Iraq will be unable to receive loans from organizations such as the World Bank and will also be unable to service its foreign debt (estimated to be over $200 billion).

As part of its efforts in rebuilding Iraq’s financial system, the US must also help to create and distribute a new currency. Analysts say that rampant counterfeiting had overvalued the dinar, and that the currency had lost credibility in the global currency markets long ago.

Before Iraq creates and distributes a new currency, it will use the American dollar – along with the dinar – as its legal tender (meaning that the dollar can be used to pay any debt in Iraq). Political analysts say that many other countries around the world have temporarily adopted the American dollar as its currency in order to rebuild a mismanaged economy or after emerging from a large-scale conflict.

After major military ground operations came to an end, the US government airlifted $550 million (consisting mostly of $1, $5, and $20 bills) from the Federal Reserve Bank of New York to Iraq in order to make payments to hundreds of thousands of Iraqi civil servants and to carry out vital public services such as repairing and maintaining water, electric, and telephone lines damaged during the war.

The US still faces many daunting challenges as part of its efforts to repair Iraq’s broken financial system. For example, they will have to rewrite that nation’s banking laws and regulations. Even though Iraq has oil reserves which, analysts say, can provide the country with $25 billion in revenues every year (if those reserves can be effectively tapped, transported, and marketed), experts believe that it will take years for the Iraqi economy to become stable.
International Law
Career Panel

How difficult is it to build a career in international law? Are there many opportunities in the public sector? What are the hot topics in private practice? Is an advanced degree necessary? How does one prepare for practice areas involving international law? Come and ask the experts.

Eleftherios (“Ted”) Georgiou ’01
Law Clerk to Senior Judge Nicholas Tsoucalas,
United States Court of International Trade
International Trade and Customs Law

Holly J. Gregory ’86
Partner, Weil, Gotshal & Manges, L.L.P.
International Corporate Governance

James A. O’Malley ’85
James A. O’Malley, P.C.
Immigration Law

Gideon Rothschild ’80
Partner, Moses & Singer, L.L.P.
International Tax and Estate Planning

Thursday, October 2, 2003
12:30 pm - 2:00 pm
Wellington Conference Center
Hot buffet lunch will be served

C.V. Starr Lecture: Borders Beyond Control:
Thoughts on Immigration Policy for the 21st Century
Lecturer: Jagdish Bhagwati

(Approved for 2 CLE credits in Professional Practice)

Rising international migration in recent years and its effects on industrialized and developing nations have seized the public’s attention. Highly-skilled workers are still leaving developing countries to seek better opportunities in wealthier nations such as the United States. Unskilled migrants continue to enter developed countries illegally to look for work. And many more people are crossing borders seeking asylum. Governments in the developed world have tried to deal with migration through various measures. But these attempts have been seen as largely ineffective in addressing what is expected to be an increasing tide of global migration in the future.

So what can be done? Can and should governments try to stem the tide of rising migration? Jagdish Bhagwati – a world-renowned economist and political scientist – argues that, in this new environment, governments should reorient their immigration policies and begin working with migrants in order to maximize the benefits of all those concerned. In his C.V. Starr Lecture, he will also discuss proposals for greater international cooperation and the creation of a new international framework to help countries oversee and monitor global migration.

HOST: SYDNEY M. CONE, III, C.V. Starr Professor of Law and Director, NYLS Center for International Law

Thursday, October 23, 2003
4:00 pm - 6:00 pm
Wellington Conference Center
Open to the NYLS community