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Exam No. _____

593-037 International Environmental Law
Fall Semester 2005

UNM School of Law
Final Examination
Three Credits

Professor Freedman
Saturday, December 10, 2005
9 a.m. – 12:30-noon

Examination Format

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

This exam consists of three parts: I. Multiple Choice and True/False (150 points); II. Short answer (490 points); and III. Essay (360 points). All answers are to be recorded in your bluebook or electronic submission – PLEASE MAKE SURE TO CLEARLY IDENTIFY WHICH QUESTIONS ARE BEING ANSWERED. In Part I, an explanation is REQUIRED for certain questions, as indicated. An explanation is ALLOWED for all questions in Part I, which may result in partial (or, less likely, full) credit if you get the answer wrong; however if the explanation is really off-base, you may lose credit for an otherwise correct response. In Part II, most answers require no more than 25 words, although there will be no penalty (other than time) for exceeding that limit. The bracketed numbers express the maximum amount of credit to be awarded for each question. If you don't think that you have sufficient information, say so, and state any assumptions you are making to answer the question. For Part III, the first question (on Climate Change) is mandatory; you must also answer one of the remaining four questions. (If you answer more than one, only the first will count.)

Excerpts from the U.S. – Canada Boundary Waters Treaty and from Justice Scalia's dissenting opinion in *Hartford Fire Ins. Co. v. California* are attached for your reference. You will not have time to read them in their entirety, but may wish to consult them on a couple of questions.

Good luck, and enjoy!

Joe Freedman
Visiting Professor

International Environmental Law Exam, Part I

Multiple Choice and True/False (T/F) [150 points]

Suggested time: ~25 minutes

Indicate the appropriate answer(s). In some cases, there is more than one correct answer and if so, indicate all correct answers. In some cases, as noted, an explanation of your answer is REQUIRED – no credit will be awarded without one. For the other questions, a brief explanation of your choice is optional and might receive some credit. Each question is worth 10 points.

1. Which of the following is/are a primarily constitutive agreement?
    a. Kyoto Protocol
    b. London (Dumping) Convention (1972)
    c. Cartagena Convention on the Protection and Development of the Marine Environment of the Wider Caribbean Region (1983)
    d. MARPOL Annex V

2. Which (if any) of the following are methods to internalize environmental costs?
    a. Privatization of resources
    b. "command and control" regulations
    c. tax breaks for installation and use of pollution-control equipment
    d. Legislative liability schemes
    e. Tradeable air emission permits

3. Which of the following are steps toward the implementation of a treaty?
    a. identification of goals and needs
    b. negotiation
    c. adoption and signature
    d. ratification
    e. implementation
    f. amendment
    g. all of the above

4. Which of the following was (were) ***not*** an output of the U.N. Conference on Environment and Development?
    a. The Rio Declaration
    b. Agenda 21
    c. The Kyoto Protocol
    d. The Biodiversity Convention
    e. The International Convention on Preservation of Tropical Forests

5. The Trail Smelter arbitration took place under the binding dispute settlement process under the Boundary Waters Treaty (T/F: EXPLANATION REQUIRED.)

6. All parties agreed to do certain things in the Framework Convention on Climate Change. Which of the following is ***not*** among them?

a. Develop and publish national inventories of greenhouse gases and sinks.
b. Consider climate change in national actions and policies.
c. Reduce greenhouse gases by specific amounts.
d. Establish trading systems for greenhouse gases.
e. Report to the conference of the parties on actions taken to implement the convention.

7. Which of the following issues (is) (are) ***not*** addressed by instruments negotiated at the IMO

a. Overfishing
b. Ocean dumping
c. Oil spills
d. Invasive species
e. Plastics
f. Land-based sources of Marine Pollution

8. What is the major substantive requirement of the IMO "Anti-fouling" Convention?

a. stricter controls on the use of "spit balls" in maritime cricket matches
b. regulations on inspection of poultry for "avian flu" before a ship may enter port
c. regulations on the discharge of ballast water containing fouling organisms
d. restrictions on and phase out of the use of tributyl tin on ships

9. Under the U.S. Constitution, a treaty is ratified upon an affirmative vote of 2/3 of the Senate present. (T/F) [EXPLANATION REQUIRED]

10. Under the MARPOL Convention and its Annexes, a Party may become bound to an amendment against its will. (T/F) [EXPLANATION REQUIRED]

11. What publication Theo Colburn known for, and what is its principal subject?

a. Silent Spring – effect of pesticides on birds

b. Our Common Future – global environmental issues, sustainable development, etc.

b. Our Common Future – endocrine disrupting chemicals

d. Our Stolen Future – global environmental issues, sustainable development, etc.

e. Our Stolen Future – endocrine disrupting chemicals

12. Without regard to current pesticides law, what actions would the U.S. be obliged to take in order to comply with the Stockholm Convention obligations respecting DDT? [EXPLANATION REQUIRED]

a. Ban the production of DDT in the United States

b. Ban export of DDT from the United States

c. Ban both of the above with respect to any U.S. citizen or corporation, wherever located.

d. other

13. The LRTAP POPs Protocol and the Stockholm Convention control exactly the same set of chemicals. (T/F) **[EXPLANATION REQUIRED]**

14. In what respect were the U.S. measures pertaining to shrimp found to violate the GATT? **[EXPLANATION REQUIRED]**

a. The U.S. impermissibly sought to impose its own cultural values on other countries.

b. The GATT exception related to conservation of natural resources did not apply to animals living outside the country that imposes the measures

c. The U.S. measures were not "necessary" to the conservation of an exhaustible natural resource

d. The U.S. measures were unjustifiably discriminatory.

15. Which allegation is most suited to the development of a factual record under Articles 14 and 15 of the NAAEC? **[EXPLANATION REQUIRED]**

a. Canada has failed to enforce its water pollution laws with respect to discharges from mines and smelters in British Columbia, including the Teck Cominco smelter.

b. The U.S. has failed to enforce its national ambient air quality standards with respect to automobile emissions.

c. The U.S. has failed to enforce its water and air pollution laws with respect to emissions of mercury from coal-fired power plants and with respect to the disposal of thermometers and other mercury-containing waste.

d. Effluent discharges from the sewage treatment plant in Tijuana, Mexico, violate national standards for fecal coliform.

[END OF SECTION I]

EXAM Part II -- SHORT ANSWERS [490 points total]
[Suggested time: 90 min.]

Unless otherwise indicated, each answer should be no more than 25 words, and may be much shorter. Maximum credit for each question is indicated in [brackets]. Please be sure to clearly number your answers.

16. What are the typical functions of a Secretariat established by a multilateral environmental agreement? What types of actions or activities undertaken by Secretariats tend to generate controversy? Why? [8]

17. What are the typical functions of conferences of parties? Are decisions by the COPs binding on the Parties? [8]

18. What does the Kyoto Protocol require with respect to emissions after the year 2012? [8]

19. List and briefly describe the market-based mechanisms allowed under the Kyoto Protocol. [8]

20. Briefly discuss potential weaknesses of an emissions trading system. Under what circumstances is it most likely to be effective? [12]

20. What are the advantages of the Kyoto Clean Development Mechanism? What pitfalls are mostly likely in its use? Are there any safeguards to avoid those pitfalls? [12]

21. Which objectives did the U.S. achieve in the negotiation of the UNFCCC and Kyoto Protocol? [10]

22. Who is liable under international law for injury to public health caused by transboundary pollution? Who has a remedy? [10]

[23. is omitted]

24. Assume the following to be true:
The Basel Convention on Transboundary Movement of Hazardous entered into force in 1992, upon the deposit of the 20th instrument of ratification, acceptance, formal confirmation, approval, or accession. The Basel "Ban Amendment" was adopted by consensus of the 82 Parties present at COP III in 1995. As of August 2005, there are were 166 Parties to the Basel Convention.

> Q: What will it take for the Ban Amendment to enter into force? Be as specific as possible. **(EXPLANATION REQUIRED.)** [14]

25. Members of the Colville Federated Tribe have sued Teck Cominco with respect to discharges from its smelter in Canada. Does the Boundary Waters Treaty (excerpted in Attachment I) require dismissal of that suit? **[EXPLANATION REQUIRED.]** [12]

26. a. What is the **holding** of *Environmental Defense Fund v. Massey* (D.C. Cir. 1993)? [6]

b. Did the district court in *NEPA Coalition of Japan* follow *Massey*? [2]

c. Is *Massey* good law in light of Supreme Court decisions in *Smith v. United States* and *Sale v. Haitian Refugees Council (1993)*? [8]

27. a. What is the "effects doctrine" regarding the extraterritorial application of national law? [25 words or less] [6]

b. Based on his dissent in *Hartford Fire* (excerpted in Attachment II), do you think Justice Scalia recognizes it, or would do so? Why or why not? [25 words or less] [12]

c. How do the "reasonableness factors" in Restatement 403 (discussed in Justice Scalia's dissent) relate (if at all) to the presumption against extraterritorial application articulated by the Supreme Court in *Foley, Aramco*, and other cases? [25 words or less] [12]

28. What are the principal substantive provisions of the Ballast Water Convention? What provisions may make implementation difficult and how? [10]

29. A number of NGO's have been clamoring for observer status at the WTO's Committee on Trade and Environment. Comment briefly on whether the following organizations should be provided credentials. **What criteria would you apply in making this decision?** [10]

- "The World Wilderness Society", boasting 800,000 members, mostly in the U.S. and Europe
- "Taking it to the Streets", a loosely organized network of an indeterminate number of activists, vocally opposed to "globalization". The applicant for accreditation served a 30 day sentence for disorderly conduct in connection with demonstrations surrounding the G-8 Summit in Genoa, Italy.
- "The Environment and Trade Institute" – a small think tank organization, currently staffed by one director, secretary, research assistant; funded by charitable institutions.
- The International Farmers Organization, a member organization claiming to represent of 5,000,000 farmers.
- The Global Association of CEO's – an organizations whose members consist of global corporations capitalized at $5 billion or more.

30. a. Is the "precautionary principle" a principle of customary international law?
b. Assuming the affirmative, what would be the practical consequences? [14]
[50 words or less total for a. and b. combined]

31. List five reasons why countries might comply with international environmental agreements. [10]

32. Why are many provisions in international environmental agreements imprecise? [10]

33. What international environmental agreements would be implicated by the injection of large quantities of CO2 beneath the seabed? Briefly discuss issues that might be raised under these agreements. [12]

34. Name the two principal obligations under the Basel Convention. [10]

35. What enforcement mechanism(s) are available with respect to violations of CITES? [10]

36. In what way(s) (if any) does the Basel Liability Protocol implement the polluter pays principle? In what way does it fall short? [10]

37. Assume (for the sake of argument) that U.S. legislators and officials are interested only in (1) protecting the environment of the United States and (2) protecting the interests of U.S. –based chemical companies. Given these constraints, assess whether the U.S. should ratify the Stockholm Convention. [12]

38. What difficulties does the issue of adding chemicals to Annexes A or B to the Stockholm Convention pose for U.S. implementing legislation? [12]

39. (Hypothetical) Assume the U.S. has ratified the Stockholm Convention. At the February 1, 2007 meeting of the Conference of Parties to Convention, a resolution is introduced, without prior notice, to add "biotech corn" to Annex A. After bitter debate, the resolution is adopted by a vote of 75 for 24 against (including the United States), with 40 members not present.

(i) what is the earliest time that the amendment can become effective? [6]
(ii) what needs to happen in order for the amendment to become effective? [8]
(iii) what steps, if any, can the U.S. take in order to avoid application of the amendment to the United States? [8]
(iv) what steps, if any, can the U.S. take in order to prevent the amendment for entering into force? [8]

40. Under what circumstances and conditions is a dispute subject to mandatory adjudication by the International Law of the Sea Tribunal? [8]

41. Under what theory was the U.S. able to successfully prosecute Royal Caribbean Cruise Lines for pollution-related crimes despite UNCLOS provisions on flag state jurisdiction? [10]

42. What is the principal distinction between the London (Dumping) Convention and the MARPOL Convention? [8]

43. What is/are the principal international mechanism(s) for controlling land-based sources of pollution of the marine environment? [8]

44. What is the principal substantive requirement of the Caribbean Protocol on Land-based Sources of Marine Pollution? [10]

45. An aged, single-hulled oil tanker offloads its cargo in Vancouver, Canada. Canadian port officials advise the Captain that the ship is in violation of Canadian and international safety and environmental standards, and

suggest that if the Captain wishes to avoid long winters in an Arctic jail, he and the ship should leave port within 24 hours. The ship proceeds to sea, where the Captain receives instructions to steam to a "recycling yard" on a beach in Bangla Desh. While attempting to carry out these orders, the ship is prevented from entering Bangla Desh waters by the Bangla Desh Navy. Frustrated, the Captain steams to a point 30 miles offshore, anchors the ship. A sister ship arrives, and the Captain and crew depart, leaving the Dopque at anchor. After the passage of several weeks, pirates seize the ship, and run it aground at the Bangla "shipyard", after receiving a payment of $500,000 from the yard's owner.

a. Does the Basel Convention apply to any of the transactions/events described above? Assume that the ships contains (inter alia) significant quantities of PCBs in its insulation and electronic capacitors. [12]

b. Do any of the actions described above violate the MARPOL Convention or its Annexes? [8]

c. Do any of the actions described above violate the 1972 London (Dumping) Convention or its 1996 Protocol? {You need address either the Convention or the Protocol, but not both} [8]

46. What are the criteria for the issuance of scientific research permits under the International Convention for the Regulation of Whaling? [8]

47. Your client, Buck Turgidson, is an avid collector of animal trophies and ivory figurines, and is planning a safari to in western Kenya. Assume that Kenyan elephants are still listed in Annex I of CITES. Buck has asked the following questions regarding the Convention on International Trade in Endangered Species (CITES). [If necessary, you may make factual assumptions, as long as you clearly state them.]

a. I want to bring back a stuffed elephant. Does CITES apply? What will I need to do (legally) in order to be able to bring back the elephant? [8]

b. What if I want to bring back only the tusks? [8]

c. What if I first have the tusks carved into little figurines? [8]

d. Let's talk about uncarved tusks. I hear African elephants from some African countries other than Kenya are now listed under Appendix II. I'm going to tell you these tusks are from one of these Appendix II countries. Work with me on this. What do I have to do to get an export permit? [8]

48. Pampas is a large South American country in which Oat-1, a genetically modified grain, is grown and processed. Oat-1 is resistant to several major plant diseases because a jellyfish gene has been transplanted into the genetic material for the plant. The leading newspaper in Yoribo, a large, rapidly developing nation, recently ran a front-page story about a scientific study concluding that Oat-1 can interbreed with certain wild grain plants to create an aggressive and "naturally" reproducing hybrid that could overwhelm natural plant communities. Based on that newspaper story, Yoribo immediately banned any importation or agricultural use of Oat-1 pending further investigation.

a. Does the Yoribo ban violate of any of the WTO agreements? Does it matter whether Pampas is a party to the Biosafety Protocol? [25 words or less] [10]

b. Is the Yoribo ban a proper application of the Biosafety Protocol? [25 words or less][8]

c. Yoribo is afraid of an adverse decision by a WTO Panel and has retained you as a consultant, on how it can protect its natural plant communities without becoming subject to WTO trade sanctions. What is your advice? [25 words or less] [14]

49. According to the WTO Appellate Body, why did the European Communities ban on the import of beef from hormone-enhanced cattle violate the SPS agreement? Why was not EC not able to successfully invoke the "precautionary principle" as a defense? [14]

50. In what major procedural way does NAFTA Chapter 11 differ from the GATT and other WTO agreements? [8]

51. Leathers Are US, a large U.S. manufacturer and retailer of leather apparel and other leather products has advised its Moroccan suppliers that it will not accept shipments of raw or finished leather unless it has been certified, by an accredited third-party auditor, that the leather was tanned in accordance with standards established by the "Eco-business" Institute, a non-profit institution based in the U.S., whose members include governmental officials, business leaders, and NGOs. The U.S. is Morocco's largest export market, and "Leathers" its largest customer.
Q: On the basis of these facts, is there a claim that Morocco can bring before the WTO? [12]

52. Is international trade in whale meat subject to CITES? Suppose the U.S. were to impose an absolute ban on the commercial importation and sale of whale meat, unless it is certified in accordance with Article III of CITES. Pequodania, a country with a long and proud whaling tradition, brings a claim against the U.S. for violation of the GATT. Analyze the merits of Pequodania's claim. Does it matter if Pequodania is a party to The International Convention on Whaling and/or CITES? Suppose that Pequodania is a party to the ICRW, and has characterized its catch of 1,000 minke and bowhead whales as being for "research purposes". [14]

[END OF SECTION II.]

INTERNATIONAL ENVIRONMENTAL LAW EXAM
Part III – ESSAYS
[suggested time: 60 minutes total]

ANSWER QUESTION 1 and ANY ONE of Questions 2-5
{each question is worth a maximum of 180 points]

QUESTION 1.

It is March 31, 2009. President Muffley has taken office, having acknowledged the phenomenon of global warming and pledged in his State of the Union address to take steps to address it "in a cost-effective manner that is in the interest of the United States". **The President has asked you, a trusted advisor and former fraternity buddy, to draft a comprehensive strategy aimed at assuring the U.S. take a "leadership role" on climate change. The President has made it clear that she would like the US to become a party to the Kyoto Protocol, or a successor instrument, keeping in mind the need to bring a skeptical Senate on board.** Of course, various federal agencies and Members of Congress have heard about your assignment and are not shy about offering (conflicting) advice. EPA underscores the need for prompt, drastic reductions in carbon emissions. The Department of Energy argues for construction of 24 new nuclear power plants. Senator Ripper, Chair of the Foreign Relations Committee (controlled by a different political party) warns of giving a "free ride" to "developing" countries such as China and India. Congressman Forehead, of the Ways and Means Committee warns against any new taxes or taxes increases. The powerful Chairman of the Office of Management and Budget (who reports directly to the President) is a devoted believer in the use of science-based cost-benefit analyses as a predicate to regulatory decisions.

Draft the strategy requested by the President. Be as specific as possible. Make clear what objectives and sub-objectives the strategy seeks to obtain.

QUESTION 2. Assume the U.S. has ratified the Stockholm Convention and enacted legislation minimally sufficient to implement the Convention. The Oxboggle Corp, a multinational company incorporated in Delaware, decides to resume production of DDT, and soon has a thriving business exporting DDT to developing countries, ostensibly to be used for control of malaria. A number of unfortunate incidents ensue:

- a chemical spill occurs at Oxboggle's Brownsville, Texas plant, with DDT and leaching into the groundwater on both sides of the U.S. – Mexico border
- some of the DDT exported to Malabar (a party to Stockholm), an African country where malaria is endemic, is actually used to spray rice fields
- some of the exported DDT is diverted to Sicily, Italy, where it is sprayed on wheat fields.

Discuss the international legal vulnerabilities both for Oxboggle and the United States.
In the five years following the spill, the following injuries/damages are claimed:

- contamination of groundwater in Matamoras, Mexico, Sicily, and Malabar
- birth defects in babies born in each of the above regions
- decreased populations of large birds, including storks, cranes, and eagles in all three regions; scientists believe that DDT ingestion causes infertility and damages the eggs of these species

Be sure to discuss what fora and forms of relief may be available, and for (and against) whom.

QUESTION 3.

[Note: This set of "facts" should be familiar, but there are a few changes from the class exercise.]

Background

Suppose it is now July, 2010, and the Ballast Water Convention has entered into force without amendment. The United States has ratified the Convention and enacted domestic legislation pertaining to the discharge of ballast water. The legislation, enacted during a crisis involving proliferation of the "Thai walking fish", includes the following features:

U.S. Statute

- EPA, in consultation with the Coast Guard, shall establish discharge standards and other requirements necessary to (i) implement that Ballast Water Convention and (ii) protect health, the environment, and property from the proliferation of harmful aquatic nuisance species.

- the Act applies to the following categories of ships:
  - ships located in U.S. ports or internal waters
  - ships transiting through the U.S. territorial sea
  - ships transiting through the U.S. contiguous zone
  - ships located in such areas of the U.S. EEZ that the Administrator of NOAA may determine are particularly sensitive to the discharge of invasive nuisance species.

- The Act exempts pleasure boats less than 100 feet in length, as well as military vessels.

- The Act does not distinguish between vessels on the basis of when they were built.

- The Coast Guard is authorized to inspect and take samples from the ballast water discharged by any ship subject to this Act, wherever located, and take appropriate enforcement action, including seizure of the ship and arrest of its captain and crew.

EPA Regulations

EPA, in consultation with the Coast Guard, has promulgated regulations to implement the Act, which provide (inter alia):

- Ships discharging ballast water in areas covered by the Act must comply with the following discharge standard:
  - less than 1 viable organism per cubic meter greater than or equal to 50 micrometers in size and
  - less than 1 viable organism per cu. meter less than 50 micrometers and greater than or equal to 10 micrometers in size

- A vessel shall be deemed to be in compliance with the Act and the Convention if the vessel:
  (i) (a) has a valid ballast water discharge certificate, issued on the basis of the proper installation of a "super-chlorine" treatment system AND
  (b) is properly operating such system; OR

  (ii) (a) has a valid ballast water discharge certificate issued on the basis of the proper installation of any alternative technology approved for this purpose by EPA; AND
  (b) is properly operating such system.

A U.S. Coast Guard cutter, out on a routine drug interdiction mission, boards a Panamanian oil tanker 21 miles east- southeast of Galveston. No drugs are found, but neither is a ballast water treatment system. The tanker has not discharged any ballast water since taking on cargo in Veracruz, but would need to do so in order to unload in Galveston. Several of the Filipino crew members testify that the Captain had ordered that the ship's wastewater treatment system be disconnected upon departure from Veracruz, but had hastily ordered it

reconnected upon the approach of the Coast Guard cutter. The Captain denies this claim, and the ship logs do not reflect any such orders.

The Coast Guard seizes and impounds the ship, holds several of the crew as material witnesses, and refers Captain Baha (a Mexican national) to the local U.S. attorney for prosecution. The U.S. attorney, Frederic Jabert, indicts the Captain, charging her with intent to violate the EPA ballast water discharge standards and marine sanitation standards, and seeks a maximum sentence of 6 months' imprisonment and $10,000 fine.

QUESTION

Discuss the merits of the U.S. Attorney's case. What limitations, if any, does international law put on the prosecution? What remedies, if any, does Captain Have? What remedies, if any, do Panama and Mexico have? Has the U.S. incurred any liability by virtue of the Coast Guard's or U.S. Attorney's actions?

Does it make a difference whether the IMO had approved the "superchlorine" system?
What if:

-- the ship was registered in Comoros, a non-party to the Convention?
-- the ship had complied with ballast water exchange requirements under the Convention?
-- the inspection/seizure took place 9 miles from shore
-- the inspection/seizure took place in Galveston harbor, and the Coast Guard had observed discharge of ballast water in violation of the EPA requirement?

QUESTION 4. Flash forward to 2010. Populations of Emperor Penguins in Antarctica are decreasing. Although the causes of the decline are not certain, the following factors have been identified by some scientists:

-- chemicals: penguin blubber samples have been found to contain high levels of PCBs, pesticides, and mercury
-- climate: global warming trends have increased the presence of predators
-- tourism: the last ten years have seen an explosion in commercial tours and tourists in Antarctica, although no specific link between such tourism and penguin health has been identified.

Q: What do you think would be the best strategy for developing and negotiating international regime or mechanism to protect the penguins? What challenges would you expect to encounter, and how would you respond? Are there any ways to make use of any "principles" of international environmental law?

QUESTION 5.

Background

As part of its "zero-tolerance" policy on drugs, the U.S. Drug Enforcement Agency (DEA) has imposed strict controls on the import, production and use of products derived from the *cannabis sativa* plant. Kenex, Ltd., a Canadian company who "manufactures, markets and distributes non-psychoactive and completely lawful industrial hemp products, including whole hemp grain (i.e. seed), hemp grain derivatives (such as refined hemp oil, hemp nut and hemp meal), hemp fiber and certified hemp seed, throughout North America," filed a claim under NAFTA Chapter 11, alleging that DEA has improperly interfered with its business of exporting and selling those products in the United States. Assume the following allegations to be true:

- DEA effectively prohibits the importation or sale of all products, any portion of which contains material originating in or derived from the *cannabis sativa* plant. The hemp food and oil products marketed and sold by the Investor contain trace amounts of naturally occurring tetrahydrocannabinol ("THC") the psycho-active ingredient in marijuana.

- THC has been demonstrated to be harmful to humans when consumed in concentrations of 2000 parts per million and higher. No studies show it to be harmful at lower concentration levels, but risks, particularly for carcinogens, are often extrapolated from a high to a low dosage.[1]
- "High Times" magazine published an article in 1972, with recipes using ground hemp nuts and hemp meal.[2]
- Canadian regulations permit hemp food and oil products containing miniscule trace amounts of naturally occurring THC of less than 10 parts per million (PPM). U.S. law contains no comparable exemption.
- The Claimant has incorporated, under the laws of Delaware, a wholly owned subsidiary, charged with marketing its product in the United States.
- The DEA does not impose an absolute ban on poppy seed products, even though they contain trace amounts of opiates

Question

Discuss the merits of Kenex's claim. Would it make a difference if Kenex also sought to supply "medical" marijuana for use in U.S. hospices by terminally ill cancer patients? What if DEA allowed such uses but otherwise maintained is "zero tolerance" restrictions?

[END OF EXAM]

Happy Holidays!

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[1] I made this paragraph up.

[2] *Id.*

ATTACHMENT I
BOUNDARY WATERS TREATY (Excerpts)

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN RELATING TO BOUNDARY WATERS, AND QUESTIONS ARISING BETWEEN THE UNITED STATES AND CANADA

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and His Britannic Majesty, the Right Honourable James Bryce, O.M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

*** * ***

ARTICLE IV

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction of maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

*** * ***

ARTICLE VII

The High Contracting Parties agree to establish and maintain an International Joint Commission of the Untied States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

ARTICLE VIII

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Article III or IV of this Treaty the approval shall be governed by the following rules of principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

- Uses for domestic and sanitary purposes;
Uses for navigation, including the service of canals for the purposes of navigation;
Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary. The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

* * *

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

ARTICLE IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

ARTICLE X

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions any

matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth and sixth paragraphs of Article XLV of the Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission fail to agree.

* * *

Article XI

* * *

The Commission shall have power to administer oaths to witnesses, and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

* * *

In faith whereof the respective plenipotentiaries have signed this treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of January, in the year of our Lord one thousand and nine hundred and nine.

(Signed) ELIHU ROOT [SEAL]

(Signed) JAMES BRYCE [SEAL]

Attachment II

JUSTICE SCALIA'S DISSENT IN *HARTFORD FIRE INS. v. California* (1993)

SCALIA, J., delivered a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined post, p. 800. [Abridged.]

Petitioners, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act. It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested).

The second question -- the extraterritorial reach of the Sherman Act -- has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC* v. *Arabian American Oil Co.* (1991) (*Aramco*) ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the U.S"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction -- want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.

There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction," or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate." There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "to regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected. * * * But the question in this litigation is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco, supra.* **Applying that** canon in *Aramco*, we held that the version of Title VII of the Civil Rights Act of 1964 then in force did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "'any activity, business, or industry in commerce.'" We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "An act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, (1804) (Marshall, C.J.). This canon is "wholly independent" of the presumption against extraterritoriality. *Aramco, supra* (Marshall, J., dissenting). It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where

the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero* v. *Int'l Terminal Operating Co.* (1959), the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries."

Lauritzen, Romero, and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be construed in light of international law in other areas as well. See, *e.g., Sale* v. *Haitian Centers Council, Inc.*. More specifically, the principle was expressed in *United States* v. *ALCOA*, 148 F.2d 416 (CA2 1945), the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue. n9

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n9 Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the "comity of courts," which has led them to characterize the question presented as one of "abstention," that is, whether they should "exercise or decline jurisdiction." As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.

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In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles and in the decisions of other federal courts. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). **The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," *id.*, § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," *id.*, § 403(2)(b); "the character of the activity to be**

regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," *id.*, § 403(2)(g); and "the likelihood of conflict with regulation by another state," *id.*, § 403(2)(h). Rarely would these factors point more clearly against application of U.S. law. The activity relevant to the counts at issue here took place primarily in the UK, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States.n10 Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, § 403(2)(g). Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b) -- suggesting that "the importance of regulation to the [United States]," Restatement (Third) § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

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n10 Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." *Id.*, at 933. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.

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It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should decline to exercise jurisdiction, rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed before. It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true conflict " counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a *violation* of another country's law. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries -- particularly our closest trading partners.

In the sense in which the term "conflict" is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did [in *Lauritzen*]. Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary.

Literally the *only* support that the Court adduces for its position is § 403 of the Restatement (Third) -- or more precisely Comment *e* to that provision, which states:

> **"Subsection (3) [which says that a State should defer to another state if that State's interest is clearly greater applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."**

The Court has completely misinterpreted this provision. Subsection (3) of § 403 (requiring one State to defer to another in the limited circumstances just described) comes into play only after

subsection (1) of § 403 has been complied with -- *i.e.*, after it has been determined that the exercise of jurisdiction by *both* of the two States is not "unreasonable. " That prior question is answered by applying the factors (*inter alia*) set forth in subsection (2) of § 403, that is, precisely the factors that I have discussed in text and that the Court rejects. n11

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n11 The Court skips directly to subsection (3) of § 403, apparently on the authority of Comment *j* to § 415 of the Restatement (Third). But the preceding commentary to § 415 makes clear that "any exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in § 403(2). Restatement (Third) § 415, Comment *a*. Comment *j* refers back to the conflict analysis set forth in § 403(3), which, as noted above, comes after the reasonableness analysis of § 403(2).

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I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91-1128.