
ANTONIN SCALIA LAW SCHOOL
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ARTICLES:

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TO OTHER TERRITORIES THE EU CONSIDERS UNDER OCCUPATION

PROF. BRENDA SHAFFER AND YAEL SHAFFER ESQ.

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CONTENTS

ARTICLES

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Prof. Brenda Shaffer And Yael Shaffer Esq. 1

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JUDICIAL REVIEW IN CHINA

Yao Cai 27

NOTES

SOMETHING'S IN THE WATER: ALTERING RADIATION REGULATIONS AND
SEAFOOD IMPORT ALERTS BY THE FDA IN THE WAKE OF THE FUKUSHIMA
DISASTER

Armon Mirian 57

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IS PSAGOT DRINKING ALONE? APPLICATION OF THE CJEU PSAGOT JUDGEMENT TO OTHER TERRITORIES THE EU CONSIDERS UNDER OCCUPATION

*Prof. Brenda Shaffer and Yael Shaffer Esq.**

I. INTRODUCTION

In the second half of the twentieth century and the early twenty-first century, a new phenomenon emerged in the international system: territorial conflicts that do not find closure. The establishment of the United Nations, and the formal adoption of the principle of inviolability of borders and inadmissibility of use of force to change them, has created an increase in protracted conflicts. As a result, close to a dozen territories around the world have been controlled for decades by forces which are not widely recognized as the sovereign over the territories.¹ Yet economic activity still takes place in these territories. The November 2019 Court of Justice of the European Union (“CJEU”) judgment in *Organisation juive européenne and Vignoble Psagot Ltd v. Ministre de l’Économie et des Finances* (“*Psagot*”) relates to trade with a territory of this type.² The *Psagot* case covered trade between Israeli controlled areas, the West Bank, East Jerusalem and the Golan Heights, and the EU.³

In *Psagot*, the CJEU upheld that exporters of goods produced in Israeli settlements, in the West Bank, East Jerusalem, and the Golan Heights, and imported into the EU could not designate as country of origin “Products of Israel” on consumer products labels, since the EU does not recognize Israel’s jurisdiction over these territories.⁴ In addition, the consumer product labels should designate explicitly that the goods are produced in Israeli settlements, in order not to potentially mislead consumers that the goods are produced by Palestinian entities.⁵ The *Psagot*

* The authors would like to thank several individuals that provided very useful comments: Prof. Anna Jonsson Cornell, Prof. Eugene Kontorovich, Chad Crowell, and Amanda Alexander.

¹ For more on these territories, see Svante E. Cornell & Brenda Shaffer, *Occupied Elsewhere: Selective Policies on Occupations, Protracted Conflicts, and Territorial Disputes*, FOUNDATION FOR DEFENSE OF DEMOCRACIES 6-7 (Jan. 2020) <https://www.fdd.org/wp-content/uploads/2020/01/fdd-report-occupied-elsewhere-selective-policies-on-occupations-protracted-conflicts-and-territorial-disputes.pdf> [hereinafter Cornell & Shaffer]; Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, 9 J. LEGAL ANALYSIS 285 (2017).

² See Case C-363/18, *Organisation juive européenne v. Ministre de l’Économie et des Finances*, 2019 ECLI:EU:C:2019:954 (Nov. 12, 2019) [hereinafter *Psagot*].

³ *Id.* ¶ 2.

⁴ *Id.* ¶¶ 34-38.

⁵ *Id.* ¶¶ 51-58.

4

judgment, thus, requires that consumer products labels explicitly indicate a geographic location's status under international law.⁶

This article examines the question of whether this judgment should be applied to other territories where the EU does not recognize the jurisdiction of occupying powers. Has the CJEU established a new standard that goods imported into the EU produced in settlements in occupied zones must be labeled as such, or is this a *lex specialis* judgment specific to Israel? There are several regions in close proximity to Europe where the EU does not recognize the occupying power's sovereignty or jurisdiction over these territories, including six regions occupied by Russia and Armenia's occupation of Nagorno-Karabakh and other territories of Azerbaijan.⁷

Among those cases, Armenia's occupation of territories of neighboring Azerbaijan is particularly relevant. The Republic of Armenia captured Nagorno-Karabakh and seven other territories of Azerbaijan from the Republic of Azerbaijan during the 1992-1994 war between the two states.⁸ These territories remain under Armenia's occupation.⁹ Armenia, like Israel, conducts an extensive settlement project in the territories it occupies.¹⁰ These territories are recognized by the UN, US, EU, and other European states as lawfully part of Azerbaijan, and Armenia is not recognized as having jurisdiction or sovereignty over the territories.¹¹ Many of Armenia's settlements produce products that are imported into the EU. However, as will be shown in this article, products from Armenian settlements in Azerbaijan's territories are labeled and marketed throughout the EU as "Product of Armenia."

This article examines the applicability of the CJEU's *Psagot* case labeling requirements to other territories. This article surveys the policy and practice of the EU toward the import of goods produced in regions that the EU considers to be under foreign occupation, including a case study on the labeling of goods produced in Armenia's settlements in territories of Azerbaijan that it occupies. Finally, this article concludes that the *Psagot* CJEU judgement is likely to generate additional cases of labeling requirements for occupied territories, such as Nagorno-Karabakh.

⁶ *Id.*

⁷ Cornell & Shaffer, *supra* note 1, at 7-19.

⁸ *Id.* at 14-15.

⁹ JOHANNA POPJANEVSKI, INTERNATIONAL LAW AND THE NAGORNO-KARABAKH CONFLICT, in THE INTERNATIONAL POLITICS OF THE ARMENIAN-AZERBAIJANI CONFLICT 23 (Svante Cornell ed., 2017).

¹⁰ Cornell & Shaffer, *supra* note 1, at 26-27, 29-31.

¹¹ *Id.* at 6; POPJANEVSKI, *supra* note 7, at 23.

II. PSAGOT JUDGMENT: A NEW LEGAL STANDARD ON GOODS IMPORTED INTO THE EU PRODUCED IN OCCUPIED ZONES?

On November 12, 2019 the CJEU published its judgement in the *Psagot case*.¹² The case was submitted to the CJEU after the publication of two notices.¹³ First, a 2015 EU Commission Notice specified that, under international law, the territories of the Golan Heights, the West Bank and East Jerusalem are not part of Israel.¹⁴ The EU Notice stated that, in order not to mislead EU consumers, the labelling of food products must explicitly indicate the origin of the products as products from Israeli settlements in such territories.¹⁵ France first applied this requirement domestically by a notice on November 24, 2016 from the French Minister for the Economy and Finance, referring to the 2015 EU notice, in which it reiterated its labelling mandate for products from Israeli settlements in the occupied territories.¹⁶ The case was referred to the CJEU following proceedings brought by the Organisation juive européenne¹⁷ and Vignoble Psagot¹⁸ against the French Minister for the Economy and Finance seeking the annulment of the French Notice.¹⁹ The CJEU judgement was preceded by the publication of an opinion by the CJEU Advocate General.²⁰

The CJEU held that goods produced in Israeli settlements, in the West Bank, East Jerusalem, and the Golan Heights, and imported into the EU could not designate their country of origin on consumer product labels as Israel, since the EU does not recognize these territories as legally part of Israel.²¹ In addition, the CJEU held that the consumer products' labels

¹² See *Psagot* ¶ 1.

¹³ See *id.* ¶¶ 2, 12, 17.

¹⁴ See Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since June 1967, 2015 O.J. (C 375) 4, 4.

¹⁵ *Id.* at 4-6. In January 2016, the US Custom's and Border Protection (CBP) issued a similar notice related to certificates of origin of imported goods. The US CBP notice also stated that the location requirement could not be circumvented by registering a producing company within Israel's pre-1967 borders. See *West Bank Country of Origin Marking Requirements*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 23, 2016, 12:13 PM), https://csms.cbp.gov/viewmssg.asp?Recid=21420&page=&srch_argv=gaza&srctype=&btype=&sortBy=&sby.

¹⁶ JORF No. 0273 texte no. 81 du 24 novembre 2016 Avis aux Opérateurs Économiques Relatif à L'indication de l'Origine Des Marchandises Issues des Territoires Occupés par Israël Depuis Juin 1967 [JORF No. 0273 text no. 81 of November 24, 2016 on the Notice to Economic Operators Relating to the Indication of the Origin of Goods from the Territories Occupied by Israel Since June 1967], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 24, 2016, p. 95.

¹⁷ A European Jewish communal organization.

¹⁸ A company that specializes in wine produced from vineyards in the West Bank.

¹⁹ Conseil d'État [CE] [Council of State], May 30, 2018, No. 407147, ECLI:FR:CECHR:2018:407147.20180530.

²⁰ See Case C-363/18, *Organisation juive européenne v. Ministre de l'Économie et des Finances*, 2019 ECLI:EU:C:2019:494 (June 13, 2019).

²¹ *Psagot* ¶¶ 13, 34-38.

4

should denote explicitly that they were produced in Israeli settlements, in order to not mislead consumers that Palestinian entities produced the goods.²² The *Psagot* judgment upheld the legality of requiring a geographic location's status under international law to be included in consumer product labels.²³

In the judgment, the CJEU referred to EU Regulation No. 1169/2011 on the provision of food information to consumers,²⁴ which states that indication of a product's origin should be provided where failure to indicate this might mislead consumers as to the actual country of origin or place of provenance of the product.²⁵ The CJEU explained that the regulation's stated goal is not only to achieve a high level of health protection for consumers, but also to guarantee a consumer's ability to "make informed choices, with particular regard to health, economic, environmental, social and ethical considerations."²⁶ In the context of these considerations, the CJEU stated that the international legal status of the production site is relevant information.²⁷ Furthermore, the judgment held it is reasonable that a consumer's purchasing decision may be influenced by whether a product comes from a settlement established in breach of international humanitarian law.²⁸ The court explained that consumers cannot be expected to guess whether a product from an occupied region came from a locality constituting a settlement established in one of those territories, in breach of the rules of international humanitarian law, and therefore the omission of such information is likely to mislead consumers.²⁹ Accordingly, the court concluded that products that originate from occupied territories must bear the indication of that territory, as well as the indication that they come from an Israeli settlement within that territory.³⁰

The CJEU's reasoning focused on the legal status of the occupied territories in question.³¹ In its interpretation of a product's origin, the court differentiated between the notion of a "state," which refers to "a sovereign entity exercising, within its geographical boundaries, the full range of powers recognised by international law,"³² and the term "territory," which refers to, inter alia, "geographic spaces which, whilst being under the

²² *Id.* ¶¶ 51-58.

²³ *See id.* ¶ 60.

²⁴ *See Psagot* ¶¶ 7-8; *see also* Council Regulation 1169/2011 2011 O.J. (L 304) 18.

²⁵ *See* Council Regulation 1169/2011, arts. 9 & 26, 2011 O.J. (L 304) 18, 18-63; *see also Psagot* ¶¶ 7-8.

²⁶ *Psagot* ¶ 53.

²⁷ *Id.* ¶ 56.

²⁸ *Id.* ¶ 55.

²⁹ *Id.* ¶¶ 50, 57.

³⁰ *Id.* ¶ 58.

³¹ *See id.* ¶¶ 33-35, 48.

³² *Id.* ¶ 29. The *Psagot* court bases this interpretation on the CJEU's judgment in *Council v. Front Polisario*. *See* Case C-104/16, *Council v. Front Polisario*, 2016 EU:C:2016:973 ¶ 95 (Dec. 21, 2016) [hereinafter *Front Polisario*].

jurisdiction or the international responsibility of a State, nevertheless have a separate and distinct status from that State under international law."³³

The CJEU noted that the products at issue in the *Psagot* case originate in territories occupied by the State of Israel since 1967, and, under the rules of international humanitarian law, these territories are subject to the limited jurisdiction of the State of Israel, as an occupying power, while "each has its own international status distinct from that of that State."³⁴ According to the *Psagot* judgment, the EU recognizes the West Bank as a territory of the Palestinian people.³⁵ In light of this, the CJEU held that indicating Israel as the product's country of origin is likely to deceive consumers.³⁶ Similarly, the CJEU held that stating the origin as the West Bank may lead consumers to think the products are of Palestinian origin and not from an Israeli settlement there.³⁷

The CJEU claimed that the settlements established in territories occupied by the State of Israel are a concrete expression of a policy of population transfer conducted by the State outside its territory, in violation of international humanitarian law.³⁸ Moreover, the CJEU noted that the settlement policy has been repeatedly condemned by the United Nations Security Council and the European Union.³⁹

In sum, the CJEU held that imported goods produced in Israel's settlements in occupied territories must be labelled as such, in order not to mislead consumers as to the origin of such products since this information is relevant as an ethical consideration for consumers when making a

³³ *Psagot* ¶ 31. The *Psagot* court bases this interpretation on the CJEU's judgments in *Council v. Front Polisario* and *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*. See *Front Polisario*, ¶¶ 92, 95; Case C-266/16, *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, 2018 EU:C:2018:118 ¶¶ 62-64 (Feb., 27, 2018) [hereinafter *Western Sahara Campaign UK*].

³⁴ *Psagot* ¶ 34.

³⁵ *Id.* ¶ 35. It should be noted that the EU does not recognize Palestine as a state. The European Commission states, regarding the term "Palestine," that "[t]his designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of the Member States on this issue." See *Palestine*, EUROPEAN COMM'N, https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/palestine_en (last updated Jan. 22, 2020). Several EU member states have recognized Palestine as a state. See *Luxembourg Said Pushing for EU States to Recognize Palestine*, TIMES OF ISRAEL (Dec. 9, 2019, 2:45 AM), <https://www.timesofisrael.com/luxembourg-said-pushing-for-eu-states-to-recognize-palestine/>.

³⁶ *Psagot* ¶ 49.

³⁷ *Id.* ¶¶ 36-38. The court mentioned that it was important to prevent consumers being misled as to the fact that the State of Israel is present in those territories as an occupying power and not as a "sovereign entity." Therefore, according to the CJEU, it is necessary to inform them that those products do not originate in Israel.

³⁸ *Id.* ¶ 48; see *Convention Relative to the Protection of Civilian Persons in Time of War*, art. 49 ¶ 6, Aug. 12, 1949, 75 U.N.T.S. 287.

³⁹ *Psagot* ¶ 48.

4

purchasing decision.⁴⁰ As shown above, the CJEU explained that the information deemed relevant in this context is the legal status of the territories where the products are produced and whether the production takes place in settlements that are established in those territories in breach of international law. Accordingly, it is reasonable that this requirement should be applied to other regions where the EU does not recognize the jurisdiction or sovereignty of the occupying powers in those territories. Goods produced in settlements in those territories should require the same designation as required by goods produced in Israeli settlements in the territories it occupies.

III. EU POLICY ON IMPORTED GOODS FROM REGIONS UNDER OCCUPATION

The European Union has an exceptionally inconsistent policy toward trade with regions under occupation.⁴¹ There are several regions in close proximity to the borders of the EU for which the EU and member countries do not recognize the controlling party as the legal sovereign or as having jurisdiction over these regions.⁴² These regions include: five regions under Russian occupation (Donbas, Crimea, Transnistria, Abkhazia, and South Ossetia); Armenia's occupation of Nagorno-Karabakh and surrounding territories of Azerbaijan; Morocco's lack of jurisdiction over Western Sahara; and Turkey's occupation of Northern Cyprus.⁴³

While, in theory, consumer product labels should be accurate in all cases, the EU only enforces this policy in the case of imports of goods from Israeli settlements and from Russian occupied Crimea, the latter in the case of broader international sanctions that target Russia's invasion and annexation of Crimea.⁴⁴ In addition, the EU conducts a trade embargo on Northern Cyprus, even though this region is located within the European Union.⁴⁵ In contrast, the European Union has encouraged trade with Western Sahara, explicitly including the region in its trade agreements with Morocco, even though Morocco's jurisdiction over the region is not recognized by the EU.⁴⁶

In the case of the Russian occupied region of Transnistria, the EU has a unique policy. The EU has set up a mechanism to enable export from the occupied region, requiring that the label list the origin of goods as Moldova, thus upholding the principle of declaration of the geographic

⁴⁰ *Id.* ¶¶ 51-58.

⁴¹ For more on EU policies and trade with zones in protracted conflicts, *see* Cornell & Shaffer, *supra* note 1, at 6, 35-39.

⁴² *Id.* at 35-39.

⁴³ *Id.* at 6, 35-39.

⁴⁴ *See id.* at 38.

⁴⁵ *Id.* at 37-38.

⁴⁶ *Id.* at 36-37.

locality per its legal status.⁴⁷ However, in labeling requirements on goods imported into the EU, there is no additional denotation that this region is under Russian occupation and not subject to Moldova's food safety regulations and oversight.⁴⁸ Nor is there any indication regarding the producers, such as whether they are Russian settlers or Moldovan nationals. Thus, this practice also deprives consumers of the information that the goods are produced under Russian occupation, which, per *Psagot*, could be a factor in consumers' preferences.⁴⁹ As such, the EU policy regarding goods from occupied Transnistria misleads EU consumers and deprives them of relevant consumer information.

Moldova supported the EU established mechanisms that enabled export to the EU of consumer goods labeled "Products of Moldova," that were produced in the occupied territories.⁵⁰ The 2007 Autonomous Trade Preferences granted to Moldova enabled EU market access to companies operating in Transnistria, which is occupied by Russian military forces.⁵¹ The EU required companies to register in Moldova's capital, Chisinau, even though they were operating in Transnistria, under Russia's control, as a condition to receive EU market access.⁵² Over 2,000 companies operating in Transnistria have used this mechanism to gain entrance to the EU market.⁵³ This arrangement for export from Transnistria was strengthened by a 2016 technical agreement between the EU and local authorities in Transnistria, which stated that Moldova's Deep and Comprehensive Free Trade Agreement (DCFTA) with the EU would also apply to Transnistria.⁵⁴

The EU's policies toward other regions occupied by Russia are also inconsistent. Prior to the full ban on imports from Crimea,⁵⁵ the EU did not accept goods from Crimea without a Ukrainian stamp on its certificate of origin.⁵⁶ Yet, there is no interference with trade with other regions under Russian occupation: Donbas, Abkhazia, South Ossetia.⁵⁷ Similarly, as will be discussed in the next section of this article, the EU has not taken any steps to ensure accuracy in certificates of origin or labeling of consumer goods on products produced in Nagorno-Karabakh and surrounding occupied territories, and goods produced in settlements in these territories

⁴⁷ Cornell & Shaffer, *supra* note 1, at 38-39.

⁴⁸ *See id.* at 39.

⁴⁹ *See Psagot* ¶¶ 53-56.

⁵⁰ *See* Cornell & Shaffer, *supra* note 1, at 38-39.

⁵¹ *Id.* at 39.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *EU Restrictive Measures in Response to the Crisis in Ukraine*, EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> (last visited May 17, 2020).

⁵⁶ *Id.* at 38.

⁵⁷ Cornell & Shaffer, *supra* note 1, at 35.

4

easily enter the EU with certificates of origin and consumer product labels that state “Product of Armenia.”

IV. CASE STUDY: PRODUCTS PRODUCED IN ARMENIA’S SETTLEMENTS IN NAGORNO-KARABAKH AND ADJOINING TERRITORIES OF AZERBAIJAN IMPORTED INTO THE EU

This article will next examine the potential applicability of the CJEU judgment in the *Psagot* case to the case of products produced in Armenia’s settlements in Nagorno-Karabakh and adjoining territories of Azerbaijan. This case study is especially illuminating regarding the question of the applicability of the CJEU *Psagot* judgement to other zones besides Israeli held territories. There are many similarities to the *Psagot* case, including: the EU does not recognize Armenia’s sovereignty over Nagorno-Karabakh and other territories of Azerbaijan; Armenia has established extensive settlements in these occupied territories of Azerbaijan; and goods produced in the settlements are imported into the EU and marketed in almost all states in the EU. Indeed, one might argue that given the concerns about international law raised in the *Psagot* case, Armenia’s occupation of Nagorno-Karabakh and additional territories of Azerbaijan should be at the forefront. Not only does Armenia encourage and give financial incentives to people to move into the occupied territories, but Armenia has expelled the Azerbaijani inhabitants from the territory. In addition, for the last two decades, Armenia has not made a diplomatic offer to return any part of the territories.⁵⁸

However, unlike in the *Psagot* case, there is no enforcement that consumer products’ labels specify that the goods are from an occupied territory, and in some cases from settlements, and the place of origin of these goods is listed in the EU as “Product of Armenia.” The legal status of Armenia’s settlements in Nagorno-Karabakh meets the criteria laid out in the *Psagot* decision. Despite this, products from these illegal settlements are imported into the EU and marketed in most of its states, while their consumer product labels state “Product of Armenia,” even though such labeling could mislead consumers as to their actual country of origin or place of provenance, according to the *Psagot* judgment rationale.

⁵⁸ See *Chiragov v. Armenia*, App. No. 13216/05, Eur. Ct. H.R. ¶ 25 (2015) [hereinafter *Chiragov*]; Knar Babayan, *150 Families Move to “Liberated” Kashatagh in 2011: Will They Stay?*, HETQ (Aug. 17, 2011, 5:08 AM), <https://hetq.am/en/article/3641>; Cornell & Shaffer, *supra* note 1, at 29-31.

A. *Background on the Armenia-Azerbaijan Conflict*

The Armenia-Azerbaijan conflict centered on control of Nagorno-Karabakh and was one of the deadliest in the post-Soviet space.⁵⁹ Nagorno-Karabakh is a region of the Republic of Azerbaijan that had an ethnic Armenian majority at the time of the Soviet collapse.⁶⁰ After the Soviet collapse in late 1991, a full-scale war erupted between the newly independent states of Armenia and Azerbaijan.⁶¹ Armenia sought to capture Nagorno-Karabakh and surrounding territories, especially those territories that would create a physical link between Armenia and Nagorno-Karabakh.⁶² During their capture of Nagorno-Karabakh and seven additional districts of Azerbaijan, Armenian forces evicted more than 700,000 ethnic Azerbaijani residents of the region.⁶³ According to Serzh Sarkisian, who commanded Armenian forces during the war and later became the country's president, Armenia employed a deliberate policy of mass killing in certain locations during the war to cause the civilian Azerbaijani population to flee.⁶⁴ Russian forces took part in certain battles and provided arms, stoking the conflict,⁶⁵ and Russian forces remain in Armenia, manning several of its border regions and its air defense and air space.⁶⁶

In 1994, Armenia and Azerbaijan signed a Russia-brokered ceasefire,⁶⁷ leaving Armenia in control of the Nagorno-Karabakh region and seven adjacent administrative districts of Azerbaijan, which had no significant Armenian populations before the war.⁶⁸ As a result of the 1992-

⁵⁹ Cornell & Shaffer, *supra* note 1, at 14. For more on the Armenia-Azerbaijan conflict, see generally SVANTE E. CORNELL, SMALL NATIONS AND GREAT POWERS (RoutledgeCurzon 2005) (2001); THOMAS DE WAAL, BLACK GARDEN (New York University Press rev. ed. 2013) (2003); SVANTE E. CORNELL ET AL., THE INTERNATIONAL POLITICS OF THE ARMENIA-AZERBAIJAN CONFLICT (Svante E. Cornell ed., 2017).

⁶⁰ Cornell & Shaffer, *supra* note 1, at 14.

⁶¹ *Id.*

⁶² *Id.*; Interviews by Authors with Armenian officials in Cambridge, MA (2002).

⁶³ Chiragov ¶ 25; see U.S. DEP'T OF STATE, AZERBAIJAN 2018 HUMAN RIGHTS REPORT at 24 (2018), available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/azerbaijan/>.

⁶⁴ See DE WAAL, *supra* note 59, at 184-85, 355-56.

⁶⁵ *Id.* at 213-217; SVANTE CORNELL, THE ARMENIAN- AZERBAIJANI CONFLICT AND EUROPEAN SECURITY, in THE INTERNATIONAL POLITICS OF THE ARMENIAN-AZERBAIJANI CONFLICT 10-11 (Svante Cornell ed., 2017).

⁶⁶ See DE WAAL, *supra* note 59, at 213-17; CORNELL, *supra* note 65, at 10-11. Iran's support was also critical to Armenia's success in conquering Azerbaijan's territories. During the war, the only regular trade open to Armenia was from Iran (Georgia was engulfed in a civil war, with Russia's participation, and Azerbaijan and Turkey had closed land borders with Armenia). Iran supplied critical fuel and food supplies and, potentially, arms. Without the supplies from Iran, Armenia could not have sustained the war effort. For more on Iran's role in the conflict, see generally BRENDA SHAFFER, THE ISLAMIC REPUBLIC OF IRAN'S POLICY TOWARD THE NAGORNO-KARABAKH CONFLICT, in THE INTERNATIONAL POLITICS OF THE ARMENIAN-AZERBAIJANI CONFLICT 107-24 (Svante Cornell ed., 2017).

⁶⁷ *Bishkek Protocol*, U.N. PEACEMAKER (May 5, 1994), <https://peacemaker.un.org/armeniaazerbaijan-bishkekprotocol194>.

⁶⁸ See *id.*

4

1994 war between the two states, the Republic of Armenia occupied close to twenty percent of the territory of the Republic of Azerbaijan.⁶⁹

Despite several UN Security Council resolutions calling for withdrawal, Armenia refuses to withdraw from these territories.⁷⁰ To circumvent actions from the international community against its occupation, Armenia claims that it in fact does not occupy the territory, despite the fact that its military is deployed in the occupied territories and its units are in active combat with Azerbaijani forces at the line of contact at the occupied territories.⁷¹ It has created a fictitious “Nagorno-Karabakh Republic”⁷² that it claims is the sovereign over the occupied territories.⁷³ No states have recognized Nagorno-Karabakh as a country, including Armenia.⁷⁴

B. *Status of the Territories According to the EU*

Both EU entities and member states do not recognize Armenia’s sovereignty or jurisdiction over the territories it captured from Azerbaijan.⁷⁵ In addition to the EU and its member states, the UN, the United States, and the European Court of Human Rights (“ECHR”) recognize Nagorno-Karabakh and adjoining regions as occupied Azerbaijani territory.⁷⁶

In official statements and documents, the EU frequently reaffirms its position that it does not recognize Armenia’s claim over Nagorno-Karabakh and surrounding territories. For instance, in response to elections held in Nagorno-Karabakh in 2002, the EU Commission issued the

⁶⁹ For a detailed analysis of the Nagorno-Karabakh conflict under international law, *see generally* HEIKO KRÜGER, THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS 93-112, 116 (2010) (“Neither from the point of view of Soviet law nor international law did any right to secession emerge on the part of the Karabakh-Armenians. For this reason, Nagorno-Karabakh continues to belong to the Republic of Azerbaijan which in this respect is able to invoke the principle of territorial integrity that applies under international law.”).

⁷⁰ *See* S.C. Res. 822 (Apr. 30, 1993); S.C. Res. 853 (July 29, 1993); S.C. Res. 874 (Oct. 14, 1993); S.C. Res. 884 (Nov. 12, 1993); *see also* 1993 *UN Security Council Resolutions on Nagorno-Karabakh*, U.S. DEP’T OF STATE, <https://2001-2009.state.gov/p/eur/rls/or/13508.htm> (last visited Jan. 2, 2020).

⁷¹ Cornell & Shaffer, *supra* note 1, at 22-23; *see also* KRÜGER, *supra* note 69, at 93-112.

⁷² The region is referred to as “Artsakh” in Armenian.

⁷³ For more on “proxy regimes” and Armenia’s use of a proxy regime in territories it occupies, *see* Svante Cornell & Brenda Shaffer, *The United States Needs to Declare War on Proxies*, FOREIGN POLICY (Feb. 27, 2020, 5:34 AM), <https://foreignpolicy.com/2020/02/27/russia-iran-suleimani-the-united-states-needs-to-declare-war-on-proxies/>.

⁷⁴ The Republic of Armenia’s Ministry of Foreign Affairs survey of Armenia’s bilateral relations does not include relations with an entity referred to as “Artsakh.” *See Bilateral Relations*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF ARMENIA, <https://www.mfa.am/en/bilateral-relations/> (last visited May 3, 2020).

⁷⁵ Cornell & Shaffer, *supra* note 1, at 6.

⁷⁶ *Id.*; Press Release, Registrar of the Court, Azerbaijani Refugees’ Rights Violated by Lack of Access to Their Property Located in District Controlled by Armenia, Eur. Ct. H.R. Press Release (June 16, 2015).

following statement: "The European Union confirms its support for the territorial integrity of Azerbaijan, and recalls that it does not recognise the independence of Nagorno Karabakh."⁷⁷ During a July 2019 meeting with Azerbaijan's President Ilham Aliyev, Donald Tusk, who at the time served as President of the European Council, emphasized the EU's support for Azerbaijan's sovereignty, independence, and territorial integrity.⁷⁸ Additionally, in response to March 2020 elections held in Nagorno-Karabakh, the EU published the following statement: "the European Union reiterates that it does not recognise the constitutional and legal framework within which they are being held."⁷⁹

On April 18, 2012, the European Parliament passed Resolution 2011/2315(INI) containing the European Parliament's recommendations to the Council, the Commission, and the European External Action Service on the negotiations of the EU-Armenia Association Agreement which, *inter alia*, noted that "deeply concerning reports exist of illegal activities exercised by Armenian troops on the occupied Azerbaijani territories, namely regular military maneuvers, renewal of military hardware and personnel and the deepening of defensive echelons."⁸⁰ The European Parliament recommended that negotiations on the EU-Armenia Association Agreement be linked to commitments regarding "the withdrawal of Armenian forces from occupied territories surrounding Nagorno-Karabakh and their return to Azerbaijani control" and "call[ed] on Armenia to stop sending regular army conscripts to serve in Nagorno-Karabakh."⁸¹

Following the meeting of the Cooperation Committee between the EU and the Republic of Azerbaijan, held in Brussels on 12 July 2002, the Committee issued a statement reconfirming the "well-known EU position on the settlement of the Nagorno-Karabakh conflict between Azerbaijan and Armenia on the basis of the full respect to the territorial integrity of Azerbaijan."⁸² In that respect, the committee reconfirmed its position "on non-acceptance of the *fait accompli* as a basis for the settlement" and called "on Armenia to refrain from the actions undertaken in the occupied

⁷⁷ *Declaration by the Presidency on Behalf of the European Union on Forthcoming "Presidential Elections" in Nagorno Karabakh*, EUROPEAN COMM'N (Aug. 2, 2002), https://ec.europa.eu/commission/presscorner/detail/en/PESC_02_105.

⁷⁸ *Remarks by President Donald Tusk After His Meeting with President of Azerbaijan Ilham Aliyev*, EUROPEAN COUNCIL (July 9, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/07/09/remarks-by-president-donald-tusk-after-his-meeting-with-president-of-azerbaijan-ilham-aliyev/>.

⁷⁹ *Nagorno-Karabakh: Statement by the Spokesperson on the So-Called Presidential and Parliamentary Elections*, EUROPEAN EXTERNAL ACTION SERVICE (Mar. 31, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/76801/nagorno-karabakh-statement-spokesperson-so-called-presidential-and-parliamentary-elections_en.

⁸⁰ *Chiragov at 18-19* (quoting Negotiations of the EU/Armenia Association Agreement, Resolution 2011/2315(INI), EUR. PARL. DOC. A7-0079/2012 (2012)).

⁸¹ *Id.*

⁸² *Final Statement & Recommendations of the EU – Azerbaijan Parliamentary Cooperation Committee (4th Meeting)*, ¶ 2 (May 14, 2003), http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/498/498231/498231en.pdf.

4

territories of Azerbaijan including the Nagorno-Karabakh region, which may in a way consolidate the status quo.”⁸³ In the statement, the Committee recognized that a “just and lasting solution to the conflict on the basis of relevant principles and norms of international law [must be reached], notably those of respect to the territorial integrity and inviolability of borders of state.”⁸⁴ According to the central judgment of the ECHR related to the conflict between Azerbaijan and Armenia, it is estimated that, in 1988-1994, around 750,000-800,000 Azerbaijanis were forced out of Armenia, Nagorno-Karabakh, and the seven Azerbaijani districts surrounding Nagorno-Karabakh.⁸⁵

In *Chiragov and Others vs Armenia*, six Azerbaijani refugees lodged a complaint with the ECHR claiming they were unable to return to their homes and property in the district of Lachin in Azerbaijan, from where they had been forced to flee in 1992 during the Nagorno-Karabakh conflict.⁸⁶ In the judgment, the ECHR held that there had been continuing violations of Article 8 (right to respect for home and private and family life), Article 13 (right to an effective remedy), and Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.⁸⁷ The Court found Armenia responsible for the breaches of the applicants’ rights and held that the Armenian Government had to pay 5,000 euros damage to each of the applicants.⁸⁸ Thus, the Court upheld that the former Azerbaijani residents were the lawful residents of the occupied territories and upheld that Armenia has effective control over the territories.⁸⁹

C. Armenia’s Settlements in the Territories Under Occupation

Armenia operates an extensive settlement project in Nagorno-Karabakh and the other occupied territories of Azerbaijan. Armenia’s settlers are housed both in homes that belonged to the former Azerbaijani residents and new buildings built since Armenia’s occupation.⁹⁰ The Organization for Security and Co-operation in Europe (“OSCE”) has documented Armenia’s establishment of settlements in the occupied territories, including in the homes of the former Azerbaijani occupants.⁹¹

⁸³ *Id.* ¶ 38 (emphasis in original).

⁸⁴ *Id.* ¶ 39.

⁸⁵ *Chiragov* ¶ 25.

⁸⁶ *Id.* ¶ 32.

⁸⁷ *Id.* ¶¶ 202-224.

⁸⁸ *Chiragov v. Armenia* (No. 2), App. No. 13216/05, Eur. Ct. H.R. at 23-24 (2017).

⁸⁹ *Chiragov* ¶ 186.

⁹⁰ For more details on Armenia’s settlement project, see Cornell & Shaffer, *supra* note 1, at 29-31; see also Babayan, *supra* note 58.

⁹¹ See Permanent Rep. of Azerbaijan to the U.N., Letter dated Mar. 18, 2005 from the Permanent Rep. of Azerbaijan to the U.N. addressed to the Secretary-General at 31, U.N. Doc. A/59/747 (Mar. 21, 2005); Cornell & Shaffer, *supra* note 1, at 31. See also *New Flats Are Built*

Several entities engage in the efforts to increase the number of settlers in the occupied territories, including officials in Armenia, local authorities in Nagorno-Karabakh, and Armenian diaspora organizations.⁹² Settlers also receive financial incentives to move to the occupied territories, such as the rights to lease land for free, receive loans for livestock and small businesses, and enjoy free utilities.⁹³ Armenia's settlements in the occupied territories receive funding from multiple sources, including direct Armenian government funding and funds from Armenian diaspora organizations.⁹⁴ Starting in 2012, a new wave of settlers has arrived to Nagorno-Karabakh and other occupied territories, as ethnic Armenians left Syria as a result of the Syrian civil war.⁹⁵ Syrian ethnic Armenian emigres were encouraged to settle in the occupied territories.⁹⁶ Armenia has received funds from the EU

for Syrian Armenians in Nagorno-Karabakh, ARMENPRESS (Aug. 5, 2013), <https://armenpress.am/eng/news/728230/new-flats-are-built-for-syrian-armenians-in-nagorno-karabakh.html>; *Yerevan Expects Further Armenian Exodus from Syria*, ECOINET (Sept. 2, 2013), <https://www.ecoi.net/en/document/1051099.html>. "Armenia has actually received funds from the European Union to settle these Syrians in Armenia." Cornell & Shaffer, *supra* note 1, at 31; see *EU Regional Trust Fund in Response to the Syrian Crisis, the 'Madad Fund,'* EUROPEAN COMM'N (Sept. 28, 2018), https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf_madad_action_document_armenia-v2.pdf.

⁹² Cornell & Shaffer, *supra* note 1, at 29. See Edik Baghdasaryan, *Repopulation is An Essential Question for All Armenians*, HETQ (June 25, 2007, 9:06 AM), <https://hetq.am/en/article/6744>; Melania Harutyunyan, *Deputy Prime Minister of Artsakh Spoke About the Resettlement of Artsakh*, ARAVOT (July 27, 2013, 9:37 PM), <https://www.aravot-en.am/2013/07/27/155729>.

⁹³ Cornell & Shaffer, *supra* note 1, at 29-30; see Permanent Rep. of Azerbaijan to the U.N., *supra* note 91, at 37-38. On subsidies and financial incentives, see Babayan, *supra* note 58; *В Нагорном Карабахе переселенцы получают возможность приватизировать свои квартиры [In Nagorno-Karabakh, Immigrants Will Be Able to Privatize Their Apartments]*, NEWS.AM (Aug. 25, 2010, 7:20 PM), <https://www.news.am/rus/news/28809.html>.

⁹⁴ Cornell & Shaffer, *supra* note 1, at 30. For an example of an annual budget allocation from Armenia's state budget, see, e.g., *В рамках госбюджета 2015 года Армения предоставит Карабаху 45 млрд. Драмов [Within the Framework of the 2015 State Budget, Armenia Will Provide 45 Billion Drams to Karabakh]*, ASYOR (Oct. 28, 2014, 1:24 PM), <https://www.aysor.am/ru/news/2014/10/28/hovik-abrahamyan/863269>. For examples of support for the settlements from Armenian diaspora organizations, see, e.g., *Artsakh Fund Holds Fundraising Event in Greater Boston*, ARMENIAN WEEKLY (Sept. 23, 2015, 1:59 PM), <https://armenianweekly.com/2015/09/23/artsakh-fund-boston-2>; *Support Artsakh Resettlement Projects*, ARMENIAN CULTURAL ASS'N OF AM., <https://acaainc.org/artsakh/> (last visited Dec. 18, 2019); *About Us*, HAYASTAN ALL ARMENIAN FUND, <https://www.himnadram.org/en/mission> (last visited Dec. 18, 2019); *General Donations*, TUFENKIAN FOUNDATION, <http://www.tufenkianfoundation.org/donate/> (last visited Dec. 18, 2019).

⁹⁵ Cornell & Shaffer, *supra* note 1, at 31.

⁹⁶ *Id.* See Gayan Mkrtychyan, *Relocation with a Reason: Some Syrian-Armenian Families Find Advantages to Resettle in Karabakh*, ARMENIA NOW, https://www.armenianow.com/society/features/44597/syrian_armenians_kashatagh_resettlement_in_karabakh (last visited May 1, 2020); *New Flats Are Built for Syrian Armenians in Nagorno-Karabakh*, *supra* note 91; *Yerevan Expects Further Armenian Exodus from Syria*, *supra* note 91; Reda El Mawy, *Why Armenia is Welcoming Syrian Armenians*, BBC NEWS (Apr. 23, 2015), <https://www.bbc.com/news/av/world-middle-east-32438128/why-armenia-is-welcoming-syrian-armenians>; *Agricultural Project Supports Syrian Armenians in Nagorno-Karabakh Republic*, ARMENIAN GENERAL BENEVOLENT UNION (Jan. 16, 2014), <https://agbu.org/news-item/agricultural-project-supports-syrian-armenians-in-nagorno->

4

to settle these Syrian refugees in Armenia, and there is no evidence that the EU has taken steps to prevent funds from being used to settle the Syrian emigres in Nagorno-Karabakh and the other territories Armenia occupies.⁹⁷

D. Goods Produced In Armenia's Settlements In Occupied Territories Marketed In The European Union

Several businesses operate in the occupied territories of Nagorno-Karabakh and surrounding regions, including in the fields of tourism and food products. Products produced in the occupied territories are exported to most states in the European Union. As will be seen in this section, companies producing these goods in Armenia's settlements in the occupied territories declare in consumer product labels that the goods are produced in Armenia, despite coming from an occupied territory of Azerbaijan. Below is a survey of some of the products produced in the occupied territories that are imported into the EU.⁹⁸

i. Wineries in the Occupied Territories That Export to the European Union

Over a dozen wineries and distilleries (vodka, cognac, etc.) operate in Nagorno-Karabakh and adjacent occupied territories. Many of their products are marketed in the EU through local European distributors, including many in the EU capital Brussels (*see Fig. 3*). The companies exporting these products erroneously write in consumer product labels that the goods are "Product of Armenia," despite writing in marketing pieces that the goods are produced in the occupied territories.

For example, the Kataro Winery advertises itself as the "flagship winery of Artsakh" (the Armenian name for Nagorno-Karabakh).⁹⁹ The winery is located in the village of Tuğ in the Khojavend district in Nagorno-Karabakh.¹⁰⁰ Yet, per *Figures 1 & 2* below, its bottled wine is labelled as a "product of Armenia."

karabakh-republic/; Sara Khojoyan, *Families Fleeing Syria Battle Raise Tension in Oil Region*, BLOOMBERG NEWS (Oct. 16, 2013), <https://www.bloomberg.com/news/articles/2013-10-15/families-fleeing-syria-battle-raise-tension-in-oil-region>; Anna Kamay & Anush Babajanyan, *Karabakh: Syrian Refugees Flee One War Zone for Another*, EURASIANET (Oct. 20, 2017), <https://eurasianet.org/karabakh-syrian-refugees-flee-one-war-zone-for-another>.

⁹⁷ Cornell & Shaffer, *supra* note 1, at 31. *See EU Regional Trust Fund in Response to the Syrian Crisis, the 'Madad Fund,' supra* note 91; Anna Grigoryan & Aneta Harutyunyan, *EU Plans to Implement Support Project for Syrian-Armenians In Armenia*, ARMENPRESS (June 26, 2018, 9:48 AM), <https://armenpress.am/eng/news/938882.htm>.

⁹⁸ This list is not all-inclusive and represents a sample of products.

⁹⁹ KATARO, <https://kataro.am> (last visited May 1, 2020).

¹⁰⁰ *Id.*



FIGURES 1 & 2: Label of Kataro wine bottle, purchased in Brussels, labeled “Product of Armenia.”

4

| | | | |
|------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| WINERY Domaine Avelissyan Togh Village, Artsakh info@kataro.am | EXPORTER "Anoush-" LLC Melkumyan str., 18/8 Yerevan, Armenia | VISITS AND WINE TASTINGS visit@kataro.am | |
| ARMENIA "ARTEXIM" +374 95 365585 | USA "KIMBERLY JONES WINE SELECTIONS" +1 818 590-0749 dvgoldenson@gmail.com | RUSSIA "NEW WINE COMPANY" +7 495 6449449 info@newwineco.ru www.newwineco.ru | UNITED KINGDOM "ARMENIAN WINE IMPORTERS" LTD +44 7918 879107 oldprior@hotmail.com www.armenianwines.co.uk |
| CANADA "KINEDOWN" +1 514 6790451 kevork@kinedown.com www.kinedown.com | LITHUANIA UAB "GADARA" +37069943600 gadara@ararat.lt www.gadara.lt | BENELUX +32 2 5827706 marc@armenianbrandyandwine.com www.armenianbrandyandwine.com | |



KATARO
TOGH VILLAGE, ARMENIA

Artsakh, Togh village | info@kataro.am | visit@kataro.am

FIGURE 3: Kataro Winery's official distributors based in the European Union¹⁰¹

Below, *Figure 4* shows an invoice for wine purchased from the Kataro Winery for delivery in France. The invoice states that the wine is "direct import from Armenia." The winery openly uses a company registered in Yerevan as a front in order to hide the wine's origin. "The company exports to the United States, Canada, Russia, and the EU, all via a corporate registration in Armenia, a tool all Karabakh producers use."¹⁰²

¹⁰¹ *Contacts*, KATARO, <https://kataro.am/contacts> (last visited May 1, 2020).

¹⁰² David Kitai, *Nagorno-Karabakh's Nascent Wine Industry Begins to Bear Fruit*, EURASIANET, (Apr. 29, 2019) <https://eurasianet.org/nagorno-karabakhs-nascent-wine-industry-begins-to-bear-fruit>.

Online Shop
Armenian Brandy & Wine
direct import from Armenia

HI [REDACTED]
THANK YOU FOR SHOPPING WITH ARMENIAN BRANDY AND WINE!

ORDER DETAILS

Order: FEMQAXQBS Placed on 01/15/2020 18:07:49

Payment: Payment by Stripe

| Reference | Product | Unit price | Quantity | Total price |
|-----------------------|--------------------------------|------------|----------|-------------|
| W211E | Kataro Red Wine of Artsakh | 18,00 € | 1 | 18,00 € |
| TTB | Tote bag offered for any order | 0,00 € | 1 | 0,00 € |
| Products | | | | 18,00 € |
| Discounts | | | | 0,00 € |
| Gift-wrapping | | | | 0,00 € |
| Shipping | | | | 5,50 € |
| Total Tax paid | | | | 0,00 € |
| Total paid | | | | 23,50 € |

SHIPPING

Carrier: Mondial Relay FRANCE

Payment: Payment by Stripe

DELIVERY ADDRESS

[REDACTED]
Boulevard Saint-Jacques
75014 Paris
France
+33762811 [REDACTED]

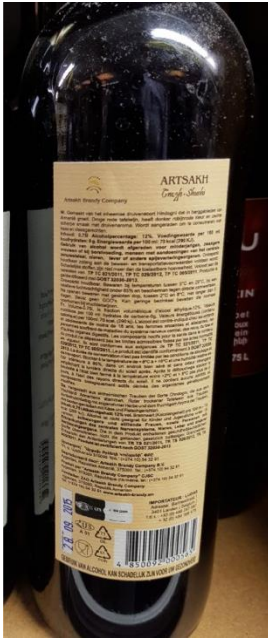
BILLING ADDRESS

[REDACTED]
Boulevard Saint-Jacques
75014 Paris
France
+33762811 [REDACTED]

FIGURE 4: Receipt for purchase of Kataro wine in France, marketed as “direct import from Armenia.”

Several wineries operating in the occupied territories label their wines as “Product of Armenia” on consumer product labels in the EU. For instance, another winery operating in the occupied territories that markets in the EU is the “Artsakh Brandy Company.” (see Figs. 5-8) This winery also labels its wine as “Product of Armenia” when exported to the EU.¹⁰³

¹⁰³ See, e.g., *Artsakh Shushi*, Artsakh Brandy Company, <http://artsakh-brandy.am/en/products/show/3/2/51> (last visited May 3, 2020).



FIGURES 5-8: Artsakh Brandy Company wine labeled in the EU as a product of the Republic of Armenia



Similarly, per *Figure 9*, distributor Armenian Brandy and Wine¹⁰⁴ markets and sells, throughout the EU, wines produced both in Armenia and in the occupied territories without distinguishing between them.¹⁰⁵

Shipments safe and fast in 27 countries in Europe *

- Shipping :
The shipping prices vary according to destination and the amount of the order.

- Free Shipping :
Shipping costs are free for orders exceeding a certain amount.
** For deliveries to Switzerland and Norway please contact us by e-mail: web@armenianbrandyandwine.eu*

| | Country | Delivery € | Free delivery starting from | Estimated Delivery Time |
|----|----------------|------------|-----------------------------|-------------------------|
| 1 | Austria | 15 € | 150 € | 4 to 5 working days |
| 2 | Belgium | 6 € | 95 € | 1 to 3 working days |
| 3 | Bulgaria | 30 € | 200 € | 5 to 6 working days |
| 4 | Croatia | 30 € | 200 € | 5 to 6 working days |
| 5 | Czech Republic | 19 € | 200 € | 3 to 5 working days |
| 6 | Denmark | 17 € | 150 € | 3 to 4 working days |
| 7 | Estonia | 24 € | 200 € | 4 to 6 working days |
| 8 | Finland | 27 € | 200 € | 4 to 6 working days |
| 9 | France | 15 € | 150 € | 2 to 5 working days |
| 10 | Germany | 10 € | 150 € | 2 to 6 working days |
| 11 | Greece | 30 € | 200 € | 6 to 9 working days |
| 12 | Hungary | 19 € | 200 € | 3 to 5 working days |
| 13 | Ireland | 19 € | 200 € | 4 to 5 working days |
| 14 | Italy | 21 € | 200 € | 3 to 6 working days |
| 15 | Latvia | 24 € | 200 € | 4 to 6 working days |
| 16 | Lithuania | 24 € | 200 € | 4 to 6 working days |
| 17 | Luxembourg | 9 € | 125 € | 1 to 3 working days |
| 18 | Monaco | 15 € | 150 € | 2 to 5 working days |
| 19 | Netherlands | 9 € | 125 € | 1 to 3 working days |
| 20 | Poland | 19 € | 200 € | 3 to 5 working days |
| 21 | Portugal | 25 € | 200 € | 4 to 6 working days |
| 22 | Romania | 30 € | 200 € | 4 to 6 working days |
| 23 | Slovakia | 19 € | 200 € | 4 to 6 working days |
| 24 | Slovenia | 19 € | 200 € | 3 to 5 working days |
| 25 | Spain | 24 € | 200 € | 3 to 5 working days |
| 26 | Sweden | 22 € | 200 € | 3 to 6 working days |
| 27 | United Kingdom | 16 € | 150 € | 3 to 5 working days |

FIGURE 9: Armenian Brandy and Wine distributes wines from both Armenia and the occupied territories throughout the EU.¹⁰⁶

Under the category of “Armenian wines”, the Armenian Brandy and Wine distributor lists wines produced in the occupied territories as “Armenian Wines” (see *Fig. 10*).

¹⁰⁴ ARMENIAN BRANDY & WINE, <https://www.armenianbrandyandwine.com/en/> (last visited May 1, 2020).

¹⁰⁵ *Armenian Wines*, ARMENIAN BRANDY & WINE, <https://www.armenianbrandyandwine.com/en/12-armenian-wines> (last visited May 1, 2020).

¹⁰⁶ *Shipments*, ARMENIAN BRANDY & WINE, <https://www.armenianbrandyandwine.eu/screen/page/shipments> (last visited May 1, 2020).

Taste our selection of Armenian wines. Our experts have travelled through Armenia to find the country’s great vintages. Accompanied by local guides, we have developed a real expertise. You can believe us, Armenia’s wines are just as good as those of Europe! We now deliver in Belgium, and soon throughout the rest of the EU.

[More](#)

Armenian Wines

There are 44 products.

SORT BY Reference: Highest first **SHOW** 12 per page







| | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  <p>Voskevaz Katarine Liqueur ★★★★★ 16,50 € Delivery in European Union Add to cart</p> |  <p>Voskevaz Areni Noir Amphora Wine ★★★★★ 32,00 € Delivery in European Union Add to cart</p> |  <p>Crossroads Syrah Areni 2018 ★★★★★ 15,00 € 17,00 € Delivery in European Union Add to cart</p> |
|  <p>Trinité Areni Ancestors' 2018 Natur... ☆☆☆☆☆</p> |  <p>Trinity 6100 Areni Noir 2018 ★★★★★ 17,00 € Out of stock</p> |  <p>Katara Reserve Armenian Red Wine ☆☆☆☆☆ 32,40 € Delivery in European Union Add to cart</p> |

FIGURE 10: Armenian Brandy and Wine distributor in the EU advertises wine produced in the occupied territories, such as Katara, as “Armenian

Wines.”¹⁰⁷

¹⁰⁷ *Armenian Wines*, ARMENIAN BRANDY & WINE, <https://www.armenianbrandyandwine.com/en/12-armenian-wines> (last visited May 1, 2020).

ii. Food Products Produced in the Occupied Territories That Are Exported to the EU

Several companies produce food products in the Armenian-occupied territories. One of the largest is the “Artsakh Berry” company.¹⁰⁸ “Artsakh Berry” operates in the largest city in the occupied territories (called Xankhendi in Azerbaijani and Stepanakert in Armenian) (*see Figs. 11-12*),¹⁰⁹ but inaccurately label their products as “Product of Armenia” when distributed in the EU (*see Figs. 13-16*). This company, alongside many others, does not make any effort to hide the fact that it is located in the occupied territories, even doing so openly on the websites,¹¹⁰ all while labeling goods exported as “Product of Armenia.”

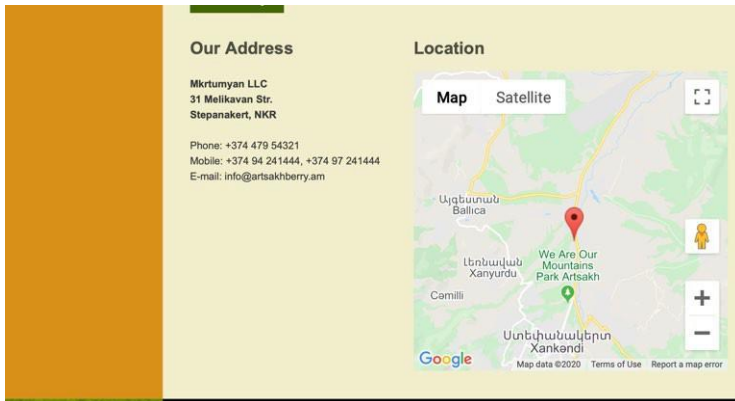


FIGURE 11: Website of “Artsakh Berry” showing its location in the occupied territories.

¹⁰⁸ See ARTSAKH BERRY, <http://www.artsakhberry.am/wp/> (last visited May 1, 2020).

¹⁰⁹ Contact Us, ARTSAKH BERRY, <http://www.artsakhberry.am/wp/contact-us> (last visited May 1, 2020).

¹¹⁰ *Id.*

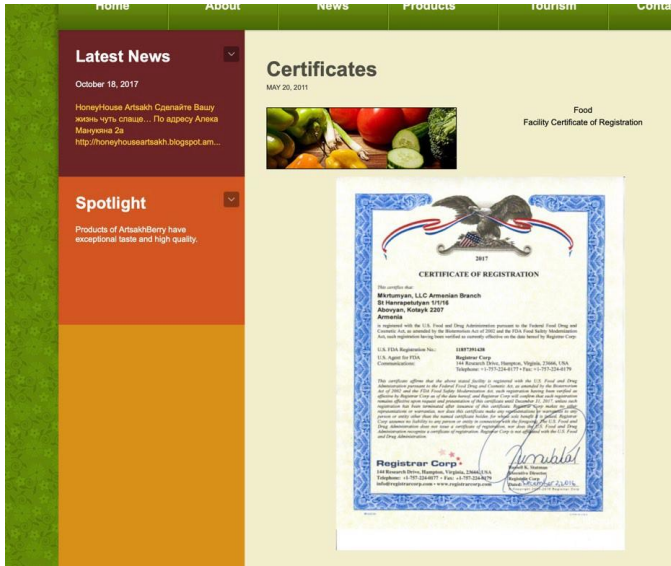


FIGURE 12: “Artsakh Berry” website showing that the company registers with the U.S FDA as if it is located in the Republic of Armenia.



FIGURE 13: “Artsakh Berry” capers, purchased in Belgium, labeled “Product of Armenia.”



FIGURES 15-16: “Artsakh Berry” pomegranate sauce purchased in Belgium, labeled “Product of Armenia.”

V. SUMMARY OF APPLICABILITY OF THE PSAGOT JUDGMENT

In *Psagot*, the CJEU concluded that products that originate from territories that are governed by Israel, as an occupying power, but have a separate and distinct status from that state under international law, must be labeled in a way that does not mislead consumers as to that product’s true place of provenance.¹¹¹ The CJEU further stated that it is reasonable that a consumer would want to know before purchasing and had a right to be informed, whether a good’s production could indirectly involve violations of international humanitarian law.¹¹² It held it is not reasonable for consumers to be expected to guess that a product from the occupied territories comes from a locality constituting a settlement established in breach of the rules of international law and not from a Palestinian producer.¹¹³ Therefore, the fact

¹¹¹ *Psagot* ¶¶ 36-38.

¹¹² *Id.* ¶ 55.

¹¹³ *Id.* ¶ 50.

that a product originated in an Israeli settlement should be clearly labelled on goods imported into the EU.¹¹⁴

As seen in the above case study, the legal status of the territories that Armenia captured from Azerbaijan in 1992-1994 meets the criteria under international law laid out in the *Psagot* decision, as these territories remain as internationally recognized part of Azerbaijan, and thus are not legally under Armenia's jurisdiction.¹¹⁵ Moreover, Armenia is an occupying power, which has expelled Azerbaijani residents of the occupied territories and engaged in the transfer of population (often with explicit cash grants, as well as violations of international humanitarian law, such as taking property of the Azerbaijani refugees). However, products from these areas are imported into the EU and marketed in most of its states with consumer product labels declaring them as a "Product of Armenia." In this case, Armenia is not "a sovereign entity exercising, within its geographical boundaries, the full range of powers recognized by international law" in the territory of Nagorno-Karabakh,¹¹⁶ to use the test of *Psagot*. Therefore, according to the rationale of the *Psagot* decision, labeling products from Nagorno-Karabakh as "Products from Armenia" could mislead consumers as to their actual country of origin or place of provenance. Furthermore, the current labeling does not take into account the ethical considerations of consumers when making a purchasing decision, specifically whether a product comes from a settlement established in breach of international humanitarian law.¹¹⁷ Despite this, the EU and member states have taken no action to end this mislabeling. To date, the EU has not published a note, similar to the 2015 EU Note regarding import of goods from Israeli settlements,¹¹⁸ clarifying that goods produced in Armenia's settlements should not be marked as "Product of Armenia," but rather products of the settlements in Azerbaijan's territories. Nor does it appear that there have been any documented discussions among EU officials to pursue such labeling.

VI. CONCLUSION

The CJEU *Psagot* judgement addresses an important aspect of trade with territories under occupation. It states that information on labels indicating the origin of products from these territories and entities that produce the goods must be compatible with these territories and entities' status under international law. In this sense, the *Psagot* judgement is not momentous. In fact, there are other cases where the EU has also insisted on detailed labeling, such as demanding a Ukrainian stamp on goods from Crimea since Russia's

¹¹⁴ *Id.* ¶ 58.

¹¹⁵ *Cf. id.* ¶¶ 26-38. As shown *supra* in notes 75, 76, & 91, the EU considers these territories as occupied under international law and the ECHR and OSCE (all EU member states are OSCE members) have documented Armenia's illegal settlement activity in these territories.

¹¹⁶ *See Psagot* ¶ 29.

¹¹⁷ *See id.* ¶¶ 46-58.

¹¹⁸ *See* Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since June 1967, *supra* note 14.

4

occupation and setting up a mechanism for import of goods from Transnistria as “Products of Moldova.” Yet, in contrast to the requirement in the *Psagot* judgment, in the case of Crimea and Transnistria, the EU has not gone so far as to demand a stipulation if the products are produced by settlers of the occupying force. It is highly likely, for instance, that in Transnistria, many of the operating companies belong to Russian citizens or operate under the auspices of Russia’s military base in the occupied region. If the EU wanted to provide full information to consumers, like in the *Psagot* case over the labeling of goods from Israel’s settlements, the EU should require that this information appear on the labels of all goods imported to the EU.

This article presents an exceptionally similar parallel to the *Psagot* case with Armenia’s occupation of Azerbaijan’s territories. According to the EU, like Israel, Armenia does not have jurisdiction over these territories. Like Israel, Armenia has established extensive settlements in the occupied territories. Like goods produced in Israeli settlements, goods produced in the Armenian settlements are imported into the EU and marketed in almost all states in the EU. Per *Psagot*, if ethical considerations are pertinent to EU consumers, the fact that Armenia expelled the native Azerbaijani residents of the territories where the goods were produced should indeed be relevant.

Yet, on the consumer product labels, the place of origin of these goods is listed as “Product of Armenia.” If the EU does not apply the principles set out in the CJEU *Psagot* judgement to the products produced in Armenia’s settlements in the territories it occupies, and to goods from similar regions such as those occupied by Russia, then indeed this will be a judgment specific to Israel. Various member state governments and entities in the EU have already declared, in response, that if this judgement is not applied to other occupied territories from which the EU imports goods, then the labeling requirement is discriminatory.¹¹⁹ The *Psagot* judgment stated that the purpose of the labeling requirement was to properly inform consumers of the origin of goods;¹²⁰ failure to do so from *all* occupied territories would not fulfill this objective.

In light of the CJEU *Psagot* judgment, it is likely that, in the near future, parties to other territorial conflicts will request that the same requirements set out in the *Psagot* judgement be applied to goods produced in other occupied regions, such as the territories occupied by Armenia and by Russia. The *Psagot* CJEU judgement is thus likely to generate additional cases. If the labeling requirement is not applied to goods produced in other occupied territories, then the discriminatory element of this policy toward Israel will be revealed, and Psagot will indeed drink alone.

¹¹⁹ *Dutch Parliament Passes Motion Against Mandatory Labeling of Settlement Products*, TIMES OF ISRAEL (Nov. 20, 2019, 5:08 AM), <https://www.timesofisrael.com/dutch-parliament-passes-motion-opposing-labeling-of-settlement-products/>.

¹²⁰ See *Psagot* ¶¶ 46-58.

CLOSE OBSERVATION ON THE VAUGHN INDEX AND ENLIGHTENMENT FOR JUDICIAL REVIEW IN CHINA

Yao Cai*

I. INTRODUCTION

Far too much information has been kept in the dark for far too long. Despite transparency laws, classification remains widespread in the United States. Alarming figures demonstrate how pervasive over-classification might be. In 2017, the government made 58,501 original classification decisions along with 49 million derivative classification decisions.¹ Approximately 854,000 people in programs related to counterterrorism, homeland security and intelligence, about 1.5 times the population of Washington, D.C., are granted top-secret security clearances.² And the cost for maintaining the classification system continues to rise, with relevant government spending soaring to \$18.39 billion and private companies spending \$1.49 billion under the National Industrial Security Program in 2017.³

“Government secrecy is as old as government itself.”⁴ In the United States, a nation where openness is honored as a pillar of democracy, government secrecy is, in fact, not rare and has been criticized for being an executive tool to manipulate citizens, conceal errors, and avoid embarrassments.⁵ For decades, from the issuance of the Administrative Procedural Act (“APA”) in 1946 to the promising Freedom of Information Act (“FOIA”) in 1966, efforts have been made by Congress to minimize secrecy and enhance transparency.⁶ Expected to serve as a powerful check against executive secrecy, the judiciary, though granted with the power to review classification decisions *de novo*,⁷ has been struggling to fulfill its

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¹ INFO. SEC. OVERSIGHT OFFICE, NAT’L ARCHIVES & RECORDS ADMIN., 2017 REPORT TO THE PRESIDENT (2017), available at <https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf>.

² Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010, 1:22 PM), <http://media.washingtonpost.com/wp-srv/special/nation/tsa/static/articles/hidden-world.html>.

³ INFO. SEC. OVERSIGHT OFFICE, *supra* note 1.

⁴ DERIGAN SILVER, NATIONAL SECURITY IN THE COURTS: THE NEED FOR SECRECY VS. THE REQUIREMENT OF TRANSPARENCY 3 (Melvin I. Urofsky ed., 2010).

⁵ See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 345 (reprt. ed. 2004).

⁶ See JASON ROSS ARNOLD, *SECRECY IN THE SUNSHINE ERA: THE PROMISE AND FAILURES OF US OPEN GOVERNMENT LAWS* 2 (2014).

⁷ 5 U.S.C. § 552(a)(4)(B) (2018).

critical role. There long seemed to be no feasible tools for courts to conduct effective judicial review in FOIA cases, except by deferring to executive's classification decisions or undertaking the time-consuming task of *in camera* inspection – where the judge examines each document to assess the relevance of the classification.⁸ More than often, courts opt for the former.

The Vaughn Index,⁹ recommended and elaborated by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) in 1973, has emerged as an alternative to enable courts to serve their role without merely bowing to agencies’ original decisions or taking up the burdensome *in camera* inspection.¹⁰ Under the Vaughn Index, executive agencies alleging to withhold information based on FOIA exemptions shall submit to courts a detailed description of the classified information, along with an itemized and indexed explanation of justification for withholding the information.¹¹

The United States is not the only country struggling with effective judicial review of nondisclosure of information concerning state secrets. China has also faced similar problems in cases concerning the state secret exemption, as manifested in fairly high affirmance rate in judicial practice.¹² The paradigm of Chinese judicial practice in these types of cases can be summarized as: agencies claim – courts defer – Plaintiffs accept. Information asymmetry and lack of adversariness are also inherent, visible features.¹³ Similarities shared by the two countries seem to provide the basis for China to draw enlightenment from the Vaughn Index.

As the Vaughn Index has been widely adopted in FOIA litigations, questions regarding this procedural tool have come into sight. What is the value of the Vaughn Index? Can that value still be realized after over 45

⁸ Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 VILL. L. REV. 67, 72-73 (1992). See also Comment, *Vaughn v. Rosen, Toward True Freedom of Information*, 122 U. PA. L. REV. 731, 733 (1974) [hereinafter Comment].

⁹ “A comprehensive list of all documents that the government wants to shield from disclosure in Freedom of Information Act (FOIA) litigation, each document being accompanied by a statement of justification of nondisclosure.” *Vaughn Index*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

¹¹ *Id.* at 826-28.

¹² See *infra* notes 153-58 and accompanying text.

¹³ See Geng Baojian & Zhou Mi (耿宝健&周密), *Xin Tiaoli Zhidu Huanjing xia Zhengfu Xinxigongkai Xingzheng Susong de Bianhua Tanxi* (新条例制度环境下政府信息公开行政诉讼的变化探析) [Changes and Prospects of Government Information Publicity Litigation under the New Institutional Environment], 2 *Zhongguo Xingzheng Guanli* (中国行政管理) [CHINESE PUB. ADMIN.] 20, 22 (2020); YANG WEIDONG (杨伟东), *ZHENGFU XINXI GONGKAI ZHUYAO WENTI YANJIU* (政府信息公开主要问题研究) [STUDY ON MAIN ISSUES OF GOVERNMENT INFORMATION DISCLOSURE] at 248 (2013). The author takes sole responsibility for the accuracy of all citations to Chinese-language sources throughout this article, including in this note and notes 29, 34, 41, 141, 148, 161-64, 172, 173, & 184.

years? This article examines the Vaughn Index in light of its historical context and relevant judicial practice and argues that the Vaughn Index is a significant procedural tool in restoring the adversarial nature of FOIA litigations and guaranteeing efficient judicial review of classification decisions. Nonetheless, this article also contends that various forms deriving from the original Vaughn Index, including the “Selective” Vaughn Index, the “Boilerplate” Vaughn Index, and the “Multiple” Vaughn Index, may hinder the objectives of this procedural tool. Given the similarities and differences between judicial reviews in the US and China, this article argues that the Vaughn Index could provide some enlightenment to China, but the value of transplantation might be limited due to China’s special legal framework governing state secret exemptions.

Focusing on the Vaughn Index in cases concerning the national security exemption, this article starts with a brief introduction to FOIA litigations, examining relevant historical background and developments. Part I of this article also analyses the dilemma courts face in conducting *de novo* reviews. Part II devotes substantial attention to the emergence of the Vaughn Index as a possible solution for courts in the trade-off between simple deference and *in camera* inspection and details the merits of this procedural instrument. Part III depicts the various declinations of the Vaughn Index and analyses this procedural tool in legal practice throughout the years. Part IV briefly summarizes the current legislation regarding state secrets exemption in China, presents a general study of cases concerning this subject, revealing that China faces problems similar than those observed in the US, and analyses how the Vaughn Index could be introduced in China.

II. FOIA LITIGATIONS: IDEALS AND REALITY

The APA allowed government agencies to withhold information necessary to be classified with regard to public interest.¹⁴ Acknowledging the wide discretion under such a standard, FOIA was originally intended to diminish discretion while retaining reasonable protections for necessary sensitive information.¹⁵ FOIA is a promise of free information, an open government and a truly democratic state. However, skeptics have described it as an illusion.¹⁶ Professor Kenneth Davis pointed out that FOIA actually strengthens the executive’s hand in “withhold[ing] information about national defense or foreign policy with the formal approval of Congress,

¹⁴ See 5 U.S.C. § 552 (1946).

¹⁵ See SAM LEBOVIC, HOW ADMINISTRATIVE OPPOSITION SHAPED THE FREEDOM OF INFORMATION ACT, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 14-16 (David E. Pozen & Michael Schudson eds., 2018).

¹⁶ See MARK FENSTER, FOIA AS AN ADMINISTRATIVE LAW, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 52-53 (David Pozen & Michael Schudson eds., 2018).

previously lacking.”¹⁷ In 2018, the total number of government information requests amounted to 863,729, of which 38.9% received a partial grant or partial denial and 4.3% received a full denial.¹⁸ Apparently, there is a gap between an ideal FOIA as protection of the public’s right to obtain information from government and a “broken” FOIA featuring unnecessary complications, misapplication of laws, and extensive delays.¹⁹

A. *Ideals: Balancing Right to Know and Need for Secrecy*

The tension between an ideal and a broken FOIA is magnified when it comes to requests involving the national security exemption,²⁰ where the balancing test between people’s right to know and government’s need for secrecy proves to be extremely difficult and controversial. The national security exemption, provided as the very first exemption in FOIA, has been one of the main excuses for withholding government information from requesters.²¹

National security, a concept universally acknowledged by courts and critics as “a notoriously ambiguous and ill-defined phrase,” emphasizes a country’s strategy to tackle all sorts of threats and covers a wide range of capabilities of a nation, including its intelligence apparatus, as well as its industrial, scientific, and economic capacities.²² National security is a “contested, subjective, [and] socially constructed concept,”²³ and it is hard to identify concrete and tangible threats due to its prophylactic nature.

i. From APA to FOIA

Tracing back to the APA, signed by President Truman in 1946, the United States has long been striving to achieve a workable balance between enabling public access to government information and the legitimate need for government secrecy.²⁴ Cruelly, as the very first attempt to facilitate the free flow of government information, the Public Information section of the

¹⁷ Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 785 (1967).

¹⁸ OFFICE OF INFORMATION POLICY, U.S. DOJ, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2018 at 2-6 (2018), *available at* <https://www.justice.gov/oip/page/file/1170146/download>.

¹⁹ SHEILA REED, IS THE FREEDOM OF INFORMATION ACT BROKEN?: BACKGROUND, PERSPECTIVES AND RECOMMENDATIONS 29 (Sheila Reed ed., 2016).

²⁰ The “national security exemption” hereinafter refers to the first exemption under FOIA. “This section does not apply to matters that are (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” *See* 5 U.S.C. § 552(b)(1) (2018).

²¹ *See id.*

²² Note, *National Security and the Amended Freedom of Information Act*, 85 YALE. L.J. 401, 407-410 (1976).

²³ ARNOLD, *supra* note 6, at 17.

²⁴ *See* 5 U.S.C. § 552 (1946).

APA proved to be a fiasco.²⁵ At least two inherent flaws could be identified from the text.

One flaw was the lack of judicial review on the disclosure or nondisclosure of government information.²⁶ The other deficiency was that the statute listed information involving “any function of the United States requiring secrecy in the public interest” or “held confidential for good cause found” as an exception.²⁷ This provision is considered to be a predecessor of the national security exemption of FOIA.²⁸ However, “public interest” is widely held as an extremely ambiguous term,²⁹ and, by adopting such a standard and excluding judicial scrutiny, the APA granted government agencies complete discretion in determining whether information shall be disclosed. To quote Lord John Acton, “[p]ower tends to corrupt and absolute power corrupts absolutely.”³⁰ Government’s natural tendency to secrecy inevitably propels it to abuse such discretion as an excuse for withholding information.³¹ The Public Information section turned out to be a “statutory excuse” for denying disclosure of government information.³²

²⁵ See Kenneth D. Salomon & Lawrence H. Wechsler, *Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151-52 (1969).

²⁶ There was no provision regarding judicial review of government information nondisclosure in the APA. See 5 U.S.C. § 552 (1946).

²⁷ “Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest... (c)PUBLIC RECORDS - Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.” 5 U.S.C. § 552 (1946).

²⁸ See Kathleen A. Mckee, *Remarks on the Freedom of Information Act: The National Security Exemption in a Post 9/11 Era*, 4 REGENT J. INT’L L. 263, 263-67 (2006).

²⁹ See JIANG BIXIN (江必新), ZUIGAO RENMIN FAYUAN GUANYU SHENLI ZHENGFU XINXI GONGKAI XINGZHENG ANJIAN RUOGAN WENTI DE YANJIU: LIJIE YU SHIYONG (最高人民法院关于审理政府信息公开行政案件若干问题的规定：理解与适用) [PROVISIONS OF THE SUPREME PEOPLE’S COURT ON SEVERAL ISSUES CONCERNING THE TRIAL OF ADMINISTRATIVE CASES ABOUT OPEN GOVERNMENT INFORMATION: UNDERSTANDING AND APPLICATION] at 137 (2011); see also Cheng Jie (程洁), *Zhengfu Xinxi Gongkai de Falv Shiyong Wenti Yanjiu* (政府信息公开的法律适用问题研究)[Study on Application of Law in Open Government Information], 3 *Zhengzhi yu Falv* (政治与法律) [POL. SCI. & L.] 28, 28 (2009); see generally Wang Jingbo (王敬波), *Zhengfu Xinxi Gongkai zhong de Gonggongn Liyi Hengliang* (政府信息公开中的公共利益衡量) [Weighing the Public Interest in the Publication of Government Information], 9 *Zhongguo Shehui Kexue* (中国社会科学) [SOC. SCI. IN CHINA] 105 (2014).

³⁰ Lord John Acton, *Letter to Bishop Mandell Creighton*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010 (last visited Feb. 21, 2020, 11:45PM).

³¹ See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 10-28* (1999); see also H.R. REP. NO. 1497 at 23-27 (1966).

³² Patrick J. Ward, *The Vaughn Index - Enforcing Agency Compliance under the Freedom of Information Act: Coastal State Gas Corp. v. DOE*, 16 NEW ENG. L. REV. 979, 993 (1980) (emphasis omitted).

To hasten the end of government's secrecy culture, the Congress enacted a series of laws that are labeled as "Sunshine Laws," including FOIA, the Federal Advisory Committee Act, and the Government in the Sunshine Act.³³ Among them, FOIA may be the most influential, providing a key template for relevant laws of other countries.³⁴ To amend the flaws of the APA, FOIA enumerated nine exceptions, allowing legitimate withholding of government information and attempting to shrink the discretion resulting from the vague standard of the APA.³⁵ Additionally, FOIA authorizes judicial review as a check against government secrecy.³⁶ Strongly favoring openness, FOIA serves to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."³⁷

ii. FOIA National Security Exemption and *De Novo* Review

Under FOIA, only information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "in fact properly classified pursuant to such Executive order" could fall within the national security exemption.³⁸ Information alleged to be relevant to national security shall be classified in accordance to both substantive and procedural requirements of the executive orders.³⁹

What is equally important to the national security exemption is the authorization of *de novo* review, under which courts must conduct a comprehensive and non-deferential review of the prior decision made by the administrative agency.⁴⁰ Before 1974, FOIA was silent on judicial review of nondisclosure of national security information.⁴¹ Justice Stewart complained that the courts were endowed with no approach to question and challenge executive's classification decisions, however "cynical, myopic, or even

³³ ARNOLD, *supra* note 6, at 2; *see* Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

³⁴ HOU XIANGDONG (后向东), MEIGUO LIANBANG XINXI GONGKAI ZHIDU YANJIU (美国联邦信息公开制度研究) [FREEDOM OF INFORMATION ACT: REGIME, HISTORY AND PRACTICE] at 117 (2014).

³⁵ *See* 5 U.S.C. § 552(b) (2018).

³⁶ *Id.* § 552(a)(4)(B).

³⁷ *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d. Cir. 1974).

³⁸ 5 U.S.C. § 552(b)(1) (2018).

³⁹ Congress made it clear that the standard for evaluating classification decisions is not "a general national-defense or foreign-policy standard, but the [Senate] committee prefers to rely on *de novo* judicial review under standards set out in Executive orders or statutes." S. REP. NO. 93-854 at 30 (1974) (emphasis added).

⁴⁰ "De novo" stands for "anew," and "de novo review," as contrary to "deferential review," refers to courts' non-deferential review of an administrative decision. *See De Novo*, BLACK'S LAW DICTIONARY (11th ed. 2019); *De Novo Review*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴¹ Deyling, *supra* note 8, at 67; HOU, *supra* note 34, at 17.

corrupt that decisions might have been,” and Justice Stewart blamed Congress for the absence of such an approach.⁴² In *Environmental Protection Agency v. Mink* (“*Mink*”), the Supreme Court held that the claim for exemption could be sustained solely by an affidavit stating that the information had been, in fact, classified and that, if a government document was in fact classified in a procedurally proper manner, the substantive adequacy of the classification decision shall not be subject to judicial review.⁴³ *Mink* seemed to defeat Congress’s intention to grant every person the right to access government records and distorted FOIA litigation that was designed to serve as a check on agency power and protect the public’s right to know.⁴⁴

Aiming to overrule *Mink*, Congress promptly amended FOIA in 1974,⁴⁵ intending to empower courts to conduct *de novo* review of classification decisions and to authorize *in camera* inspection⁴⁶ of the classified documents when necessary, without relying on the original agency contentions.⁴⁷

B. Reality: Dilemma of De Novo Review

Though granted the power to conduct *de novo* review and *in camera* inspection, courts still tend to affirm agency’s classification decisions,⁴⁸ which seems quite odd given Congress’s strong desire to minimize overclassification in the 1974 amendment. Paradoxically, Congress may be the one to blame for this one-sided result.

Congress, in Committee Reports, stated its desire to rectify abuse of “SECRET” stamps in the 1974 amendment, yet such an attempt was likely to be vetoed by the President.⁴⁹ To avoid a potential veto, Congress inserted a reminder stating that, when conducting *de novo* review, courts shall “accord substantial weight to an affidavit of an agency concerning the

⁴² *Environmental Protection Agency v. Mink*, 410 U.S. 73, 94-95 (1973) (Stewart, J., concurring).

⁴³ *Id.* at 92-94.

⁴⁴ In *Mink*, Justice Brennan wrote an opinion concurring in part and dissenting in part. “We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly ‘in order that the ultimate decision as to the propriety of the agency’s action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion’....The Court’s rejection of the Court of Appeals’ construction is inexplicable in the face of this overwhelming evidence of the congressional design.” *Id.* at 100-01 (Brennan, J., concurring in part and dissenting in part).

⁴⁵ See Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

⁴⁶ Before 1974, many courts had adopted *in camera* inspection when dealing with cases concerning FOIA exemptions. See Richard H. Walker, *Vaughn v. Rosen: New Meaning for the Freedom of Information Act*, 47 Temp. L.Q. 390, 397 (1974).

⁴⁷ See 5 U.S.C. § 552(a)(4)(B) (2018). Whether to conduct *in camera* inspection is within the discretion of courts. See *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

⁴⁸ See Deyling, *supra* note 8, at 67.

⁴⁹ *Id.* at 78-79; see S. REP. NO. 93-854 at 30 (1974).

agency's determination" of the classified status of the disputed record due to agency expertise and agency's unique insights on national defense and foreign policy matters.⁵⁰ This reminder, however, has been then held as a source of deference by many courts.⁵¹

Despite the clear language of the FOIA mandate, courts continue to frequently defer to executive agencies in cases concerning the national security exemption.⁵² This leads to a surprising finding. The affirmance rate under *de novo* review in FOIA cases is even higher than the theoretically more lenient standard of review in other agency-related cases, the arbitrary and capricious standard, with the former being 90% and the latter around 50%.⁵³ Critics have deemed FOIA litigation as a frustration in practice, viewing it as a more symbolic commitment to the free flow of government information rather than an actual and effective approach to minimize government secrecy.⁵⁴

If one observes the typical FOIA litigations involving national security exemptions, the government will almost always start with a concise affidavit and a motion for summary judgment, stating that the document has been in fact properly classified and is within the exemptions under FOIA.⁵⁵ Courts, to determine whether to grant the motion, will be faced with a dilemma. On the one hand, courts are aware that government litigants have "the inevitable temptation" of giving "an expansive interpretation in relation to the particular records in issue,"⁵⁶ and, if courts continue to affirm agency's classification decisions with great deference to affidavits, they inevitably will serve no more than a rubber stamp. On the other hand, courts will not be able to survive the heavy workload if they determine to conduct an *in camera* inspection, due to the immense volume of documents,⁵⁷ which would also be an "unfortunate misuse of scarce judicial resources."⁵⁸ For instance, in *Shannahan v. I.R.S.*, the defendant identified 5,735 pages of documents and a 35.7 MB electronic database after receiving Plaintiff's request, and consequently withheld a total of 5,417 pages of documents and

⁵⁰ 5 U.S.C. § 552(a)(4)(B) (2018); H.R. CONF. REP. No. 93-1380 (1974).

⁵¹ See, e.g., *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

⁵² Nathan Slegers, *De Novo Review under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 212 (2006).

⁵³ Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 718-20 (2002). Professor Verkuil examined *de novo* review standard under FOIA cases and arbitrary and capricious standard under "reverse-FOIA" cases where private parties seek to prevent agencies from voluntarily producing documents requested under FOIA.

⁵⁴ FENSTER, *supra* note 16, at 52-53.

⁵⁵ Deyling, *supra* note 8, at 72.

⁵⁶ See, e.g., *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

⁵⁷ As the court in *Vaughn v. Rosen* stated: "where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case." See *Vaughn*, 484 F.2d at 825.

⁵⁸ Comment, *supra* note 8, at 740.

the electronic database from disclosure.⁵⁹ It would have required an immense amount of judicial resources to review these documents *in camera* and identify their factual characteristics and whether they were properly withheld.⁶⁰

III. ADOPTION OF THE VAUGHN INDEX

A. *Inherent Feature and Procedural Crux of FOIA Litigations*

Courts face a dilemma, forced to either defer to the routinely rough and sketchy agency affidavits or to take on the time-consuming job of reviewing disputed documents *in camera*. If one observes this dilemma from a procedural perspective, the dilemma may be, to a large extent, due to a lack of adversariness. The lack of adversariness is rooted in an inherent feature of FOIA cases – the asymmetry of information.

In FOIA cases, especially in cases concerning the national security exemption, the executive agency is the sole subject with full access to the disputed information, and the requesters are often “at a loss” because of ignorance of the information.⁶¹ This lack of knowledge leaves requesters unable to effectively challenge the government’s classification decisions. They can only make weak, generic arguments that the documents contain no information worth classifying.⁶² Absent of *in camera* inspection, both the courts and the requesters would have to rely on the agencies’ characterizations of the documents sought to be protected.⁶³ Before *Vaughn v. Rosen*, by the mere contention that the requested information falls within the national security exemption of FOIA, the government was deemed to have fulfilled its burden of proof, and the burden to rebut such factual characterization will then be incumbent upon the Plaintiffs, who have strong desires for disclosure but lack the knowledge to controvert the government’s contentions.⁶⁴ This easy and quick shifting of the burden of proof fails to embody impartiality and apparently grants more advantages to the already dominant party.

Acknowledging the imbalance of information and the unreasonable transfer of the burden of proof, courts resort to *in camera* inspection to minimize such defects.⁶⁵ Though meant to mend the disadvantages arising from the asymmetry of knowledge, adopting *in camera* inspection triggers

⁵⁹ *Shannahan v. I.R.S.*, 672 F.3d 1142, 1145 (9th Cir. 2012).

⁶⁰ *See id.*

⁶¹ *Vaughn*, 484 F. 2d at 824.

⁶² *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 221 (2013).

⁶³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987).

⁶⁴ Richard H. Walker, *Vaughn v. Rosen: New Meaning for the Freedom of Information Act*, 47 TEMP. L.Q. 390, 396 (1974).

⁶⁵ *See, e.g.*, *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Evans v. U.S. Dep’t of Transp.*, 446 F.2d 821 (5th Cir. 1971); *Ackerly*, 420 F.2d. at 1336.

three major concerns. First, as illustrated in Part B, *in camera* inspection places undue burden on courts due to the often-voluminous documents in dispute.⁶⁶ The immense volume of requested documents would very likely render inspection sloppy. Second, one major consequence resulting from the asymmetry of knowledge – the lack of adversariness – remains unsettled, and cases are still without the “benefit of criticism and illumination by a party with the actual interest in forcing disclosure.”⁶⁷ Finally, interestingly enough, the courts often end up undertaking the burden of proving the government’s claim.⁶⁸ Courts, instead of plaintiffs, become the adversary in FOIA litigations.⁶⁹ The Supreme Court’s decision in *Mink* also has contributed to discouraging the use of *in camera* inspections.⁷⁰

The dilemma is now clear and distinct. The express statutory language of *de novo* review in FOIA⁷¹ and the enumerated congressional policy favoring openness⁷² compel courts to carry out their function as effective checks against executive secrecy, while the incubus of *in camera* inspection and the lack of other feasible tools render courts helpless in reviewing FOIA cases concerning national security exemptions.

A “quick fix” to tackle the dilemma was to regain the adversarial nature of litigations by enabling plaintiffs more information to base their arguments and, thus, allowing courts to review agencies’ claims more comprehensively and efficiently. *Vaughn v. Rosen*, decided by D.C Circuit appeared just in time to serve such purpose.⁷³

B. *Vaughn v. Rosen*

At the outset of the landmark case *Vaughn v. Rosen* (“*Vaughn*”), law Professor Robert Vaughn, who was conducting an intensive study of the US civil service system,⁷⁴ filed a request to the Bureau of Personnel

⁶⁶ See *supra* notes 57-60 and accompanying text.

⁶⁷ *Vaughn*, 484 F.2d at 825.

⁶⁸ See Walker, *supra* note 64, at 397-99.

⁶⁹ The *in camera* inspection is undesirable because “it frustrates the statutory burden of proof requirement by shifting this burden from the agency to the courts.” See *id.* at 397.

⁷⁰ See *Mink*, 410 U.S. at 93 (“[I]n some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material....”)

⁷¹ 5 U.S.C. § 552(a)(4)(B) (2018).

⁷² See ARNOLD, *supra* note 6, at 2-3.

⁷³ “In recent cases, the courts have generally either conducted *in camera* inspection of the documents or adjudicated the dispute solely in reliance upon the briefs and arguments of the parties,” and the Vaughn Index is to “replace[] these methods with requirements of government specificity and indexing designed to lessen reliance upon unenlightened *in camera* inspection, enhance the adversary process between citizen and government, and provide a meaningful record for appellate review.” See Comment, *supra* note 8, at 733 (emphasis added).

⁷⁴ Robert G. Vaughn, *The Freedom of Information Act and Vaughn v. Rosen: Some Personal Comments*, 23 AM. U. L. REV. 865, 866-71 (1974) (providing personal comments on

Management of the Civil Service Commission (“Bureau”), seeking disclosure of Evaluation of Personnel Management and some other documents.⁷⁵ The Bureau turned down his request, stating that the information sought was exempt under FOIA.⁷⁶ After Professor Vaughn brought a lawsuit in the United States District Court for the District of Columbia (“D.C. District Court”), the Bureau filed a motion to dismiss or, in the alternative, for summary judgment, with an affidavit of the Director of the Bureau.⁷⁷ There was no other, additional document supporting the Bureau’s motion.⁷⁸ In reviewing the affidavit, the D.C. District Court found that it “did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director’s opinion that the evaluations were not subject to disclosure under the FOIA.”⁷⁹ However, the court still granted the Bureau’s motion for summary judgment.⁸⁰

When the case was appealed to the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit Court”), the court was presented with the following issue: whether the agency had satisfied its burden of proof under FOIA by proving an affidavit which stated, generally, that the disputed information was exempt from disclosure.⁸¹ However, faced with a “scant record,” the court was at a loss in determining whether the requested information was indeed exempt from disclosure.⁸² The court ruled in favor of Professor Vaughn and held that the court “will simply no longer accept conclusory and generalized allegations of exemptions.”⁸³

The D.C. Circuit Court recognized the inherent asymmetry of information in FOIA cases.⁸⁴ Judge Wilkey stated that, in typical FOIA litigations, only the executive agency was “in a position confidently to make statements categorizing information,” and the agency’s factual characterization of the withheld information “may or may not be accurate.”⁸⁵ By simply contending that the requested information falls within the exemption provisions in FOIA, the agency can easily transfer the burden to the requester to rebut the government’s factual characterization of the disputed information.⁸⁶ The requester, however, is in a position where he or she can neither “state that, as a matter of his knowledge, this characterization is untrue,” nor state that the personal items can be separated

the events and the litigation from the plaintiff-author’s point of view) [hereinafter *Vaughn Personal Comments*].

⁷⁵ *Vaughn*, 484 F.2d at 822.

⁷⁶ *Id.* at 822-23.

⁷⁷ *Id.* at 823.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See generally Vaughn*, 484 F.2d at 820.

⁸² *Id.* at 822.

⁸³ *Id.* at 826.

⁸⁴ *Vaughn*, 484 F.2d at 824-825.

⁸⁵ *Id.* at 823-824.

⁸⁶ Walker, *supra* note 64, at 396.

from the disputed documents.⁸⁷ The D.C. Circuit Court further contended that the information imbalance “seriously distorts the traditional adversary nature of our legal system’s form of dispute resolution” and stated that: “It is vital that some process be formulated that will (1) assure that a party’s right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.”⁸⁸

As the party holding direct access to the withheld information, the executive agency is to bear the burden of proof under FOIA.⁸⁹ The court held that the government “may not sweep a document under a general allegation of exemption,” because it is possible that part of the document may be subject to disclosure,⁹⁰ but instead shall subdivide the materials into manageable sections and provide detailed justifications stating which exemption is applied to which classified material.⁹¹ To do so, the court recommended that the agency submit an “itemizing and indexing” description that correlates each particular portion of the documents to the particular exemption relied upon by the government.⁹²

Courts have subsequently acknowledged the so-called Vaughn Index and now require that agencies shall not only state the exemption for each withheld document or “merely recite the statutory standards,”⁹³ but shall also “explain why the exemption is relevant.”⁹⁴ The case of *King v. United States Department of Justice* (“*King*”) is an illustration of the adoption of the Vaughn Index, in which the court followed and further elaborated this itemizing and indexing system.⁹⁵ The *King* court recognized that substantial weight shall be given to affidavits filed by an executive agency describing the disputed material and the manner in which the material falls within the exemption claimed.⁹⁶ However, such affidavits shall “describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed.”⁹⁷ Because affidavits shall “strive to correct...the asymmetrical distribution of knowledge that characterizes FOIA litigation[s],” the affidavits must fulfill the requirement of itemizing and indexing.⁹⁸ There is no set format for a Vaughn Index; however, the agency shall “disclos[e] as

⁸⁷ *Vaughn*, 484 F.2d at 824.

⁸⁸ *Id.* at 826.

⁸⁹ 5 U.S.C. § 552(a)(4)(B) (2018).

⁹⁰ *Vaughn*, 484 F.2d at 826.

⁹¹ *Id.* at 826-828.

⁹² *Vaughn*, 484 F.2d at 827.

⁹³ *Carter v. U.S. Dep’t of Commerce*, 830 F.2d 388, 392-93 (D.C. Cir. 1987).

⁹⁴ *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹⁵ *See generally King*, 830 F.2d at 210.

⁹⁶ *Id.* at 217.

⁹⁷ *Id.*

⁹⁸ *Id.* at 218.

much information as possible without thwarting the exemption's purpose."⁹⁹

Vaughn is significant for first bringing the issue of the adequacy of FOIA adversary proceedings into light. Little concern, before *Vaughn*, had been given to the question of how FOIA plaintiffs could refute government agencies for denying their right to the information, when plaintiffs remained ignorant of the precise content of the information.¹⁰⁰ After *Vaughn*, courts have come to realize that the most effective and efficient way to determine the factual characterization of the withheld information is to shift the burden back to the agency that is claiming exemption,¹⁰¹ and the Vaughn Index has been widely adopted in FOIA litigations.¹⁰²

IV. OBSERVATION ON THE VAUGHN INDEX IN PRACTICE

Through the procedural requirements of the Vaughn Index, courts are able to remove the "blind reliance" of both plaintiffs and courts on agency affidavits, which may not accurately characterize every single portion of the information in dispute.¹⁰³ The Vaughn Index enables plaintiffs to engage in meaningful adversarial litigation and allows courts to effectively determine the factual nature of the information withheld.¹⁰⁴

However, critics have shown concerns regarding the efficacy of the Vaughn Index, and some contend that the procedural tool "is often more of a hindrance than a help to requesters."¹⁰⁵ This article attempts to address these concerns.

⁹⁹ *Id.* at 224. See also *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006); *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 88-92 (D.D.C. 2009) (finding that Defendant failed to "identify relevant information such as the originating component agency, the author, and frequently the recipient(s) of the document" and provided "only bare legal conclusions regarding the exemptions"). For an example of the Vaughn Index in judicial practice, see *Filing of Full Vaughn Index by Dep't of Justice, Soghoian v. U.S. Dep't of Justice*, 885 F. Supp. 2d 62 (D.D.C. 2012), available at <https://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2011cv01080/148626/22/1.html>.

¹⁰⁰ Comment, *supra* note 8, at 736.

¹⁰¹ Walker, *supra* note 64, at 399.

¹⁰² See, e.g., *New York Times Co. v. U.S. Dep't of Justice*, 762 F.3d 233 (2d Cir. 2014); *Judicial Watch, Inc.*, 449 F.3d 141; *Gardels*, 689 F.2d 1100; *Bell*, 603 F.2d 945; *Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824 (D.C. Cir. 1979); *Mead Data Cent. v. U.S. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *Defs. of Wildlife*, 623 F. Supp. 2d 83; *Schoenman v. FBI*, 604 F. Supp. 2d 174 (D.D.C. 2009).

¹⁰³ Comment, *supra* note 8, at 733.

¹⁰⁴ See Deyling, *supra* note 8, at 96-97.

¹⁰⁵ Kwoka, *supra* note 62, at 223.

A. "Selective" Vaughn Index

Agencies claiming exemptions under FOIA now have to undertake several steps to satisfy Vaughn Index requirements, including: segregating the withheld documents into manageable portions; describing with enough specificity each portion of the documents; and, more importantly, establishing detailed cross-references of each portion of the documents with each statement of exemption.¹⁰⁶ In short, segregation, specificity, and correlation are the essence of the Vaughn Index.

When discussing *in camera* inspection, it has been universally recognized that the inspection would cause an immense burden on the courts due to the huge volume of information at issue.¹⁰⁷ Under the Vaughn Index, the burden of proof now shifts back to the government. This may, in fact, also bring about a comparable encumbrance on the Executive. *Vaughn* itself could be an example illustrating this problem. *Vaughn* arose from the non-disclosure of 2,448 documents, which would fill "17 standard-size, five-drawer filing cabinets in the Civil Service Commission."¹⁰⁸ It was estimated that to itemize and index all these documents, according to the instructions and guidelines of the D.C. Circuit Court, it would require years of work and cost the government approximately \$96,176.40.¹⁰⁹

The question of whether FOIA exerts too much burden on the government was raised and refuted as early as the debating phase of the 1974 FOIA Amendment, and Senator Muskie replied to such concern by stating that "[t]he burden is on the agency to sustain its action."¹¹⁰ Heavy as the burden might be, the underlying purposes of FOIA are sufficient to justify the requirements, and the practical burden of cost may never be an excuse for shaking off the legal burden of proof.

Having said that, courts have devised a seemingly smart way of tackling the problem. In *Vaughn*, the government, with permission of the court, only indexed nine documents that it deemed representative.¹¹¹ Such lenience helps reduce the cost tremendously, because much less information has to be segregated, specified, and indexed. In *Vaughn*, the cost plummeted to \$353.89, as only nine out of 2,448 documents were presented with indexes to the court.¹¹² Similarly, in *Mullen v. United States Army Criminal Investigation Command* ("Mullen"), the court permitted the defendant to

¹⁰⁶ *Vaughn*, 484 F.2d at 826-828.

¹⁰⁷ Delying, *supra* note 8, at 72; Comment, *supra* note 8, at 740; *see also* Walker, *supra* note 64, at 397.

¹⁰⁸ *Vaughn Personal Comments*, *supra* note 74, at 873.

¹⁰⁹ *Id.*

¹¹⁰ Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 742 (2014) (alteration in original).

¹¹¹ *Vaughn Personal Comments*, *supra* note 74, at 874.

¹¹² *Id.*

index only a representative sample of the records.¹¹³ The volume of documents was immense in *Mullen*, where the government “produced over 41,000 pages of responsive documents and consulted with approximately thirty federal agencies or organizations in order to do so.”¹¹⁴ The approach taken by the *Mullen* court is considered the “Selective” Vaughn Index.

However, whether the “Selective” Vaughn Index may be a panacea for reducing burdensome work in every case remains questionable. On the one hand, it is fortunate that, in cases like *Vaughn* and *Mullen*, most documents followed a similar format, which provided a basis for representativity.¹¹⁵ But this is not true in all cases. On the other hand, a “Selective” Vaughn Index grants the government discretion regarding which documents to be selected and indexed. It is possible that agencies may opt for those documents with the strongest factual basis of applying exemptions, while leaving out those unnecessarily classified. It is likely that the latter may abate the objectives of the original Vaughn Index.

B. “Boilerplate” Vaughn Index

The problem of “Boilerplate” Vaughn Indexes has been addressed by some scholars: “When courts expect detail, agencies can deliver. When courts are unwilling to insist on a serious specification and indexing of exemption claims, by contrast, agencies take the easy route of relying on boilerplate justifications.”¹¹⁶

The name “Boilerplate Vaughn Index,” itself, can reveal how such an index fails to meet the requirement established in *Vaughn*. In *King*, the court stated “specificity” as the “defining requirement” of the Vaughn Index.¹¹⁷ Contrarily, the term “boilerplate” indicates generality and standardization, as a boilerplate document is intended to fit into varieties of situations.¹¹⁸ Generality and standardization are opposite concepts to specificity, which could explain why, in *King*, the court rejected the defendant’s categorical description of the disputed documents as “clearly inadequate” under the Vaughn Index.¹¹⁹

¹¹³ *Mullen v. U.S. Army Criminal Investigation Command*, No. 1:10CV262(JCC/TCB), 2012 WL 2681300, at *2 (E.D. Va. July 6, 2012).

¹¹⁴ *Id.* at *7.

¹¹⁵ *See id.*; *see generally Vaughn*, 484 F.2d 820.

¹¹⁶ Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 172 (2006).

¹¹⁷ *King*, 830 F.2d at 219.

¹¹⁸ “Boilerplate” refers to “[r]eady-made or all-purpose language that will fit in a variety of documents” or “[f]ixed or standardized contractual language that the proposing party often views as relatively nonnegotiable.” *Boilerplate*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹⁹ *King*, 830 F.2d at 224.

Unfortunately, the “Boilerplate” Vaughn Index is rather prevalent in legal practice.¹²⁰ Take *Wiener v. FBI* (“*Wiener*”) as an example.¹²¹ In *Wiener*, the FBI filed five affidavits successively, attempting to justify the withholdings in general terms.¹²² The affidavits stated, in conclusory terms, why the documents should be exempt from disclosure.¹²³ The court deemed all the affidavits as not constituting adequate Vaughn Indexes, because the categorical description “affords Wiener little or no opportunity to argue for release of particular documents.”¹²⁴ The court then concluded that only when plaintiffs were aware of the precise basis for withholding the information could they provide effective advocacy.¹²⁵

The “Boilerplate” Vaughn Index has been clearly rejected by most courts as failing to comply with the specific requirement of *Vaughn*.¹²⁶ However, the question of how specific the affidavits should be to qualify as an adequate Vaughn Index remains unclear.

Additionally, other concerns related to the “Boilerplate” Vaughn Index are worth mentioning. With attention shifting to the question of whether a government affidavit can be recognized as a Vaughn Index, the focus of FOIA litigations has also changed. Government agencies devote a substantial amount of labor and time to formulate adequate Vaughn Indexes, while plaintiffs often respond by challenging the specificity of the indexes instead of debating on the core issue of whether the national security exemption asserted shall be applied.¹²⁷ As such, it seems likely to undermine the emphasis on values that FOIA litigations are supposed to promote. Another relevant issue is courts’ tolerance after agencies submit a “Boilerplate” Vaughn Index, which is examined in the following section.

C. “Multiple” Vaughn Index

A “Boilerplate” Vaughn index alone poses limited threats to the objectives of the original Vaughn Index, because courts are often acute in

¹²⁰ See, e.g., *Knight First Amendment Inst. at Columbia Univ. v. U.S. Dep’t of Homeland Sec.*, 407 F. Supp. 3d 334 (S.D.N.Y. 2019); *Protect Democracy Project, Inc. v. U.S. Dep’t of Health & Human Servs.*, 370 F. Supp. 3d 159 (D.D.C. 2019); *Center for Biological Diversity v. Office of Mgmt. & Budget*, 625 F. Supp. 2d 885 (N.D. Cal. 2009).

¹²¹ See generally *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991).

¹²² *Id.* at 977.

¹²³ *Id.* at 978-79.

¹²⁴ *Id.* at 979.

¹²⁵ *Id.* The court further addressed the purpose of Vaughn Index: “[T]he purpose of the index is not merely to inform the requester of the agency’s conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest.” *Id.*

¹²⁶ See, e.g., *Wiener*, 943 F.2d 972; *Knight First Amendment Inst. at Columbia Univ.*, 407 F. Supp. 3d 334; *Protect Democracy Project, Inc.*, 370 F. Supp. 3d 159; *Center for Biological Diversity*, 625 F. Supp. 2d 885.

¹²⁷ Kwoka, *supra* note 62, at 223.

detecting and rejecting them.¹²⁸ Nonetheless, more attention should be paid to its subsequent consequences, the so-called “Multiple Vaughn Index.”¹²⁹

Under FOIA, government agencies shall bear the burden to prove that the withheld documents at issue have been, in fact, classified according to the criteria in Executive orders.¹³⁰ It is safe to say that, once agencies fail to satisfy this burden of proof, they undertake the risks of losing. However, as in *Wiener* and many other cases, it is quite common that agencies are given multiple chances to sustain their burden of justifying nondisclosure.¹³¹ Despite the dearth of specificity and adequacy, courts would still allow defendants to provide supplemental Vaughn submissions, adding more detailed descriptions of the documents withheld.¹³² The extra chances and time for agencies to sustain their burden of proof will inevitably result in unfairness for requesters, because such delay might render requesters more likely to give up pursuit of the information and might also extinguish the need and intended use of the disputed information.¹³³

Another reason for allowing defendants to amend or resubmit Vaughn Indexes is courts’ awareness of the “sheer magnitude” of requests and documents.¹³⁴ Courts recognize burdens arising from the “sheer magnitude” of requests and have stated that it would be “unrealistic to expect that a *Vaughn* index would be a work of art or contain the uniform precision that a substantially smaller universe of requested documents would entail.”¹³⁵ In *American Management Services, LLC v. Department of the Army*, there existed inconsistencies between contents of the documents

¹²⁸ See Fuchs, *supra* note 116, at 171-172 (“The fact that the agency’s affidavit failed to meet the standard for specificity ranks as the most likely reason for a circuit court to reverse the judgment of a district court in favor of the agency in a FOIA case involving national security information. For these reasons, it is incumbent on the courts to enforce true specificity, separation, and indexing requirements in government affidavits.”).

¹²⁹ “Multiple Vaughn Index” is not a legal or academic term, but it is adopted in this article to describe the situation when government agencies are permitted by courts to present new affidavits or indexes when the original submissions fail to comply with requirements of Vaughn Index.

¹³⁰ 5 U.S.C. § 552(a)(4)(B) (2018).

¹³¹ See generally *Wiener*, 943 F.2d 972. Patrick Ward noticed that, in *Mobil Oil Corp. v. FTC*, it took four years for the defendant to eventually satisfy its burden of proof after repeated requests to submit adequate, sufficient facts to justify exemption ordered by the court. See Ward, *supra* note 32, at 1021-1027; see also *Mobil Oil Corp. v. FTC*, 430 F. Supp. 849 (S.D.N.Y. 1977); *Mobil Oil Corp. v. FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976).

¹³² In *Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*, the court recognized that the Vaughn index originally submitted was “vague, conclusory and inadequate” and that, even after *in camera* review, several exemption claims remained unresolved, and the court required Defendant to submit a supplemental Vaughn index. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 157-62 (D.D.C. 2009).

¹³³ Ward, *supra* note 32, at 1026.

¹³⁴ See *Am. Mgmt. Servs., LLC v. Dep’t of the Army*, 842 F. Supp. 2d 859, 870 (E.D. Va. 2012) (citing *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 370 (4th Cir. 2009)).

¹³⁵ *Rein*, 553 F.3d at 370.

requested and the Vaughn Index.¹³⁶ The court, holding that the inconsistencies were insufficient to manifest bad faith, stated that “[i]t is well to recall that there were almost a thousand pages of documents gathered by the Army” and that “some fall-off from perfection” shall be expected.¹³⁷

Granting a second or even more chances for government agencies, to quote Margaret Kwoka, may be a form of courts “unspoken deference.”¹³⁸ By unreasonably giving one party multiple chances and delaying indefinitely the possible negative outcomes for agencies, not only are courts defeating the purposes of the Vaughn Index, they also frustrate congressional mandates set in FOIA.

Such leniency of courts displays their fear, especially in cases concerning the national security exemption. As Judge Wald claims, courts may be “approaching too timidly” the question of “whether national security claims override traditional constitutional rights or liberties.”¹³⁹ The danger resulting from erroneous decisions explains judges’ timidity. If a judgment against government agencies is wrongly decided, possible catastrophic consequences might arise.

Despite the above derivatives, the original Vaughn Index, fashioned by the D.C. Circuit Court in *Vaughn*, continues to be the most widely adopted tool for defendant agencies to meet the burden of proof under FOIA.¹⁴⁰ China, also facing the lack of adversariness in state secret exemption cases, may be able to draw lessons from this US procedural creation.

V. ENLIGHTENMENT FOR JUDICIAL PRACTICE IN CHINA

Many scholars in China, when discussing solutions to improve judicial review of open government information cases concerning state secret exemptions, have been referring to the Vaughn Index as a template.¹⁴¹ By recognizing the significance of this procedural creation,

¹³⁶ *Am. Mgmt. Servs., LLC.*, 842 F. Supp. 2d at 870.

¹³⁷ *Id.*

¹³⁸ Kwoka, *supra* note 62, at 211. “Unspoken deference” refers to “a set of procedural practices developed uniquely for FOIA cases...which produce significant litigation advantages to the government and effectively result in deference to the government’s position.” *Id.*

¹³⁹ Patricia M. Ward, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 764 (1988).

¹⁴⁰ *United States Department of Justice Guide to the Freedom of Information Act*, DOJ at 82, <https://www.justice.gov/oip/page/file/1205066/download>, (last updated Feb. 18, 2020).

¹⁴¹ YANG, *supra* note 13, at 246-48. See generally Zheng Chunyan (郑春燕), *Zhengfu Xinxigongkai yu Guojia Mimi Baohu* (政府信息公开与国家秘密保护) [*Open Government Information and State Secret Protection*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.], no. 1, 2014, at 144, 155-56; Cheng Xiezhong (成协中), *Xinxigongkai Linian xia de Dignmi Yiyi yu Sifa Shencha* (信息公开理念下的定密异议与司法审查) [*The Objection to Classifying State Secrets and Judicial Review under the Idea of Information Openness*], HAERBIN GONGYUE

they have shown interest in transplanting the Vaughn Index in China. This article will next assess: Is transplanting the Vaughn Index a feasible solution to the current problems of Chinese practice?

A. Current Legislation in China

In 2007, the State Council of China promulgated the Open Government Information Regulation (“OGIR”), which is intended to enhance openness and transparency of administrative agencies.¹⁴² Though the OGIR has not established the “right to know” and the presumption favoring disclosure, it is undeniably an important milestone in the course to pursuing the ideal of a law-based government.¹⁴³

Unlike FOIA, the OGIR has enumerated seemingly fewer exemptions from disclosure, which can be further divided into two categories, including absolute exemptions and non-absolute exemptions.¹⁴⁴ Absolute exemptions cover state secrets; information on internal matters;

DAXUE XUEBAO (SHEHUI KEXUE BAN) (哈尔滨工业大学学报(社会科学版)) [J. OF HARBIN INST. OF TECH. (SOC. SCI. ED.)], no. 3, 2013, at 54, 58; Jiang Bixin & Li Guangyu (江必新 & 李广宇), *Zhengfu Xinxi Gongkai Xingzheng Susong Ruogan Wenti Tantaoyan* (政府信息公开行政诉讼若干问题探讨) [Discussion on Issues Concerning Litigation of Open Government Information], ZHENGZHI YU FALV (政治与法律) [POL. SCI. & L.], no. 3, 2009, at 12, 20; Xu Lianli (许莲丽), *Zhengfu Xinxi Gongkai Susong Zhong de Mimi Shencha Zhidu* (政府信息公开诉讼中的秘密审查制度: 美国的实践) [In Camera Inspection in FOIA Litigations: American Practice], HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL L. REV.], no.3, 2011, at 92, 93.

¹⁴² See generally *Zhengfu Xinxi Gongkai Tiaoli* (政府信息公开条例) [Open Government Information Regulation] (promulgated by the St. Council, Apr. 5, 2007, rev'd Apr. 3, 2019, effective May 15, 2019), available at http://www.gov.cn/zhengce/content/2019-04/15/content_5382991.htm [hereinafter *Open Government Information Regulation*]. Note that the Open Government Information Regulation was revised very recently in 2019, which mainly targets the abuse of right to government information and vexatious litigation concerning government information disclosure. See Jiang Bixin & Liang Fengyun (江必新 & 梁凤云), *Zhengfu Xinxi Gongkai yu Xingzheng Susong* (政府信息公开与行政诉讼) [Disclosure of Governmental Information and Administrative Litigation], FAXUE YANJIU (法学研究) [CHINESE J. OF L.], no.5, 2007, at 21, 21.

¹⁴³ See generally *Open Government Information Regulation*, *supra* note 142. “A law-based government” or “government under the rule of law,” together with “a law-based country” and “a law-based society,” are core concepts and goals of China’s legal construction, which refers to a government whose public is regulated according to law. See Jiang Mingan (姜明安), *Lun Fazhi Guojia, Fazhi Zhengfu, Fazhi Shehui Jianshe de Xianghu Guanxi* (论法治国家、法治政府、法治社会建设的相互关系) [On the Interrelationship among the Building-up of a Country, a Government, and a Society under the Rule of Law], FAXUE ZAZHI (法学杂志) [L. SCI. MAGAZINE], no.6, 2013, at 1, 1-2. See also Ma Huaide (马怀德), *Woguo Fazhi Zhengfu Jianshe Xianzhuang Guancha: Chengjiu yu Tiaozhan* (我国法治政府建设现状观察: 成就与挑战) [Observation on the Status Quo of Lawful Government Construction in China: Achievement and Challenge], GUOJIA XINGZHENG XUEYUAN XUEBAO (国家行政学院学报) [J. OF CHINESE ACADEMY OF GOVERNANCE], no.5, 2014, at 21, 21.

¹⁴⁴ See *Open Government Information Regulation*, *supra* note 142, arts. 14-16.

and information that may harm national security, public security, economic security and social stability.¹⁴⁵ Absolute exemptions are known as the “three security and one stability” exemptions. Trade secrets and individual privacy are non-absolute exemptions, which can be disclosed with the consent of relevant third parties or when the administrative agencies consider that withholding such information would “materially affect public interest.”¹⁴⁶ Administrative law enforcement files and information generated in the process of performing administrative tasks are also within the range of non-absolute exemptions, whose disclosure is subject to requirements of any laws, regulations, or rules.¹⁴⁷

With regard to the state secret exemption, the OGIR only presents a very conclusory provision and does not have a final say as to what may constitute a “state secret.”¹⁴⁸ This is due to legal hierarchy. OGIR is an administrative regulation issued by the State Council, the legal validity of which is lower than that of laws implemented by the National People’s Congress and its Standing Committee.¹⁴⁹ As a result, the determination of a “state secret” that shall be withheld from disclosure is subject to the Law of the People’s Republic of China on Guarding State Secret (“Law Guarding State Secret”), in particular Article 2 and Article 9.¹⁵⁰ Pursuant to Article 2 of the Law Guarding State Secret, information shall satisfy the following elements to be determined to be a state secret: a) matters relevant to national security and interest; b) having undergone statutory procedures; and c)

¹⁴⁵ “Government information that is determined as state secrets according to the law, or whose public disclosure is prohibited by any law or administrative regulation, or that may harm national security, public security, economic security, or social stability, shall not be disclosed to the public.” *Id.* art. 14. “An administrative agency may withhold information on its internal matters, including personnel management, logistics management, and internal work flow.” *Id.* art. 16.

¹⁴⁶ “For government information relating to a trade secret, individual privacy or the like whose public disclosure would harm the lawful rights and interest of any third party, an administrative agency shall not disclose to the public such government information, unless the third party consents to its public disclosure, or the administrative agency deems that its withholding would materially affect the public interest.” *Id.* art. 15.

¹⁴⁷ Article 16 also provides that “an administrative agency may withhold deliberative records, pre-decisional documents, consultation communications, requests for instructions and reports, and other pre-decisional information generated in the process of its performance of government administration functions and information on administrative law enforcement files, unless otherwise required by any law, regulation or rule.” *Id.* art. 16.

¹⁴⁸ ZHOU HANHUA (周汉华), ZHENGFU XINXI GONGKAI TIAOLI ZHUANJIA JIANYI GAO: CAOAN, SHUOMING, LIYOU, LIFA LI (政府信息公开条例专家建议稿——草案·说明·理由·立法例) [EXPERTS PROPOSED RULE OF THE OPEN GOVERNMENT INFORMATION REGULATION: DRAFTS, EXPLANATIONS, REASONS AND LEGISLATIONS] at 112-15 (2003).

¹⁴⁹ See Lifa Fa (立法法) [Legislation Law] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, rev’d Mar. 15, 2015), art. 78, available at http://www.npc.gov.cn/wxzl/gongbao/2015-05/07/content_1939105.htm.

¹⁵⁰ Baoshou Guojia Mimi Fa (保守国家秘密法) [Law on Guarding State Secret] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 5, 1988, rev’d Apr. 29, 2010, effective Oct. 1, 2010), arts. 2, 9, available at http://www.npc.gov.cn/wxzl/gongbao/2010-08/04/content_1587728.htm [hereinafter *Law on Guarding State Secret*].

access to the information shall be vested in a limited scope of persons during a given period of time.¹⁵¹ Article 9 has been widely criticized as extremely broad and vague,¹⁵² covering seven categories ranging from matters relating to foreign affairs and defense to those involved in economic, social, and scientific development.¹⁵³ Nonetheless, Article 9 is significant in that it also presents the standard of determining state secrets, the “harm standard,” which is similar to that provided in Executive Orders of the United States.¹⁵⁴

B. *Judicial Review on State Secret Exemption Cases in China*

The OGIR allows requesters to apply for administrative reconsideration or bring lawsuits against government agencies that refuse to disclose information.¹⁵⁵ This article, by conducting a study of state secret exemption cases in China from 2015 to 2019, attempts to depict an overview of the current judicial practice in China.

¹⁵¹ “State secrets refer to matters which relate to the national security and interests as determined under statutory procedures and to which access is vested in a limited scope of persons during a given period of time.” *Id.*, article 2.

¹⁵² Wang Xixin (王锡锌), *Zhengfu Xinxi Gongkai Yujing xia de “Guojia Mimi” Tantaoyan* (政府信息公开语境下的“国家秘密”探讨) [*Discussion of “State Secret” under the Context of Open Government Information*], *ZHENGZHI YU FALV* (政治与法律) [POL. SCI. & L.], no. 3, 2009, at 2, 7; Zhang Jiangsheng (章剑生), *Zhengfu Xinxi Gongkai Tiaoli zhong de “Guojia Mimi” zhi Jieshi* (《政府信息公开条例》中的“国家秘密”之解释) [*“State Secrets” in Government Information Disclosure*], *JIANGSU DAXUE XUEBAO (SHEHUI KEXUE BAN)* (江苏大学学报(社会科学版)) [J. of JIANGSU U. (SOC. SCI. ED.)], no. 14, 2012, at 7, 7-8; Zhan Zhongle & Su Yu (湛中乐&苏宇), *Lun Zhengfu Xinxi Gongkai Paichu Fanwei de Jieding* (论政府信息公开排除范围的界定) [*On Definition of Exemptions of Government Information Publicity*], *XINGZHENG FAXUE YANJIU* (行政法学研究) [ADMIN. L. REV.], no. 4, 2009, at 36, 37.

¹⁵³ “The following matters which relate to the national security and interests and the leakage of which may damage the national security and interests in the field of politics, economy, national defense, foreign affairs, etc. shall be determined as state secrets: (1) Classified matters involved in the key policy decisions on state affairs; (2) Classified matters involved in the national defense construction and armed force activities; (3) Classified matters involved in the diplomatic and foreign affair activities and classified matters involved in the state’s international obligation of secrecy; (4) Classified matters involved in the national economic and social development; (5) Classified matters involved in science and technology; (6) Classified matters involved in the activities of maintaining national security and investigating criminal offenses; and (7) Other classified matters as determined by the state secrecy administrative department. A political party’s classified matters which conform to the provisions of the preceding paragraph shall be state secrets.” *Law on Guarding State Secret*, *supra* note 150, art. 9.

¹⁵⁴ *Id.*

¹⁵⁵ Requesters who have been denied disclosure can resort to filing report or complaint, applying for administrative reconsideration, or filing lawsuits. *See Open Government Information Regulation*, *supra* note 142, art. 51.

i. A General Study of State Secret Exemption Cases in China

Below is empirical research into open government information cases concerning the state secret exemption in recent years.¹⁵⁶ 2,114 cases were collected using two important judicial decision databases in China.¹⁵⁷ The search conditions were as follows: a) “state secret” as the keyword; b) “administrative case” as the litigation type; c) “second-instance, retrial and others” as the inquisition stages;¹⁵⁸ d) May 1, 2015 to December 31, 2019 as the time limit.¹⁵⁹ By reviewing every search result and filtering cases that are repetitive and uncorrelated, 340 cases are ultimately valid search results, as shown in the following chart.

| YEAR | 2015 | 2016 | 2017 | 2018 | 2019 | TOTAL |
|----------------------------------|------|------|------|------|------|-------|
| PRELIMINARY SEARCH RESULT | 107 | 606 | 490 | 494 | 417 | 2114 |
| FINAL SEARCH RESULT | 26 | 38 | 48 | 70 | 158 | 340 |

Chart 1 – Search Results

Among the above search results, requesters prevailed in 48 cases, accounting for approximately 14.12%, slightly better than that of the US.¹⁶⁰ As with the situation in the United States, state secret exemptions in China, while being used as powerful protection for national security, have also been adopted as shields against disclosure.¹⁶¹ Both the FOIA of the US and

¹⁵⁶ The closing date of the search is February 26, 2020. The author takes sole responsibility for the accuracy of the statements made regarding search results and this general study of state secret exemption cases in China.

¹⁵⁷ See PKULaw (北大法), <http://pkulaw.cn/Case/>; Itslaw (无讼案例), <https://www.itslaw.com/>.

¹⁵⁸ Excluding first-instance cases is because such cases are tried by fairly low-level courts and are very likely to be appealed and due to its pending validity, it shall not be included. However, this article also recognizes that such exclusion may embody certain inaccuracy, as a very small amount of first-instance cases that are final are not studied.

¹⁵⁹ May 1, 2015 was the time when the amended Administrative Litigation Law of the People’s Republic of China took effect. The amendment has had profound impact on China’s administrative litigation system. For instance, the amendment established a case registration system and abandoned the former case-filing review system which originally barred numerous cases from being heard by courts. See generally Ma Huaide & Kong Xiangwen (马怀德&孔祥稳), *Zhongguo Xingzheng Fazhi Sishi Nian: Chengjiu, Jingyan yu Zhanwang* (中国行政法治四十年：成就、经验与展望) [40 Years of China’s Rule of Administrative Law: Achievements, Experience and Perspectives], FAXUE (法学) [L. SCI.], no.9, 2018, at 34.

¹⁶⁰ See *supra* notes 49-54 and accompanying text.

¹⁶¹ WANG WANHUA (王万华), ZHIQINGQUAN YU ZHENGFU XINXI GONGKAI ZHIDU YANJIU (知情权与政府信息公开制度研究)[THE RIGHT TO KNOW AND OPEN GOVERNMENT INFORMATION] at 151-54 (2013).

the Administrative Litigation Law of China have provided for fairly strict standards for reviewing cases concerning non-disclosure of national security information or state secrets, but judicial review in practice are in fact much more lenient.

ii. Ex Parte Evidence Examination

Scholars have reached a consensus that state secret exemption cases in China are tried differently than other open government information cases.¹⁶² One core difference is that government agencies only need to submit “peripheral evidence,” instead of revealing to the court the disputed classified information.¹⁶³ Peripheral evidence is evidence “surrounding” the withheld information, which enables courts to conduct judicial review of procedural aspects of the non-disclosure and classification decisions of the withheld information.¹⁶⁴ Such evidence may include the first page of the relevant documents (bearing the classification level signs),¹⁶⁵ classification review forms,¹⁶⁶ state secret approval forms,¹⁶⁷ power of attorney of

¹⁶² See Jiang & Liang, *supra* note 142, at 34. LIANG FENGYUN (梁凤云), XIN XINGZHENG SUSONG FA JIANGYI (新行政诉讼法讲义) [LECTURES ON THE NEW ADMINISTRATIVE LAW] at 236-37 (2015). Cheng Hu (程琥), *Xin Tiaoli Shishi hou Zhengfu Xinxi Gongkai Susong Rugan Wenti Tanta* (新条例实施后政府信息公开行政诉讼若干问题探讨) [Discussion of a Number of Questions about Administrative Litigation of Government Information Disclosure after Implementation of the New Regulation], XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.], no.4, 2019, at 13, 27.

¹⁶³ Jiang & Liang, *supra* note 142, at 34; LIANG, *supra* note 162, at 236-37; Cheng, *supra* note 162, at 26-28.

¹⁶⁴ Jiang & Liang, *supra* note 142, at 34; LIANG, *supra* note 162, at 236-37; Cheng, *supra* note 162, at 27.

¹⁶⁵ See Wang Ruilan Su Beijing Shi Shenji Ju He Zhonghua Renmin Gonghe Guo Shenji Shu (王瑞兰诉北京市审计局和中华人民共和国审计署) [Wang Ruilan v. Beijing Municipal Bureau of Audit & Nat'l Audit Office of the People's Republic of China], Lawinfochina (Beijing 2d Interm. People's Ct. Feb. 28, 2019); Tang Jinkang Su Beijing Shi Gong'an Ju Dongcheng Fenju (唐金康诉北京市公安局东城分局) [Tang Jinkang v. Dongcheng Div. of Beijing Municipality Pub. Security Bureau], Lawinfochina (Beijing 2d Interm. People's Ct. Feb. 26, 2019).

¹⁶⁶ See Si Xiuqing Deng Ren Su Neimenggu Zizhi Qu Renmin Zhengfu (司秀清等人诉内蒙古自治区人民政府) [Si Xiuqing et al. v. People's Gov't of Inner Mongolia], Lawinfochina (Inner Mongolia Higher People's Ct. Nov. 2, 2018); see also Beijing Shi Yudu Meixin Cekong Dianqi Youxian Gongsu Su Beijing Shi Shijingshan Qu Renmin Zhengfu (北京市誉都美心测控电器有限公司诉北京市石景山区人民政府) [Beijing Yudu Meixin Appliance Measurement & Control Co. Ltd. v. Shijingshan Dist. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Nov. 29, 2017) [hereinafter *Yudu Meixin*].

¹⁶⁷ See Wu Yazhen Su Beijing Shi Fengtai Qu Renmin Zhengfu He Beijing Shi Renmin Zhengfu (武亚珍诉北京市丰台区人民政府和北京市人民政府) [Wu Yazhen v. Fengtai Dist. People's Gov't & Beijing Mun. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Sept. 20, 2018) [hereinafter *Wu Yazhen*]; Zhong Yanhua Su Shangdong Sheng Shenj Ting (仲衍华诉山东省审计厅) [Zhong Yanhua v. Audit Office of Shandong Province], Lawinfochina (Jinan Interm. People's Ct. Aug. 15, 2017); see also *Yudu Meixin, supra* note 166.

classification,¹⁶⁸ and statements of situation.¹⁶⁹ Only when peripheral evidence is insufficient to support that the information has been classified, or when courts assume that there exists separable non-classified information, may courts require submission of the disputed information.¹⁷⁰ Peripheral evidence submitted beyond the statutory period may still be admitted by courts.¹⁷¹ Under article 37 of the Provisions of the Supreme People's Court on Several Issues Concerning the Evidence in Administrative Litigations ("Supreme People's Court Evidence Provisions"), any evidence that is relevant to state secrets shall not be presented in court and cross examined.¹⁷² As a result, peripheral evidence is treated similarly to the classified information and is also kept away from plaintiffs.¹⁷³

Requesters in China are in an inferior position due to ignorance of the disputed information, similar to those in the US. However, the asymmetry of information is aggravated in China due to the special treatment of peripheral evidence, as described above. In many cases, plaintiffs cannot access the content of the peripheral evidence, nor are they informed of the name, producer, or time of production of the peripheral evidence.¹⁷⁴ This is described as "vacuum isolating."¹⁷⁵ Very rarely will

¹⁶⁸ See *Wu Yazhen*, *supra* note 167.

¹⁶⁹ See *Lu Zhanyun Su Zhonghua Renmin Gonghe Guo Shenji Shu* (卢占云诉中华人民共和国审计署) [*Lu Zhanyun v. Nat'l Audit Office of the People's Republic of China*], *Lawinfochina* (Beijing Higher People's Ct. Apr. 3, 2019); *Zhu Yuzhen Su Anhui Sheng Guotu Ziyuan Ting He Anhui Sheng Renmin Zhengfu* (朱玉珍诉安徽省国土资源厅和安徽省人民政府) [*Zhu Yuzhen v. Nat'l Land & Res. Office of Anhui Province & People's Gov't of Anhui Province*], *Lawinfochina* (Hefei Interm. People's Ct. Nov. 5, 2018); *E Xiuyun Su Shenyang Shi Renmin Zhengfu Waishi Bangong Shi* (鄂秀云诉沈阳市人民政府外事办公室) [*E Xiuyun v. Foreign Affairs Office of Shenyang Municipality*], *Lawinfochina* (Shenyang Interm. People's Ct. May 29, 2018).

¹⁷⁰ See *Jiang & Liang*, *supra* note 142, at 34-35; *Jiang & Li*, *supra* note 141, at 19-20.

¹⁷¹ See *Jiang & Li*, *supra* note 141, at 19-20; see also *He Shaohuan Su Panzhihua Shi Ziran Ziyuan He Guihua Ju* (贺绍欢诉攀枝花市自然资源和规划局) [*He Shaohuan v. Dep't of Nat. Res. & Planning of Panzhihua City*], *Lawinfochina* (Panzhuhua Interm. People's Ct. Aug. 20, 2019).

¹⁷² See *Zuigao Renmin Fayuan Guanyu Xingzheng Susong Zhengju Ruogan Wenti De Guiding* (最高人民法院关于行政诉讼证据若干问题的规定) [*The Provisions of the Supreme People's Court on Several Issues Concerning the Evidence in Administrative Litigations*] (promulgated by the Sup. People's Ct. June 4, 2002, effective Oct. 1, 2002), art. 37, *available at* <https://www.chinacourt.org/article/detail/2002/07/id/9003.shtml> [hereinafter *Supreme People's Court Evidence Provisions*]; *Zuigao renmin fayuan guanyu zhonghua renmin gongheguo minshi susong fa de shiyong xing* (最高人民法院关于中华人民共和国民事诉讼法的适用性) [*Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China*] (promulgated by the Judicial Comm. of the Sup. People's Ct. Dec. 18, 2014, effective Feb. 4, 2015) art. 103, *available at* <https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf> [hereinafter *Supreme People's Court Interpretations*].

¹⁷³ *LIANG*, *supra* note 162, at 236-37.

¹⁷⁴ See *Zheng Minjie Su Zhonghua Renmin Gonghe Guo Gongye He Xinxin Hua Bu* (郑敏杰诉中华人民共和国工业和信息化部) [*Zheng Minjie v. Ministry of Industry and Info.*

courts provide clues to peripheral evidence, as in the case of *Zhu Fuxiang v. Beijing Municipal People's Government*, in which the court stated that the peripheral evidence submitted was a classified document concerning internal structure and personnel quotas of the Beijing Municipal Public Security Bureau.¹⁷⁶

The Supreme People's Court Evidence Provisions only prohibits peripheral evidence from being presented and cross-examined, but does not specify how the evidence can be reviewed otherwise.¹⁷⁷ In practice, courts have developed “review after court”¹⁷⁸ and “direct review,”¹⁷⁹ with regard to peripheral evidence and the withheld information.¹⁸⁰ Despite the

Tech. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Nov. 21, 2017); *see also* Ma Yafen Su Zhonghua Renmin Gonghe Guo Ziran Ziyuan Bu (马亚芬诉中华人民共和国自然资源部) [Ma Yafen v. Ministry of Nat. Res. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Dec. 24, 2018); Bai Wanyong Deng Si Ren Su Zhonghua Renmin Gonghe Guo Guojia Fazhan He Gaige Weiyuan Hui (白万勇等4人诉中华人民共和国国家发展和改革委员会) [Bail Wanyong et al. v. Nat'l Dev. & Reform Comm'n of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Dec. 10, 2019).

¹⁷⁵ *See* Zheng, *supra* note 141, at 153-54.

¹⁷⁶ *See* Zhu Fuxiang Su Beijing Shi Renmin Zhengfu (朱福祥诉北京市人民政府) [Zhu Fuxiang v. Beijing Mun. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Sep. 29, 2017). *See also* Ruan Jibao Su Beizhen Shi Guotu Ziyuan Ju (阮吉宝诉北镇市国土资源局) [Ruan Jibao v. Bureau of Nat'l Land & Res. of Beizhen Municipality], Lawinfochina (Jinzhou Interm. People's Ct. Sept. 28, 2015) (Defendant submitted two pieces of classified evidence, including documents produced by the National Development and Reform Commission of the People's Republic of China and Minutes of Meeting of Governor of Liangning Province, both with “CONFIDENTIAL” marks.).

¹⁷⁷ *See Supreme People's Court Evidence Provisions, supra* note 172, art. 37; *Supreme People's Court Interpretations, supra* note 172, art. 103.

¹⁷⁸ *In* Li Shuiqing v. Chengdu Municipal Public Security Bureau, the defendant submitted the disputed information and the court reviewed the information after a court hearing, which was later referred to as “review after court (庭后审查)” in the judicial opinion. *See* Li Shuiqing Su Chengdu Shi Gong'an Ju He Sichuan Sheng Gonganting (李水清诉成都市公安局和四川省公安厅) [Li Shuiqing v. Chengdu Mun. Pub. Sec. Bureau & Pub. Sec. Dep't of Sichuan Province], Lawinfochina (Chengdu Interm. People's Ct. Mar. 19, 2018).

¹⁷⁹ *In* Wu Jinrong v. Tianjian Municipal Planning Bureau, the defendant submitted a response letter concerning the withheld information by the Tianjin Municipal National Administration of State Secrets Protection, and the court reviewed the evidence without presence of the parties, which was later referred to as “direct review (径行审查)” in the judicial opinion. *See* Wu Jinrong Su Tianjin Shi Guihua Ju (武金荣诉天津市规划局) [Wu Jinrong v. Tianjin Mun. Planning Bureau], Lawinfochina (Tianjin Higher People's Ct. Sept. 11, 2015).

¹⁸⁰ *See* Song Baojiang Su Beijing Shi Gong'an Ju Fengtai Fenju (宋保江诉北京市公安局丰台分局) [Song Baojiang v. Fengtai Div. of Beijing Mun. Pub. & Sec. Bureau], Lawinfochina (Beijing 2d Interm. People's Ct. Mar. 27, 2019); Shen Meili Su Zhonghua Renmin Gonghe Guo Nongye Bu (沈美丽诉中华人民共和国农业部) [Shen Meili v. Ministry of Agric. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. July 20, 2017); Mei Mincai Su Luxian Guotu Ziyuan Ju (梅民才诉泸县国土资源局) [Mei Mincai v. Luxian Nat'l Land & Res.], Lawinfochina (Luzhou Interm. People's Ct. May 17, 2017).

difference in expressions, both methods, aforementioned, are in fact *ex parte* examination of the relevance, veracity, and legality of evidence, without the participation of plaintiffs.

The *ex parte* evidence examination may be reminiscent of the *in camera* inspection used in the United States, as discussed above. The two methods bear certain resemblances and distinctions, as seen in *Chart 2* below.

| | <i>Ex Parte</i> Evidence Examination | <i>In Camera</i> Inspection |
|---------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Content | Peripheral evidence (rarely includes the withheld information) | The withheld information |
| Condition of Application | Upon submission of peripheral evidence | Upon choice of courts ¹⁸¹ |
| Question to be Resolved | Whether the peripheral evidence can reveal that the withheld information has in fact been classified <ul style="list-style-type: none"> ◆ RELEVANCE OF EVIDENCE ◆ VERACITY OF EVIDENCE ◆ LEGALITY OF EVIDENCE | Whether the withheld information can be exempt under the national security exemption <ul style="list-style-type: none"> ◆ HAS THE WITHHELD INFORMATION IN FACT BEEN CLASSIFIED? ◆ IS THE CLASSIFICATION IN LINE WITH PROCEDURAL AND SUBSTANTIVE REQUIREMENTS IN EXECUTIVE ORDERS? |
| Characteristics | Method of reviewing evidence | Method of reviewing disputed issue |

Chart 2 – Comparison of Ex Parte Examination and In Camera Inspection

As discussed *infra*, under the *in camera* inspection in the United States, several defects can be identified, including the heavy encumbrance upon courts, the fairly low burden of proof from the government agencies' side, and the lack of adversariness. Despite the distinctions illustrated in the *Chart 2*, the *ex parte* examination in China and *in camera* inspection in the US share similar problems. For one thing, under both methods, government agencies can easily satisfy their burden of proof, even without submitting the withheld information. It is common that courts may rule in favor of government agencies that only submit legal rules or documents upon which

¹⁸¹ See *Ray*, 587 F.2d at 1195.

classification decisions rely, instead of peripheral evidence.¹⁸² Additionally, plaintiffs can neither access the withheld information nor be informed of the content of peripheral evidence, which contributes to an even more obvious lack of adversariness.

The US has introduced the creative procedural tool of the Vaughn Index to address to the above-mentioned problems. Similarities, especially in the defects shared by the *ex parte* examination and the *in camera* inspection, provide the grounds for drawing enlightenment in China from the Vaughn Index.

iii. Lessons from the Vaughn Index

Before proceeding to discuss how the Vaughn Index could be introduced to China, this article seeks to elaborate on one distinct feature of Chinese judicial review on state secret exemption cases.

Theoretically speaking, in cases concerning the state secret exemption (or the national security exemption in the US), the core issue at dispute is whether the information may be withheld under the exemption. This issue can be further divided into three sub-issues: 1) whether the disclosure is made in accordance to procedural requirements of the OGIR; 2) whether the withheld information is in fact classified; and 3) whether the information is properly classified. Unlike in the US, courts in China are not in a position to review the last issue, the legitimacy and justifiability of the classification decisions. The People's Supreme Court has held that legitimacy of classification is beyond the scope of court's functions and powers,¹⁸³ and, given the special expertise of administrative agencies, as

¹⁸² See Shen Huili Su Shanghai Shi Yangpu Qu Zhufang Baozhang He Fangwu Guanli Ju (沈惠丽诉上海市杨浦区住房保障和房屋管理局) [Shen Huili v. Yangpu Dist. Hous. Sec. & Hous. Auth. Bureau of Shanghai Municipality], Lawinfochina (Shanghai 2d Interm. People's Ct. Nov. 14, 2018); Sun Lanying Su Zhengzhou Shi Guancheng Huizu Qu Zhufang Baozhang Zhongxin He Zhengzhou Shi Guancheng Huizu Qu Renmin Zhengfu (孙兰英诉郑州市管城回族区住房保障中心和郑州市管城回族区人民政府) [Sun Lanying v. Guancheng Hui Nationality Dist. Hous. Sec. Ctr. of Zhengzhou Municipality & Guancheng Hui Nationality Dist. People's Gov't of Zhengzhou Municipality], Lawinfochina (Zhengzhou Interm. People's Ct. May 18, 2017).

¹⁸³ In *Gao Ruihua v. Jixian People's Government*, the Supreme People's Court stated "the power to determine state secrets and the power to adjudicate disputes over state secrets are exclusive. Gao Ruihua's request concerning whether the withheld information shall be classified was beyond the scope of court's power in administrative litigations." *Gao Ruihua Su Tianjin Shi Jixian Renmin Zhengfu* (高瑞华诉天津市蓟县人民政府) [*Gao Ruihua v. Jixian People's Gov't of Tianjin Municipality*], Lawinfochina (Sup. People's Ct. June 24, 2016); see *Cai Xun Su Zhonghua Renmin Gonghe Guo* (蔡迅诉中华人民共和国) [*Cai Xun v. Ministry of Justice of the People's Republic of China*], Lawinfochina (Sup. People's Ct. Mar. 26, 2019). See also *Zheng Hong Su Shanghai Shi Zhufang He Chengxiang Jianshe Guanli Weiyuan Hui* (郑洪诉上海市住房和城乡建设管理委员会) [*Zheng Hong v. Shanghai Mun. Comm'n of Hous. & Urban-Rural Dev.*], Lawinfochina (Shanghai 1st Interm. Ct. May 9, 2016).

long as classifications are made pursuant to statutory procedures, courts shall respect the agencies' classification decisions.¹⁸⁴

The inability of Chinese courts to review the legitimacy of classification decisions is significant, because it renders it fairly useless to require government agencies to submit a detailed explanation of the exemption. However, what China can learn from the Vaughn Index is that a defendant's burden of proof shall be increased as to the description of the withheld information, which would contribute to reviewing the second sub-issue aforementioned.

Under current judicial practice in China, government agencies need only submit peripheral evidence and sometimes even a mere legal basis for classification would suffice.¹⁸⁵ Rarely do government agencies submit supplemental statements further addressing the classification status and legal basis for classification.¹⁸⁶ By increasing the burden of proof of government agencies and requiring the provision of more detailed descriptions regarding the withheld information, plaintiffs will not only receive more factual bases, with regard to the classification procedures and status of the withheld information, but also will be able to formulate rebuttals focusing on whether the information has been classified and whether classification has been in conformity to statutory procedural requirements. Some scholars have proposed a discussion on authorizing courts to have the power to review the legitimacy of classifications.¹⁸⁷ Transplantation of the Vaughn Index might be functioning to the largest extent if such ideal were realized, because administrative agencies would then be required to provide explanations of why the information is classified, instead of just proving the mere fact of classification and that the classification has been conducted in accordance to procedural requirements of relevant laws and regulations. Nonetheless, in light of the current legal framework concerning the state secret exemption, what China can absorb is the essence of the Vaughn Index – raising defendants' burden of proof.

¹⁸⁴ In *Liu Shuhua v. Ministry of Housing and Urban-Rural Development*, the Supreme People's Court stated: "Though the Administrative Litigation Law has established the standard of comprehensive review, due to agencies' expertise and natural advantage over their services, as long as the state secrets were determined in accordance to statutory procedural requirements, courts shall respect the classification decisions." Liu Shuhua Su Zhonghua Renmin Gonghe Guo Zhufang He Chengxiang Jianshe Bu (刘淑华诉中华人民共和国住房和城乡建设部) [Liu Shuhua v. Ministry of Hous. & Urban-Rural Dev. of the People's Republic of China], Lawinfochina (Sup. People's Ct. Nov. 1, 2016).

¹⁸⁵ See *supra* note 136 and accompanying text.

¹⁸⁶ Ren Bulin Su Huaian Shi Renmin Zhengfu (任步林诉淮安市人民政府) [Ren Bulin v. Huaian Mun. People's Gov't], Lawinfochina (Jiangsu Higher People's Ct. July 31, 2018) (Defendant submitted a statement for proving that the working map used in the existing land use map requested by Plaintiff was the product of the country's first land-use survey, and the working map along with its derivative products are within the scope of state secrets.); see also Zhang Daichun Su Zhonghua Renmin Gonghe Guo Ziran Ziyuan Bu (张代春诉中华人民共和国自然资源部) [Zhang Daichun v. Ministry of Nat. Res. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Jan. 22, 2019).

¹⁸⁷ See generally Cheng, *supra* note 162.

Due to the comparatively low volume of requested information in China, it is unlikely that the “Selective” Vaughn Index would be troublesome. Nonetheless, both the “Boilerplate” Vaughn Index and the “Multiple” Vaughn Index might also be troubling for China. The gloom of the “Boilerplate” Vaughn Index might be mitigated by requiring administrative agencies to provide descriptions of information and reasons for withholding the information that are as detailed as possible, instead of simply stating relevant legal provisions. Courts shall also require administrative agencies to strictly follow rules on terms of adducing evidence to prevent circumstances similar to the “Multiple” Vaughn Index.

VI. CONCLUSION

As President John F. Kennedy once wrote:

The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.¹⁸⁸

Despite the openness of American democracy, public officials sometimes keep bowing towards secrecy. The incentive for concealing error and embarrassment, and for eliminating skepticism and disagreement, is deeply rooted in bureaucracy. “They own their desks and they own their file cabinets, and they own the papers that are in them.”¹⁸⁹ Such vivid depiction of the attitudes of government officials demonstrates precisely how pervasive and rooted secrecy is. Excessive secrecy will always be a constant. The Executive has every incentive to maintain national security secrecy, either for legitimate causes or for bureaucratic needs. The US Congress, however, has demonstrated clear intention to curb extensive secrecy, while the Judiciary has been struggling between serving as an effective check, as mandated by Congress, and bowing to government classification decisions for lack of expertise and fear of endangering national interests. The dynamics of the three US branches of government in FOIA litigations have revealed that the ideal result is not the elimination of government secrecy, which remains rather unrealistic. Indeed, what the FOIA scheme strives to achieve is an “acceptable world,”¹⁹⁰ where secrecy occurs within a reasonable, and probably predictable, range, but not because of the Executive’s desire to conceal incompetence or wrongdoings.

¹⁸⁸ ARNOLD, *supra* note 6, at 14.

¹⁸⁹ Harrison Wellford, *Rights of People: The Freedom of Information Act, in None of Your Business: Government Secrecy in America*, 209, 209 (Norman Dorsen & Stephen Gillers, ed., 1974).

¹⁹⁰ ARNOLD, *supra* note 6, at 19-21.

In *Vaughn*, the D.C. Circuit Court devised a procedural tool that has been widely adopted and highly praised. This creative instrumentality is helpful to both courts and plaintiffs in FOIA litigation. By shifting the burden of proof back to government agencies and raising the standard of justifying exemptions, it mends the lack of adversariness and solves the dilemma faced by courts in FOIA cases, especially those concerning the national security exemption. Additionally, it may also serve as an incentive to compel the government to disclose information, because the cost of justifying nondisclosure can be much higher than disclosure. Nonetheless, benign as it may be, the Vaughn Index has evolved and bred some derivatives that might hinder its objectives as a procedural tool and contribute to defeating Congress' intention to keep an informed citizenry and enable democratic participation and citizen oversight.

China, a latecomer in open government initiatives, has been accelerating open government information legislation in the past two decades. While recognizing China's incentive to and efforts in propelling openness and transparency of government, it should be noted that problems similar to those of the US can be found in China's judicial practice. The Vaughn Index, though a procedural creation emerging from a different legal system, is of some reference value. Lessons that Chinese courts can learn from the Vaughn Index are restricted by the fact that courts in China remain unauthorized to review legitimacy of classification decisions. However, adopting the Vaughn Index could still help Chinese courts. By adopting the core mechanism of raising the burden of proof with regard to classification conformity to be a procedural requirement, it is likely that, to some extent, the imbalance of information can be mitigated and the lack of adversariness can be mended.

The Vaughn Index, by imposing a stricter burden of proof on government agencies, surely has contributed to the "acceptable world," but its various forms of derivatives may offset its positive effects, which both the US and China should beware of. In the end, what remains certain is that the system of Vaughn Index is a valuable tool that is far from perfect and needs further elaboration in the long run.

SOMETHING'S IN THE WATER: ALTERING RADIATION REGULATIONS AND SEAFOOD IMPORT ALERTS BY THE FDA IN THE WAKE OF THE FUKUSHIMA DISASTER

*Armon Mirian**

I. INTRODUCTION

In general, everyone has an idea of what radiation is and a healthy fear of its effects. This fear, however, does not take into account the sinister effects of radiation upon the human body. Without any accompanying visuals, sounds, smells, taste, or any other physical manifestation, radiation is a true silent killer. As smaller fish are consumed by larger fish, their contaminants and toxins are absorbed by the larger fish, and so-on up the food chain. This is called “bioaccumulation.”¹

Just as these bioaccumulated fish are passed up the food chain, so are the risks, which are passed from fisherman to market to buyer and, eventually, to consumer. The consumer stands the most to lose from seafood contaminated with radioactive materials. A consumer on the West Coast could unwittingly eat seafood from the coastal waters of Japan, near Fukushima, without knowing and continue to do so day after day. After all, isn't Japanese seafood said to be a mark of quality?² This consumer could then, after a period of some years, develop highly dangerous cancers as a result of eating fish contaminated with cesium, iodine, plutonium, or strontium, all chemical elements leaked from Fukushima,³ bioaccumulated up the food chain. This silent killer could strike without warning, and it could all stem back to a 2011 incident off the coast of Japan.

March 11, 2011 marked the start of Japan's nuclear nightmare, when the Fukushima Daiichi nuclear power station (“Fukushima”) was rocked by both earthquake and tsunami.⁴ Nearly 16,000 people died in the wake of the devastation.⁵ Off the Eastern coast of Honshu, Japan's largest island, a 9.0 magnitude earthquake rocked the Earth, with an epicenter

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¹ *What is Bioaccumulation?*, MICH. DEPT. OF CMTY. HEALTH (2020), https://www.michigan.gov/documents/mdch/Bioaccumulative__Persistent_Chemicals_FINAL_354016_7.pdf.

² *See Norwegian Seafood Takes Off in SE Asia*, THE NATION (Apr. 21, 2018), <https://www.nationthailand.com/Economy/30343606> (Consumers are more likely to patronize restaurants that they believe is serving Japanese seafood, even though the seafood they are eating is actually from Norway. The restaurant in the article has used the popularity of the “high quality of Japanese seafood” idea to its own advantage to draw in picky consumers.).

³ Ed Vitz et al., *Radiation Contamination from Fukushima*, CHEMISTRY LIBRETEXTS, https://chem.libretexts.org/Ancillary_Materials/Exemplars_and_Case_Studies/Exemplars/Environmental_and_Green_chemistry/Radiation_Contamination_from_Fukushima (last visited Dec. 20, 2018).

⁴ MARK HOLT ET AL., CONG. RESEARCH SERV., R41694, FUKUSHIMA NUCLEAR DISASTER 1 (2012).

⁵ Jotaro Yokoyama, *Fukushima Disaster and Reform*, 43 ENVTL. POL'Y & L. 226, 226 (2013).

approximately eighty miles out to sea from the coastal city of Sendai.⁶ The earthquake was the largest event ever recorded in Japan.⁷ It was a rare and complex double-quake, shifting the Earth so much that Japan moved a few feet to the east.⁸ The massive earthquake triggered an automatic shutdown of eleven reactors at four⁹ of Japan's fifty-five operational nuclear power plants, most of which suffered little to no damage.¹⁰ However, when the resulting forty-nine foot high tsunami¹¹ struck the coast, it obliterated everything in its path and easily overtopped a twenty foot high seawall at Fukushima, one of the nuclear power plants closest to the epicenter.¹²

Fukushima was rocked by two explosions in the days following the earthquake and the tsunami.¹³ These explosions resulted in high radiation levels outside Fukushima, where only a moment's exposure equaled one year's worth of allowable radiation.¹⁴ To save the dangerously overheating nuclear power plant, Fukushima's operators flooded the damaged reactors with water in a "last-ditch" effort to cool the plant.¹⁵ In the aftermath of the damage to Fukushima, water contaminated with radioactive material had not only leaked into the ocean, but had also been intentionally dumped directly into it.¹⁶ All varieties of sea creatures, many of which are consumed by humans the world over, were impacted by the radioactive materials spilled into the ocean.¹⁷

⁶ Michael Faure & Jing Liu, *The Tsunami of March 2011 and the Subsequent Nuclear Incident at Fukushima: Who Compensates the Victims*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 129, 131 (2012).

⁷ P. Carydis, A. Pomonis & K. Goda, *Fukushima Daiichi Nuclear Power Plant: A Retrospective Evaluation*, 15TH WORLD CONG. ON EARTHQUAKE ENG'G I (Sept. 2012), https://www.iitk.ac.in/nicee/wcee/article/WCEE2012_2832.pdf.

⁸ *Fukushima Daiichi Accident*, WORLD NUCLEAR ASS'N, <http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident.aspx> (last updated June 2018).

⁹ *Id.*

¹⁰ RICHARD J. CAMPBELL ET AL., CONG. RESEARCH SERV., R41694, FUKUSHIMA NUCLEAR CRISIS I (2011).

¹¹ *Fukushima Daiichi Accident*, *supra* note 8.

¹² Campbell, *supra* note 10, at 2.

¹³ Darian Ghorbi, *There's Something in the Water: The Inadequacy of International Anti-Dumping Laws as Applied to the Fukushima Daiichi Radioactive Water Discharge*, 27 AM. U. INT'L L. REV. 473, 475 (2012).

¹⁴ *Id.* Nuclear workers are normally allowed to receive a dose of 20 mSv of radiation per year, and up to 100 mSv in emergency situations. See *Japan to Raise Worker Emergency Radiation Exposure Limits*, WORLD NUCLEAR NEWS (May 21, 2015), <http://www.world-nuclear-news.org/RS-Japan-to-raise-worker-emergency-radiation-exposure-limits-2101154.html>. Radiation dose rates of up to 1,000 mSv per hour were reported following the disaster, before stabilizing between 600 and 800 mSv per hour. See *Radiation Spike Hinders Work at Japan Nuke Plant*, CBS NEWS (Mar. 16, 2011), <https://www.cbsnews.com/news/radiation-spike-hinders-work-at-japan-nuke-plant/>.

¹⁵ Ghorbi, *supra* note 13, at 475.

¹⁶ *Id.*

¹⁷ EUGENE H. BUCK & HAROLD F. UPTON, CONG. RESEARCH SERV., R41751, EFFECTS OF RADIATION FROM FUKUSHIMA DAI-ICHI ON THE U.S. MARINE ENVIRONMENT 1-4 (2012).

While the nuclear materials from Fukushima may not impact U.S. fisheries in the near future, both ocean currents and atmospheric winds have the potential to carry radiation over and into the territorial waters of the United States.¹⁸ Further, those fish that make it to American markets from the seas around Japan may bring radioactive contamination with them.¹⁹ Some sea creatures harvested by Japanese fishers have been found to have elevated levels of radiation.²⁰ Higher than normal levels of radioactive iodine-131, cesium-137, and cesium-134²¹ were all measured in the ocean adjacent to Fukushima in the days since the earthquake-tsunami.²² To head this issue off at the pass, rather than wait decades down the line when the human cost will be too great, the Food and Drug Administration (“FDA”) should pass binding regulations that would prevent products with elevated levels of radiation from coming into U.S. markets, rather than promoting toothless import alerts that may not actually protect American consumers when challenged in court.

First, this article will describe the history of nuclear power in Japan, the effect of the Fukushima disaster on sea life, and the mechanisms by which radiation from Fukushima continues to contaminate the ocean. Second, this article will discuss Japanese regulations in reaction to this disaster and the role they play compared to the American regulations through the FDA. Third, this article will use case law and precedent to lay out a step-by-step recommendation of how the current FDA import alert system should be improved. The dangerous fallout from Fukushima has potential to impact populations not only across Japan and East Asia, but may rear its head in the United States’ own coastal population, and thus must be acted upon in a preventative manner rather than a reactive one.

II. BACKGROUND

A. *Nuclear Power in Japan*

Despite being the only country that has experienced the devastation of nuclear weapons, Japan has embraced nuclear power to provide a substantial portion of its energy needs.²³ Following the atomic

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3.

²¹ These are radioactive isotopes, also known as radioisotopes or radionuclides, which are unstable forms of their parent elements. These isotopes have a different atomic mass compared to the parent form of their parent elements, denoted by the number affixed to the end of the element name. These isotopes are created via the production of nuclear energy and emit dangerous radiation. See *Radioisotopes: What Are They and How Are They Made?*, DEP’T OF ENERGY, https://ehss.energy.gov/ohre/roadmap/achre/intro_9_4.html.

²² Buck, *supra* note 17, at 2.

²³ *Nuclear Power in Japan*, WORLD NUCLEAR ASS’N, <http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/japan-nuclear-power.aspx> (last updated Mar. 2020).

bombing that ended the Second World War, anti-nuclear sentiment in Japan was extremely high, with depictions across the entire spectrum of Japanese culture, from politics to cinema.²⁴ Although other countries were also greatly devastated by the war, the atomic bombings of Hiroshima and Nagasaki imprinted themselves on the Japanese national psyche, echoing into the modern era with their longstanding national ban on nuclear weaponry.²⁵ Consequently, it was a surprising turn of events when the Japanese embraced nuclear technology, albeit for peaceful purposes, with open arms.²⁶ Up until the Fukushima disaster in 2011, Japan had been generating 30% of its electricity from its fifty-four nuclear reactors.²⁷ By comparison, the United States produced about 20% of its electricity from nuclear power plants in 2018.²⁸ Before the Fukushima disaster skewed the projections, Japan was slated to produce 50% of its electricity from nuclear power plants by 2030.²⁹ However, after the disaster, public sentiment regarding nuclear energy in Japan shifted markedly.³⁰

Following the disaster at Fukushima, widespread public protests called for nuclear power to be abandoned altogether.³¹ With total costs of the Fukushima disaster reaching into the hundreds of billions of dollars, a predictably unhappy public now faces the reality of a fallout clean-up plan that makes them shoulder a part of that burden.³² As a result, there have been renewed calls for the closing of all Japanese nuclear power plants.³³ In a poll conducted by the pro-nuclear Japan Atomic Energy Relations

²⁴ See Masakatsu Ota, *Conceptual Twist of Japanese Nuclear Policy: Its Ambivalence and Coherence Under the US Umbrella*, 1 J. FOR PEACE & NUCLEAR DISARMAMENT 193, 193-98 (2018).

²⁵ Shigenori Matsui, *T-Rex, Jurassic Park and Nuclear Power: Nuclear Power Plants and the Courts After the Fukushima Nuclear Accident*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 145, 145 (2017); *Japan*, NUCLEAR THREAT INITIATIVE, <https://www.nti.org/learn/countries/japan/nuclear/> (last updated Oct. 2018).

²⁶ Ota, *supra* note 24, at 197.

²⁷ Matsui, *supra* note 25, at 148; *Nuclear Power in Japan*, *supra* note 23.

²⁸ *Nuclear Power in the USA*, WORLD NUCLEAR ASS'N, <http://www.world-nuclear.org/information-library/country-profiles/countries-t-z/usa-nuclear-power.aspx> (last updated Apr. 2020).

²⁹ *Nuclear Power in Japan*, *supra* note 23.

³⁰ Mari Saito & Sophie Knight, *Thousands in Japan Anti-Nuclear Protest Two Years After Fukushima*, REUTERS (Mar. 10, 2013, 5:40 AM), <https://www.reuters.com/article/us-japan-protest/thousands-in-japan-anti-nuclear-protest-two-years-after-fukushima-idUSBRE92903Y20130310>.

³¹ Mari Saito and Sophie Knight, *Thousands in Japan anti-nuclear protest two years after Fukushima*, REUTERS (Mar. 10, 2013), <https://www.reuters.com/article/us-japan-protest/thousands-in-japan-anti-nuclear-protest-two-years-after-fukushima-idUSBRE92903Y20130310>.

³² Tatsujiro Suzuki, *Six Years After Fukushima, Much of Japan Has Lost Faith in Nuclear Power*, THE CONVERSATION (Mar. 9, 2017, 10:30 AM), <http://theconversation.com/six-years-after-fukushima-much-of-japan-has-lost-faith-in-nuclear-power-73042>.

³³ *Id.*

Organization, only 10.1% of polled Japanese citizens said that the use of nuclear energy should be maintained.³⁴

Prior to the disaster at Fukushima, some Japanese citizens protested and filed lawsuits to stop the operation of nuclear power plants, but Japanese courts were typically reluctant to intervene, essentially siding with the government and nuclear power companies.³⁵ However, the disaster at Fukushima clearly demonstrated that nuclear power is fraught with risks and nuclear accidents could cause serious damage; enough damage to cause a change in the judicial attitude towards nuclear power plants in Japan.³⁶

This change in attitude towards nuclear energy in Japan manifested a major effect on the reality of Japanese energy production, and, since 2011, Japan has shuttered many of its nuclear power plants.³⁷ In 2017, Japan produced only about 3% of its electricity from nuclear power plants, a far cry from the 30% in 2011,³⁸ demonstrating that fears regarding nuclear energy in Japan have clearly manifested into its electricity production policy.

B. *Damage to the Fukushima Power Plant*

The Fukushima power plant complex consists of two separate nuclear plants, Fukushima Daiichi (first) and Fukushima Daini (second), with Daiichi being about 6.8 miles to the north of Daini.³⁹ The Fukushima Daiichi plant began construction in 1967⁴⁰ and was designed to withstand tsunamis based on an assessment of the 1960 Chile tsunami,⁴¹ a tsunami that resulted from the most powerful earthquake ever recorded.⁴² The Fukushima power plant was built on the coast of Japan, thirty-three feet above sea level, with its seawater pumps thirteen feet above sea level.⁴³ In 2002, the seawater pumps, meant to cool the reactor, were redesigned, sealed, and raised to nineteen feet above sea level.⁴⁴ However, the 2011 tsunami created waves approximately 49 feet high, and the power plant's

³⁴ *Id.*

³⁵ Matsui, *supra* note 25, at 145-46.

³⁶ *See id.* at 189 (Several courts granted injunctions against the restart of nuclear reactors following the Fukushima disaster.).

³⁷ *Nuclear Power in Japan*, *supra* note 23.

³⁸ *Id.*

³⁹ *Fukushima Daiichi Accident*, *supra* note 8.

⁴⁰ *See* Carydis, *supra* note 7, at 2. The Fukushima reactors are boiling water reactors designed by the General Electric Company, similar to ones in use in the United States. *See* Stephen G. Burns, *The Fukushima Daiichi Accident: The International Community Responds*, 11 WASH. U. GLOBAL STUD. L. REV. 739, 742 (2012).

⁴¹ *Fukushima Daiichi Accident*, *supra* note 8.

⁴² *1960 Chile Tsunami*, WESTERN STATES SEISMIC POLICY COUNCIL, <https://www.wsspc.org/resources-reports/tsunami-center/significant-tsunami-events/1960-chile-tsunami/>.

⁴³ *Fukushima Daiichi Accident*, *supra* note 8.

⁴⁴ *Id.*

turbine halls were submerged under over sixteen feet of seawater until the ocean subsided.⁴⁵ As such, the 2002 redesign proved to be grossly ineffective, as everything was submerged, creating a toxic slurry of contaminated radioactive water.⁴⁶

Like Fukushima, many nuclear plants are built along the coast in other countries, as the vast amounts of seawater make for an easily accessible resource to keep the plants cool.⁴⁷ However, when such power plants are constructed near the ocean, it follows that they should be built to withstand whatever elements the sea may throw at them.

Earthquakes and their resulting tsunamis are a recurring problem in the Japanese archipelago, so much so that Japanese architects and building planners have become adept at earthquake proofing new constructions. However, failing to update older buildings with new earthquake proofing technology has been a problem in Japan.⁴⁸ In fact, TEPCO, the electric utility company that operated the Fukushima nuclear power plant facility, was found guilty of negligence in 2017 by a Japanese court for failure to prevent meltdowns at the facility during the 2011 catastrophe.⁴⁹ The court found that TEPCO should have been able to predict and prevent the disaster at Fukushima and ordered TEPCO to pay damages to victims of the disaster.⁵⁰ The National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission ("NAIIC"), in a damning report on the actions taken by TEPCO in maintaining the Fukushima power plant, stated that TEPCO, as the nuclear operator, and a host of Japanese

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Map of Power Reactor Sites*, U.S. NUCLEAR REGULATORY COMM'N, <https://www.nrc.gov/reactors/operating/map-power-reactors.html> (demonstrating numerous American nuclear power plants are constructed along the coast); John Vidal, *What are Coastal Nuclear Power Plants Doing to Address Climate Threats?*, ENISIA (Aug. 8, 2018), <https://ensia.com/features/coastal-nuclear/> (using the Fukushima disaster to address the preventable problem and dangers posed by coastal nuclear power plants in the event of flooding).

⁴⁸ See *28% of Municipal Government Buildings Still at Risk from Earthquakes: Survey*, JAPAN TIMES (Mar. 11, 2018), <https://www.japantimes.co.jp/news/2018/03/11/national/28-municipal-government-buildings-still-risk-earthquakes-survey/#.XEOSNy2ZPOQ> (stating that, according to a survey by the internal affairs ministry, nearly 30 percent of the nation's municipalities had not completed seismic reinforcement work on their main buildings as of the end of 2017); James M. Acton & Mark Hibbs, *Why Fukushima Was Preventable*, THE CARNEGIE ENDOWMENT FOR INT'L PEACE 1 (Mar. 2012), <https://carnegieendowment.org/files/fukushima.pdf> (asserting that a major tsunami caused accident at Fukushima could have been prevented if the power plant's outdated disaster prevention mechanisms and reinforcements had been updated).

⁴⁹ Motoko Rich, *Japanese Government and Utility Are Found Negligent in Nuclear Disaster*, N.Y. TIMES (Mar. 17, 2017), <https://www.nytimes.com/2017/03/17/world/asia/japan-fukushima-nuclear-disaster-tepcO-ruling.html>.

⁵⁰ *Id.*

regulatory bodies failed to correctly prepare and implement the most basic safety requirements needed to avoid the disaster.⁵¹

Fukushima had six reactor units.⁵² This is a relatively large number of reactors for one plant,⁵³ which heightened the chance for catastrophe in the event of a meltdown. Comparatively, current and planned U.S. nuclear power plants typically have only two or three reactors.⁵⁴ At the time of the 2011 earthquake and tsunami, Fukushima's reactor units one, two, and three were operational, while reactor units five and six were shut down as part of routine maintenance work.⁵⁵ Only unit four had no fuel in its reactor.⁵⁶

When the earthquake hit in 2011, it triggered an automatic shutdown of the three operating reactors at Fukushima, causing the reactor control rods to be inserted to stop the fission reaction from generating electricity.⁵⁷ The same automatic process occurred at eight other reactors in Japan, causing a "sudden loss of power across Japan's power grid" and cutting crucial electricity supplies to Fukushima.⁵⁸ Because external power supply sources to the power plant were disabled when the national power grid was affected, the on-site emergency diesel generators at the power plant had to be activated in order to keep the reactors cooled.⁵⁹ However, these on-site emergency diesel generators were knocked out of commission when the forty-nine foot waves from the tsunami breached the power plant's sea wall and flooded the facility.⁶⁰ The tsunami also drowned the electrical switchgear and batteries located in the basements of the turbine building, with the one surviving air-cooled generator serving units five and six.⁶¹

⁵¹ Kiyoshi Kurokawa & Andrea Ryoko Ninomiya, *Examining Regulatory Capture: Looking Back at the Fukushima Nuclear Power Plant Disaster, Seven Years Later*, 13 U. PA. ASIAN L. REV. 47, 53-54 (2018).

⁵² Carydis, *supra* note 7, at 1.

⁵³ See *U.S. Operating Nuclear Reactors*, WORLD NUCLEAR ASS'N, <http://world-nuclear.org/information-library/country-profiles/countries-t-z/appendices/nuclear-power-in-the-usa-appendix-1-us-operating-n.aspx>.

⁵⁴ See *id.*; Westinghouse, *Blue Castle Working to Bring Benefits of AP1000® Plant Technology to Western Us*, WESTINGHOUSE NUCLEAR (Aug. 20, 2014), <http://www.westinghousenuclear.com/About/News/View/ArticleId/447/Westinghouse-Blue-Castle-Working-to-Bring-Benefits-of-AP1000-Plant-Technology-to-Western-US> (discussing plans for a new, two-unit nuclear power plant).

⁵⁵ Burns, *supra* note 40, at 742.

⁵⁶ *Id.*

⁵⁷ Carydis, *supra* note 7, at 1.

⁵⁸ *Id.*; Antonios Pomonis et al, *The M_w 9.0 Tōhoku Earthquake and Tsunami of 11th March 2011*, THE INSTITUTION OF STRUCTURAL ENGINEERS 132 (2011), <https://www.istructe.org/IStructE/media/Public/Resources/report-eeftm-mission-japan-20111203.pdf>.

⁵⁹ Carydis, *supra* note 7, at 1.

⁶⁰ *Id.*

⁶¹ *Fukushima Daiichi Accident*, *supra* note 8.

As a consequence, four of the reactor units entered a state known as “station blackout,” where “the only electric power comes from station batteries, which are capable of providing power only in terms of hours, not days.”⁶² In this station blackout, the reactors were isolated from their ultimate heat sink.⁶³ Without a functional heat removal system connected to the facility, “the reactor cores increased in temperature, evaporating the surrounding water and, once there was no more water left to evaporate, the cores began to melt down.”⁶⁴ Even after the reactors were finally shut down, they continued to produce heat.⁶⁵ “To cool down the nuclear fuel, plant workers tried to do everything they could.”⁶⁶ They attempted “to cool down the reactor cores as well as the fuel stored in the fourth reactor by supplying water from outside.”⁶⁷ The workers were so desperate to stop the reactors from melting down that they resorted to using seawater to cool the reactors, “knowing that the use of seawater would ruin the system” and potentially contaminate the environment.⁶⁸ The tsunami had further damaged and obstructed roads, making outside access difficult for emergency cleanup and repair crews, prolonging the resulting damage.⁶⁹

Despite the best efforts of plant facility workers to cool the reactors, unit one lost its cooling status within hours.⁷⁰ The initial loss of cooling in unit one was followed by unit three, which lost its cooling status within thirty-six hours, and unit two, which lost cooling within seventy-one hours.⁷¹ The loss of cooling damaged the fuel in all three reactors.⁷² Damaged fuel within a nuclear reactor has the potential to release catastrophic amounts of radiation by triggering a meltdown.⁷³ At Fukushima, the damaged fuel caused the release of hydrogen gas, which then ignited and exploded, “impair[ing] the functionality of the equipment and the integrity of structures at the site,” further complicating already challenging recovery operations at the power plant.⁷⁴ This caused the reactors to suffer meltdowns, with subsequent explosions polluting the air

⁶² Burns, *supra* note 40, at 742.

⁶³ *Id.* at 744. The ultimate heat sink of a nuclear power plant is the source of the water that provides cooling for the reactors: the ocean, river, or lake that provides ultimate cooling. It is imperative that the ultimate heat sink remain stable in order for the reactors to avoid melting down. See Kari Lydersen, *Amid Climate Concerns, Nuclear Plants Feel the Heat of Warming Water*, ENERGY NEWS NETWORK (Sept. 9, 2016), <https://energynews.us/2016/09/09/midwest/nuclear-plants-feel-the-heat-of-warming-water/>.

⁶⁴ Matsui, *supra* note 25, at 175.

⁶⁵ *Id.*

⁶⁶ Matsui, *supra* note 25, at 175.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Burns, *supra* note 40, at 743; *Fukushima Daiichi Accident*, *supra* note 8.

⁷⁰ Burns, *supra* note 40, at 743.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *id.*

⁷⁴ *Id.*

and ocean around the power plant with massive doses of radioactive material.⁷⁵

In a last-ditch effort to cool the plant, Fukushima's operators flooded the damaged reactors with water, but this had the unfortunate side-effect of greatly contaminating the water with massive amounts of radiation.⁷⁶ In the aftermath of the catastrophe, this contaminated water did more than just leak into the ocean; it was intentionally dumped directly into it.⁷⁷

The Japanese government announced in mid-December 2011 that the three damaged reactors had entered a state of cold-shutdown.⁷⁸ This would ostensibly be a significant step in maintaining the long-term stability of the damaged reactors,⁷⁹ but in 2013 it was announced that a toxic mix of highly radioactive water being used to cool melted fuel at Fukushima continued to seep into the ocean at a rate of 300 tons per day.⁸⁰ In fact, it was further revealed in 2018 that TEPCO failed to adequately contain radiation leaking from the plant, contrary to what had previously been reported.⁸¹ Despite being responsible for cleaning and maintaining the damaged facility, TEPCO revealed that contaminated water around the plant's reactors has continued to seep into the ground, causing major difficulties in the decommissioning process.⁸² In February 2018, damaged fuel at Fukushima continued to leak radioactive particles into the environment, despite best efforts to contain and clean the area around the power plant.⁸³ TEPCO admitted that it could take until 2020 for the contamination issue to be resolved; however, in the meantime, exposure to the radiation leaking from the plant could kill a human in just one hour.⁸⁴

⁷⁵ Geoff Brumfiel, *Fukushima's Doses Tallied*, 485 NATURE 423, 423 (May 24, 2012).

⁷⁶ Ghorbi, *supra* note 13, at 475.

⁷⁷ *Id.*

⁷⁸ Burns, *supra* note 40, at 745.

⁷⁹ *Id.*

⁸⁰ Mari Saito & Antoni Slodkowski, *Japan Says Fukushima Leak Worse Than Thought, Government Joins Clean-Up*, REUTERS (Aug. 7, 2013, 10:16 PM),

<https://www.reuters.com/article/us-japan-fukushima-pm/japan-says-fukushima-leak-worse-than-thought-government-joins-clean-up-idUSBRE97601K20130808>; Justin McCurry, *Fukushima Radiation Levels 18 Times Higher Than Previously Thought*, THE GUARDIAN (Sept. 1, 2013 5:22 PM), <https://www.theguardian.com/environment/2013/sep/01/fukushima-radiation-levels-higher-japan>.

⁸¹ Jeff Farrell, *Fukushima Nuclear Disaster: Lethal Levels of Radiation Detected in Leak Seven Years After Plant Meltdown in Japan*, THE INDEPENDENT (Feb. 2, 2018, 3:16 PM), <https://www.independent.co.uk/news/world/asia/fukushima-nuclear-disaster-radiation-lethal-levels-leak-japan-tsunami-tokyo-electric-power-company-a8190981.html>.

⁸² *Id.*

⁸³ *See New Evidence of Nuclear Fuel Releases Found at Fukushima*, UNIV. OF MANCHESTER (Feb. 28, 2018), <https://www.manchester.ac.uk/discover/news/new-evidence-of-nuclear-fuel-releases-found-at-fukushima/>.

⁸⁴ Farrell, *supra* note 81.

C. Radiation and its Effects on Sea Life

Higher than normal levels of radioactive iodine-131, strontium-90, cesium-134, and cesium-137 were all measured in the ocean adjacent to Fukushima in the time following the catastrophe.⁸⁵ The highest concentrations of radiation were found close to the coast, mainly of iodine-131 and cesium-137.⁸⁶ The occurrence of cesium-137 is of greater concern because of its longer half-life.⁸⁷ A longer half-life means, for example, that “radioactive iodine decays naturally within weeks but [cesium] can stay in the environment for many years.”⁸⁸ The effects of this are severe, as exposure to radioactive cesium can result in an increased risk of cancer.⁸⁹ Cesium has no known taste or odor accompanying it, and can accumulate in humans from food contaminated with the element.⁹⁰

At least seventy-three species of sea creatures are known to have been affected by radiation as a result of the Fukushima disaster.⁹¹ Some of these species include flounder, cod, blue crab, squid, sea urchins, clams, mackerels, pollock, salmon, and sardines.⁹² Seafood affected by Fukushima has been sold in Japanese markets⁹³ and, in March 2018, began to be exported to markets abroad for the first time since the 2011 disaster.⁹⁴ One month after the disaster, a sand lance fish caught near Fukushima was found to have cesium isotope levels twenty-five times the legal consumption limit.⁹⁵ Other fishery products including “cherry salmon, rock fish, flounder, sea urchin, [and] seabass” were also found to be contaminated.⁹⁶

⁸⁵ Buck, *supra* note 17, at 2; *FAQs: Radiation from Fukushima*, WOODS HOLE OCEANOGRAPHIC INST. (June 6, 2019), <https://www.whoi.edu/press-room/news-tip/faqs-radiation-from-fukushima/>.

⁸⁶ Buck, *supra* note 17, at 2.

⁸⁷ *Id.*

⁸⁸ *Fukushima's Fish Industry Yet to Recover*, U.N. OFFICE FOR DISASTER RISK REDUCTION (Mar. 31, 2015), <https://www.unisdr.org/archive/43503>.

⁸⁹ *Id.*

⁹⁰ *Public Health Statement: Cesium*, DEP'T OF HEALTH AND HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY 2-3 (Apr. 2004), <https://www.atsdr.cdc.gov/ToxProfiles/tp157-c1-b.pdf>.

⁹¹ Hiroki Wakamatsu & Tsutomu Miyata, *Reputational Damage and the Fukushima Disaster: An Analysis of Seafood in Japan*, 83 *FISHERIES SCI.* 1049, 1050 (2017).

⁹² *Id.* For more information on the affected species, see *id.* Table 1.

⁹³ *Id.*

⁹⁴ *Fukushima Exports First Fish Consignment Since Nuclear Disaster*, EFE (Mar. 1, 2018), <https://www.efc.com/efe/english/world/fukushima-exports-first-fish-consignment-since-nuclear-disaster/50000262-3539377>.

⁹⁵ Gijs Berends and Megumi Kobayashi, *Food after Fukushima - Japan's Regulatory Response to the Radioactive Contamination of Its Food Chain*, 67 *FOOD & DRUG L.J.* 51, 52 (2012). The Fisheries Agency of Japan is the body responsible for monitoring levels of radiation in seafood. See *The Solution of Stop the Contaminated Water and The Safety of Fishery Products at TEPCO's Fukushima Daiichi Nuclear Power Station*, FISHERIES AGENCY OF JAPAN (Sept. 2018), <https://web.archive.org/web/20181114211604/http://www.jfa.maff.go.jp/pdf/181102English.pdf>.

⁹⁶ Berends, *supra* note 95, at 51.

In trying to scrub and contain the radiation from the environment, one problem is that the very sands of the beaches around Fukushima and the brackish waters inland from the ocean are hindering clean-up efforts.⁹⁷ Radioactive cesium contains properties which make it stick to grains of sand like glue, which makes clean-up difficult.⁹⁸ The high levels of radioactive cesium-137 released in 2011 were transported along the coast by ocean currents and, in the weeks after the disaster, the waves and tides brought the cesium in these highly contaminated waters onshore, where the cesium “stuck” to the surfaces of sand grains.⁹⁹ The cesium-enriched sands on the beaches and the brackish mixture of fresh water and salt water underneath the beaches act together as a mechanism constantly transporting cesium back out to sea.¹⁰⁰

As cesium contaminates the water surrounding Fukushima and spills into the greater Pacific Ocean off the coast of Japan, the radioactive cesium in marine fish can become concentrated 5 to 100 times the concentration of radioactive cesium in seawater.¹⁰¹

As radiation makes its way into the bodies of various species of sea life, it has cascading effects up through the food chain.¹⁰² This bioaccumulation is how a relatively minor bit of radiation in the bottom of the food chain can make its way up through the food chain, from smaller fish to larger species like tuna and other species that humans eat and, eventually, settling into the human microbiome.¹⁰³

In the Pacific Ocean, plankton, a class of waterborne microorganisms that includes both plants and animals,¹⁰⁴ have been detected containing high levels of radioactive cesium originating from Fukushima.¹⁰⁵ If plankton are contaminated with cesium, then this presents a very large problem, as they are eaten by all manner of sea creatures up the food chain.¹⁰⁶ Dangerous levels of both cesium and strontium have been found in species of fish at varying levels of the food chain off the coast near

⁹⁷ Lonny Lippsett, *Radioactivity Under the Beach? Pollution from Fukushima Disaster Found in Unexpected Spot*, 53 OCEANUS 8 (2017).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Questions and Answers about Fishery products (Monitoring for radioactive materials)*, Fisheries Agency of Japan,

https://web.archive.org/web/20181114212645/http://www.jfa.maff.go.jp/e/q_a/index.html.

¹⁰² See Elizabeth Grossman, *Radioactivity in the Ocean: Diluted, But Far from Harmless*, YALE ENVIRONMENT 360 (Apr. 7, 2011),

https://e360.yale.edu/features/radioactivity_in_the_ocean_diluted_but_far_from_harmless.

¹⁰³ *Id.*

¹⁰⁴ *Plankton*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, <https://www.whoi.edu/science/B/people/kamaral/plankton.html>.

¹⁰⁵ *Researchers Find High Cesium in Some Pacific Plankton*, JAPAN TIMES (May 22, 2013), <https://www.japantimes.co.jp/news/2013/05/22/national/researchers-find-high-cesium-in-some-pacific-plankton/#.XEUUjy2ZPOS>.

¹⁰⁶ *Id.*; *Plankton*, *supra* note 104.

Fukushima.¹⁰⁷ With regards to strontium, it has been found to have substantially impacted smaller, bony fish, like sardines, due to its bone-seeking properties.¹⁰⁸ Since strontium's chemical makeup resembles calcium, it assimilates in bones and teeth, where it causes radiation injury by damaging bone marrow, impairing the process of forming new blood cells, and possibly inducing cancer.¹⁰⁹ This presents a significant danger to humans, as these small, bony fish are often consumed whole: bones and all.¹¹⁰ Further, when these fish are consumed by other, larger fish, radioactive materials cascade up the food chain, eventually ending up on the dinner plate of an American.

D. Japanese Regulations and Reaction

The Japanese government had regulations in place in case of disaster.¹¹¹ Unfortunately, the scope of these regulations was not wide enough to be an effective and preventative tool for stopping all contaminated seafood from entering the market, as fish with high levels of radioactive iodine were not covered by the provisional values.¹¹² In response to the Fukushima disaster, the Japanese government imposed new regulations regarding radioactivity, but some radioactive products had already slipped into the market via the unregulated stream of commerce.¹¹³ Since April 2012, the Japanese government lowered the allowable standard limit of radioactive cesium in fishery products from 500 becquerels per kilogram (or "bq/kg," a becquerel being the standard unit of radioactivity) to 100 bq/kg.¹¹⁴ Further restrictions were added, and restrictions on fish were imposed so that "when the fishes [sic] concerned can no longer be captured in the restricted zones due to the migration of fishes [sic] from the restricted zones to the outside or the end of the fishery seasons, the restrictions of distribution can be cancelled, based on inspection results obtained before the next fishery season."¹¹⁵ When a sand lance, a sea fish, was found contaminated near Fukushima one month after the disaster, the Japanese government blocked distribution from the entirety of Fukushima prefecture.¹¹⁶ Similarly, when a cherry salmon, a river fish, was found contaminated in the Fukushima prefecture, the government further imposed

¹⁰⁷ See Claire Wright, *Blueprint for Survival: A New Paradigm for International Environmental Emergencies*, 29 FORDHAM ENVTL. L. REV. 221, 232 (2017); Ken Buesseler, *FAQs: Radiation from Fukushima*, WOODS HOLE OCEANOGRAPHIC INST. (Mar. 11, 2011), <http://www.whoi.edu/page.do?pid=127297> (last updated Mar. 2016).

¹⁰⁸ Buesseler, *supra* note 107.

¹⁰⁹ *Id.*; *Strontium*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/strontium>.

¹¹⁰ Buesseler, *supra* note 107.

¹¹¹ Berends, *supra* note 95, at 55.

¹¹² *Id.* at 56.

¹¹³ *Id.* at 59.

¹¹⁴ *Questions and Answers about Fishery Products*, *supra* note 101.

¹¹⁵ Berends, *supra* note 95, at 63.

¹¹⁶ *Id.* at 61.

restrictions on lakes and river systems in Fukushima prefecture.¹¹⁷ This is significant as it demonstrates that the spread of radiation from Fukushima is not contained to one area or region, and, just as it spreads throughout the rivers and waterways of the Japanese archipelago, so too does it spread across the ocean.¹¹⁸

The Japanese government has tried to compel consumers to be more confident in the safety of Japanese fisheries,¹¹⁹ but, in 2012, elevated levels of radiation were still present in fish caught off the coast near Fukushima.¹²⁰ In January 2013, a fish was caught that contained 2,500 times the legal amount of radiation.¹²¹ Also in 2013, radiation levels at Fukushima were found to be eighteen times higher than had been previously reported.¹²²

Between the disaster in 2011 and March 2018, fish caught off the coast near Fukushima were not exported.¹²³ Exporting seafood is an important part of Japan's overall economy, accounting for \$14 billion annually, or 20 percent of the agricultural industry, at the time of the Fukushima disaster.¹²⁴ However, the confidence of Japanese seafood stock holders was shaken by this disaster.¹²⁵ In the aftermath, Japan was estimated to have sustained \$11 billion in damages to its fisheries sector.¹²⁶ It stands to reason that the Japanese would be eager to get the fishery sector of their economy running normally again as soon as possible.¹²⁷

The Japanese government and the Fukushima Prefectural Fisheries regulatory body has, as of September 2018, allowed for certain species of marine fish to be caught and inspected for human consumption.¹²⁸ The fish, once caught, are inspected on the ship immediately by the fishermen.¹²⁹

¹¹⁷ *Id.*

¹¹⁸ Indeed, in 2014 and 2015, radiation from Fukushima was found in seawater collected off the coasts of Canada and California. See Wright, *supra* note 107, at 233.

¹¹⁹ Cf. Youkyung Lee & Mari Yamaguchi, *South Korea to Fight WTO Ruling on Fukushima Seafood Ban*, SEATTLE TIMES (Feb. 23, 2018, 12:46 AM), <https://www.seattletimes.com/business/south-korea-to-fight-wto-ruling-on-fukushima-seafood-ban/> (describing how multiple countries in East Asia and around the world have enacted flat bans on products from Fukushima and efforts the Japanese government has undertaken to use the WTO to compel South Korea to overturn its ban on products from Fukushima).

¹²⁰ Jim Haw, *Challenges Facing Japan's Marine Fisheries*, SCI. AM. (June 26, 2013), <https://blogs.scientificamerican.com/expeditions/challenges-facing-japans-marine-fisheries/>.

¹²¹ *Id.*

¹²² McCurry, *supra* note 80.

¹²³ See *Fukushima Exports First Fish Consignment Since Nuclear Disaster*, *supra* note 94.

¹²⁴ RENEE JOHNSON, CONG. RESEARCH SERV., R41766, JAPAN'S 2011 EARTHQUAKE AND TSUNAMI: FOOD AND AGRICULTURE IMPLICATIONS 1 (May 18, 2011).

¹²⁵ See *id.* at 3.

¹²⁶ *Id.*

¹²⁷ See *id.*

¹²⁸ *The Solution of Stop the Contaminated Water and The Safety of Fishery Products at TEPCO's Fukushima Daiichi Nuclear Power Station*, *supra* note 95.

¹²⁹ *Id.*

Afterwards, they are sent to a middle-man processor, where they are inspected again, this time more closely, for radioactive contamination.¹³⁰ If they pass these double-inspections, they are then ready for the commercial distributor and sale to the consumer.¹³¹ However, sometimes the fish skip the second stage of inspection, are sold directly to the distributor, and then to the consumer.¹³² Herein lies a problem, especially as more and more potentially contaminated fish are prepared for export. This porous inspection system allows for a fish laced with a radioactive isotope of cesium, strontium, or iodine to swim its way up the food chain and end up on a plate in an American restaurant.

E. American Regulations and Reaction

U.S. food imports are regulated by the FDA, which monitors the safety of most types of food imports, including seafood.¹³³ The FDA uses a variety of interconnected regulations in order to monitor for and screen out contaminated products, such as seafood.¹³⁴ One tool the FDA uses in these regulatory schemes is import alerts.¹³⁵ Import alerts are guidelines used to inform both FDA field staff and the public that the agency may, without a physical examination, detain products that appear to be in violation of FDA laws and regulations.¹³⁶ "These violations could be related to the product, manufacturer, shipper, and/or other information."¹³⁷ Before importing products into the United States, the onus is on importers to know if their products are subject to detention without physical examination.¹³⁸ The purpose of import alerts is multi-faced, as they are used to: ensure potentially violative products are not distributed in the United States; free-up agency resources to examine other, more pertinent imports; provide a uniform guideline across the country; and ensure that the importer maintains compliance with FDA laws and regulations for products being imported into the United States.¹³⁹ In the wake of the Fukushima disaster, the FDA implemented regulatory schemes, including an import alert, which

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *Imported Seafood Safety Program*, FDA,

<https://www.fda.gov/Food/GuidanceRegulation/ImportsExports/Importing/ucm248706.htm> (last visited Apr. 27, 2020).

¹³⁴ See *id.*

¹³⁵ *Id.*; *Import Alerts*, FDA,

<https://www.fda.gov/ForIndustry/ImportProgram/ActionsEnforcement/ImportAlerts/default.htm>.

¹³⁶ *Import Alerts*, *supra* note 135.

¹³⁷ *Id.*

¹³⁸ *Import Alerts*, *supra* note 135.

¹³⁹ *Id.*

sought to prevent Americans from consuming potentially contaminated products sourced from Japan.¹⁴⁰

FDA Import Alert #99-33 is one such living guideline, ever evolving since the 2011 disaster.¹⁴¹ Import Alert #99-33 provides “guidance” to FDA field personnel to detain, without examination, a comprehensive list of products from Japan due to radioactive iodine particles.¹⁴² Import Alert #99-33 contains all manner of seafood products, as well as produce and meat products, and it specifically states that its reason for promulgation was the 2011 Fukushima disaster.¹⁴³ However, Import Alert #99-33 is not binding according to its language.¹⁴⁴ Rather, it is described as a guideline for FDA field personnel to detain, without examination, anything contained within the alert.¹⁴⁵ The nonbinding language of Import Alert #99-33, combined with its substantive language, may present a problem in the future.¹⁴⁶ Import Alert #99-33 has not, to date, been published in the Federal Register and, as will be discussed below, this poses a problem as it may violate notice-and-comment requirements.¹⁴⁷

The FDA heavily regulates additives and, as part of its duties, monitors what can and cannot be added to food sold in the United States. The Federal Food, Drug, and Cosmetic Act (“FDCA”) establishes the legal framework within which the FDA operates and regulates food standards and food additives.¹⁴⁸ The FDCA also gives the FDA broad authority in matters involving adulterated products which can harm health of the public.¹⁴⁹ For instance, the Food Additives Amendment states that a food is adulterated (and thus cannot be marketed legally) if it has been intentionally irradiated, unless that irradiation is carried out in conformity with a regulation prescribing safe conditions of use.¹⁵⁰ It is of note that, according to the

¹⁴⁰ See *FDA Import Alert #99-33*, FDA (Jan. 30, 2020), https://www.accessdata.fda.gov/cms_ia/importalert_621.html (last visited Apr. 27, 2020).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Cf. Bente v. Kessler*, 799 F. Supp. 281, 288-89 (E.D.N.Y. 1992); *Bellarno Int'l Ltd. v. Food & Drug Admin.*, 678 F. Supp. 410, 414-15 (E.D.N.Y. 1988).

¹⁴⁷ *Cf. Bente v. Kessler*, 799 F. Supp. at 288-89; *Bellarno Int'l Ltd* 678 F. Supp. at 414-15; *Notice-and-Comment Rulemaking*, CTR. FOR EFFECTIVE GOV'T, <https://www.foreffectivegov.org/node/2578>.

¹⁴⁸ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (2018); 21 U.S.C. §§ 341-348 (2018).

¹⁴⁹ *United States v. Blue Ribbon Smoked Fish, Inc.*, 56 F. App'x 542, 543 (2d Cir. 2003).

¹⁵⁰ See 21 U.S.C. § 321 (2018); 21 U.S.C. § 341 *et seq.* (2018); *see also* 21 U.S.C. §§ 331-333 (2018). Governmental regulation of irradiated food varies from country to country. This author notes that Japan has more stringent radiation standards for foodstuffs than both the U.S. and Europe. See *Tokyo Food Safety Information Center*, TOKYO METRO. GOV'T, BUREAU OF SOCIAL WELFARE & PUB. HEALTH, <https://www.fukushihoken.metro.tokyo.lg.jp/shokuhin/eng/faq/category01/17.html> (last visited

language of the amendment, only intentionally irradiated products not in compliance with regulations are to be deemed adulterated.¹⁵¹ Products that may have been unintentionally irradiated are not deemed adulterated.¹⁵² The FDA does not define the form of energy or the process of irradiation as an additive, instead focusing on the equipment used to irradiate the food.¹⁵³ The equipment used is itself what may affect the characteristics of the food, according to the FDA, with the definition of radiation as an additive in food focusing on the particular method of irradiating the food.¹⁵⁴ This is problematic, as potential, unintentional radiation that can bioaccumulate in humans is not labeled as an additive and, thus, may not be regulated as stringently as it could be.

It is important that any future regulatory schemes also be able to evolve, like Import Alert #99-33, as radiation in the ocean can traverse vast distances both on the currents of the ocean as well as through the movement of sea life it contaminates via bioaccumulation.¹⁵⁵ As stated above, in 2014 and 2015, radiation from Fukushima was found in seawater collected off the coasts of Canada and California.¹⁵⁶ Every single bluefin tuna tested off the California coast was found to contain trace radiation from Fukushima.¹⁵⁷ Further, while this article does not address the effects of Fukushima's radiation on all aspects of American life, it does acknowledge that there are many.¹⁵⁸

Eating a piece of tuna contaminated with cesium-137 would not make someone drop dead at the sushi bar, but it would build up in their body. The internal contamination level of a carcinogenic radioactive substance takes at least 110 days for half of it to clear out of the body.¹⁵⁹

Apr. 27,2020). "Most countries approve food irradiation on a case-by-case basis." *See Overview of Irradiation of Food and Packaging*, FDA, <https://www.fda.gov/food/ingredientspackaginglabeling/irradiatedfoodpackaging/ucm081050.htm>.

¹⁵¹ 21 U.S.C. § 342 (2018).

¹⁵² *See id.*

¹⁵³ *Food Additive Status List*, FDA, <https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAdditivesIngredients/ucm091048.htm#ftnR>.

¹⁵⁴ *Id.*

¹⁵⁵ *See Grossman, supra* note 102.

¹⁵⁶ Wright, *supra* note 107, at 233.

¹⁵⁷ *Id.* at 233.

¹⁵⁸ *See, e.g.,* Jessica Campisi & Saeed Ahmed, *There May Be Traces of Radioactive Particles from Fukushima in Your California Red Wine*, CNN (July 26, 2018, 11:48 AM), <https://www.cnn.com/2018/07/23/health/california-wine-radioactive-fukushima-trnd/index.html> (describing how bottles of California wine produced after the 2011 Fukushima disaster contain much higher levels of radioactive cesium than experts believed they would when tested); Julian Ryall, *Japanese Dealers Selling 'Radioactive Cars'*, THE TELEGRAPH (Oct. 26, 2011), <https://www.telegraph.co.uk/news/worldnews/asia/japan/8849664/Japanese-dealers-selling-radioactive-cars.html> (describing how unwitting consumers purchased cars originating in Fukushima province that later on turned out to be contaminated with radiation).

¹⁵⁹ *Sorry Charlie, There's Cesium-137 In Your Tuna*, THE FUKUSHIMA PROJECT (May 29, 2012), <http://www.fukuleaks.org/web/?p=6171>.

This sort of internal contamination is “worse than external contamination,” and, if a consumer is continually eating contaminated food from one or many sources, it could quickly add up and become a life-threatening problem, especially in the very young or very old.¹⁶⁰ Although experts state that “these traces are too small to endanger human health,”¹⁶¹ the problem remains that, just as in sea life, trace radiation can build in humans over time, with radioactive iodine accumulating in, for example, the thyroid.¹⁶² In Japan, there have been hundreds of cases where relatively young and healthy people have developed thyroid cancer as a result of the Fukushima disaster.¹⁶³ There is even evidence of those most vulnerable to radiation being affected. Data gathered by a French NGO, the Association for the Control of Radioactivity in the West (“ACRO”), found significant increases over time in the amount of radioactive cesium in the urine of young Japanese children.¹⁶⁴ These children were located not only in Fukushima prefecture, but in other areas around the country as well.¹⁶⁵ It is believed that elevated levels of cesium could be attributed to diet, and, when people become more selective in their food choices, their internal contamination levels decrease.¹⁶⁶ There is a justified cause for alarm, however preventable, that American consumers could find themselves confronted with elevated levels of cesium or other radioactive elements from seafood contaminated by the Fukushima disaster in their own bodies, despite the flimsy protections put in place by the FDA.

The FDA has a host of regulatory schemes to complement Import Alert #99-33.¹⁶⁷ To import seafood into the United States, the FDA requires compliance with its Hazard Analysis and Critical Control Points (“HACCP”) regulations, which entails the analysis and control of biological, chemical, and physical hazards.¹⁶⁸ The HACCP regulations require seafood processors to identify safety hazards that are reasonably

¹⁶⁰ *Id.*

¹⁶¹ Wright, *supra* note 107, at 233.

¹⁶² See *FDA Import Alert #99-33*, *supra* note 140; *Fish Sampling Shows Widespread Problems from Nuclear Disaster*, THE FUKUSHIMA PROJECT (Oct. 26, 2012), <http://www.fukuleaks.org/web/?p=8070>.

¹⁶³ See *Japanese Woman Breaks Silence on Fukushima-Related Cancer*, CBS NEWS (June 7, 2016, 5:46 AM), <https://www.cbsnews.com/news/japan-fukushima-thyroid-cancer-patient-is-first-to-speak-out/>.

¹⁶⁴ See *Fish Sampling Shows Widespread Problems from Nuclear Disaster*, *supra* note 162; *Results of ACRO's Monitoring in Japan*, ASS'N POUR LE CONTRÔLE DE LA RADIO-ACTIVITÉ DANS L'OUEST, https://www.acro.eu.org/Archives/OCJ_en.html (last updated Mar. 6, 2013).

¹⁶⁵ *Results of ACRO's Monitoring in Japan*, *supra* note 164.

¹⁶⁶ See *Fish Sampling Shows Widespread Problems from Nuclear Disaster*, *supra* note 162.

¹⁶⁷ See *Imported Seafood Safety Program*, *supra* note 133; *FDA Response to the Fukushima Dai-Ichi Nuclear Power Facility Incident*, FDA, <https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm247403.htm#food> (last visited Apr. 27, 2020).

¹⁶⁸ See *Imported Seafood Safety Program*, *supra* note 133; *Seafood HACCP*, FDA, <https://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006764.htm>.

likely to occur in food production and to develop plans for the control of those hazards, and, in this way, it serves as a guidance to the FDA's Fish and Fishery Products regulation.¹⁶⁹ The FDA's Fish and Fishery Products regulation also applies to seafood importers and requires importers of certain seafood products to comply with requirements designed to help ensure that imported products are processed in accordance with the seafood HACCP regulation.¹⁷⁰

However, the FDA also has some rules that are outdated or ineffectual when it comes to proactive protections against radiation. Import alerts, such as Import Alert #99-33, are one such example. Import alerts have easily been adjudicated as unlawful, as this article shall discuss in detail.¹⁷¹ Chapter 19 of the seafood HACCP regulation deals with prohibited food and color additives, specifying a variety of additives that are prohibited in the processing of seafood while conspicuously leaving absent irradiation.¹⁷² However, monitoring for prohibited additives is usually done merely via visual examination.¹⁷³ The onus is on seafood processors to conduct such examinations. Domestic seafood processors are "required to establish and implement HACCP plans pursuant to 21 C.F.R. § 123.6(b)."¹⁷⁴ Importers of fish or fishery products must verify that their products are not adulterated, and that their products comply with HACCP regulations.¹⁷⁵

If the FDA detects that a potentially carcinogenic material has been used as a food additive, then it can decisively ban it from use, even if the FDA has previously stated that those additives are not cancer causing.¹⁷⁶ In October 2018, the FDA amended food additive regulations and banned the use of six different synthetic flavoring substances, despite the FDA's own scientific analysis and determinations that those substances did not pose a risk to public health under the conditions of their intended use.¹⁷⁷ These additives were banned because petitioners provided data to the FDA that these additives induced cancer in laboratory animals.¹⁷⁸ As a result, the

¹⁶⁹ 21 C.F.R. §§ 123, 1240 (2018); *Seafood HACCP*, *supra* note 168.

¹⁷⁰ *See* 21 C.F.R. §§ 123.12, 1240 (2018).

¹⁷¹ *See Benteen*, 799 F. Supp. at 288; *Bellarno Int'l Ltd.*, 678 F. Supp. at 411.

¹⁷² *See Undeclared Major Food Allergens and Certain Food Intolerance Causing Substances and Prohibited Food and Color Additives*, FDA (Apr. 2011), <https://www.fda.gov/downloads/Food/GuidanceRegulation/UCM252439.pdf>.

¹⁷³ *See id.* at 15.

¹⁷⁴ *United States v. Blue Ribbon Smoked Fish, Inc.*, 179 F. Supp. 2d 30, 34 (E.D.N.Y. 2001), *aff'd*, 56 F. App'x 542 (2d Cir. 2003); *see also* 21 C.F.R. § 123.6(b) (2018).

¹⁷⁵ 21 C.F.R. § 123.12 (2018).

¹⁷⁶ 21 U.S.C. § 348(c)(3)(A) (2018).

¹⁷⁷ *See Food Additive Regulations; Synthetic Flavoring Agents and Adjuvants*, 83 Fed. Reg. 50490 (Oct. 9, 2018) (to be codified at 21 C.F.R. §§ 172, 177).

¹⁷⁸ *Id.*

FDA could not, as a matter of law, maintain the listing of these substances in food additive regulations.¹⁷⁹

III. CASE AND PROBLEM ANALYSIS

A. *Bellarno and Benten*

While the FDA has a network of regulatory schemes in place, ostensibly to stop radioactive contaminated seafood from reaching American dinner plates, these regulations have been shown in the past to be easily challenged. In *Bellarno Int'l Ltd. v. Food & Drug Admin.* (“*Bellarno*”), a corporation had its goods detained at import by the FDA pursuant to an import alert.¹⁸⁰ The alert stated that the FDA could automatically detain all imports of a certain class of pharmaceuticals.¹⁸¹ The import alert was issued one year before the date of import, and the government had not followed notice-and-comment procedures.¹⁸²

In appealing the detention of its imports, the plaintiff corporation argued that the automatic detention and imposition of certain requirements to have goods returned exceeded the statutory authority of the FDA, and, further, that the detention was arbitrary and capricious.¹⁸³ The FDA argued that it was not required to conduct notice-and-comment procedures for detention because the import alert in question was an “interpretive rule” or a “general statement of policy.”¹⁸⁴ Normally, agency rules are required to be issued only after notice-and-comment procedures are completed, but “an exception to the procedures is provided when an agency is adopting merely an ‘interpretive rule’ or a ‘general statement of policy.’”¹⁸⁵ The decision in *Bellarno* hinged on whether the import alert in question was unlawful as a “legislative rule” or was permitted as either an “interpretive rule” or a “general statement of policy.”¹⁸⁶

The court in *Bellarno* laid out four general factors to distinguish between these rules: “the binding effect of the pronouncement; the degree of discretion accorded the agency in applying the pronouncement; deference to the agency’s characterization, and the language of the pronouncement itself.”¹⁸⁷ Although the language of the import alert in *Bellarno* suggested that it was not binding, the FDA essentially had “*carte blanche*” to detain these pharmaceuticals, rendering the first factor against the FDA.¹⁸⁸ The

¹⁷⁹ *Id.*

¹⁸⁰ *Bellarno Int'l Ltd.*, 678 F. Supp. at 411.

¹⁸¹ *Bellarno Int'l Ltd.*, 678 F. Supp. at 411.

¹⁸² *Id.* at 416.

¹⁸³ *Id.* at 411-12.

¹⁸⁴ *Id.* at 412.

¹⁸⁵ *Id.*; see also 5 U.S.C. § 553(b)(3)(A) (2018).

¹⁸⁶ *Bellarno Int'l Ltd.*, 678 F. Supp. at 412.

¹⁸⁷ *Id.* at 413.

¹⁸⁸ *Id.* at 413-14.

FDA also argued that the import alert was merely “a statement directed primarily to agency staff advising them how to conduct an agency discretionary function.”¹⁸⁹ However, the court found that other language in the import alert suggested that the FDA sought to create “a substantive rule of general applicability,” impacting a wide class of pharmaceuticals, “rather than a discretionary statement of general policy.”¹⁹⁰ Finally, the court in *Bellarno* stated that, although the import alert was entitled “guidance” by the FDA, this “[did] not mitigate the tone of the language” that followed.¹⁹¹ As a result, the court held the import alert was unlawful and that, rather than a statement of policy or interpretive rule, the import alert was meant as a binding legislative rule.¹⁹²

Four years after *Bellarno*, the court in *Benten v. Kessler* (“*Benten*”), handed down a similar ruling on “substantive regulations” and their need to follow notice-and-comment procedures.¹⁹³ *Benten* was, as the court described, “a lawsuit waiting to happen,” due to “political and bureaucratic timidity mixed with well-intentioned blundering.”¹⁹⁴ In *Benten*, as in *Bellarno*, the FDA detained a pharmaceutical under the authority of an import alert it had issued without following notice-and-comment procedures.¹⁹⁵ The plaintiff argued that the pharmaceutical had been illegally banned.¹⁹⁶ The import alert in *Benten* stated that the drug was to be subject to “automatic detention” and that agents should “automatically detain all shipments of [the class of drug],” for reasons of public safety.¹⁹⁷ The *Benten* court cited *Bellarno* and noted that the language of the import alert at issue was similar in its “automatic detention” language, while different with its lack of even “guidance” language to mitigate its substantive effects.¹⁹⁸ The court in *Benten* held that the import alert was unlawful, as the language was clearly that of a substantive rule, and, as a substantive rule, it was required to follow notice-and-comment procedures.¹⁹⁹ Further, even if the import alert in *Benten* was not a substantive rule, notice-and-comment procedures would have been required.²⁰⁰ Under the agency's own rules in effect on the date the alert was promulgated, notice-and-comment procedures were required even if the

¹⁸⁹ *Bellarno Int'l Ltd.*, 678 F. Supp. at 414 (internal quotations omitted).

¹⁹⁰ *Id.* at 415.

¹⁹¹ *Id.*.

¹⁹² *Id.* at 416.

¹⁹³ *Benten*, 799 F. Supp. at 288.

¹⁹⁴ *Id.* at 282.

¹⁹⁵ *Id.* at 284.

¹⁹⁶ *Id.* at 283-85.

¹⁹⁷ *Id.* at 286.

¹⁹⁸ *Id.* at 288-89.

¹⁹⁹ *Benten*, 799 F. Supp. at 289-91.

²⁰⁰ *Id.* at 289-90.

alerts were interpretive rules or agency practices, and an agency is bound to follow procedures required by its own regulations.²⁰¹

B. *Blue Ribbon Smoked Fish and N.Y. Fish*

Despite the holdings in *Bellarno* and *Benten*, courts are still willing to give the FDA broad powers in imposing sanctions on producers who commit statutory violations. In *United States v. Blue Ribbon Smoked Fish, Inc.* (“*Blue Ribbon Smoked Fish*”), the Second Circuit held that the FDA may choose to set a zero-tolerance policy for potentially hazardous substances in foods.²⁰² In the preceding District Court opinion, it was stated that because of the health risk to the young and elderly, a zero-tolerance policy was necessary to enjoin the risk to public health.²⁰³ The Second Circuit then found that enjoining the New York manufacturer from producing adulterated products was also within the scope of the FDA, but the FDA could not employ language so broad as to stop the manufacturer from producing seafood at facilities which had not been proven to be adulterating products.²⁰⁴

In *United States v. N.Y. Fish* (“*N.Y. Fish*”), just as in *Blue Ribbon Smoked Fish*, the FDA had found a seafood production company to be in violation of the FDCA and attacked it on the grounds of produced adulterated seafood products.²⁰⁵ Again, similarly to *Blue Ribbon Smoked Fish*, the facility and its finished products were found to contain amounts of an adulterous substance.²⁰⁶ The court in *N.Y. Fish* held that the government must prove there is a “reasonable likelihood that [the] defendants will violate the FDCA in the future unless enjoined.”²⁰⁷ This reasonable likelihood of continued violations could be “some cognizable danger of recurrent violation, [but] something more than the mere possibility that serves to keep the case alive.”²⁰⁸ Thus, the FDA has rather broad powers to determine whether or not a future violation may occur. As in *Blue Ribbon Smoked Fish*, the court in *N.Y. Fish* held that the defendant’s seafood products had become adulterated when they were contaminated to such a degree that they became injurious to the public’s health.²⁰⁹ In such a situation, the FDA has “broad authority in manners involving adulterated products which can damage the health of the public.”²¹⁰ This authority

²⁰¹ *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 694-95 (1974)).

²⁰² *Blue Ribbon Smoked Fish, Inc.*, 56 F. App’x at 544 (citing *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986)).

²⁰³ *Blue Ribbon Smoked Fish, Inc.*, 179 F. Supp. 2d at 37.

²⁰⁴ *Blue Ribbon Smoked Fish, Inc.*, 56 F. App’x at 543-544.

²⁰⁵ *United States v. N.Y. Fish, Inc.*, 10 F. Supp. 3d 355, 359 (E.D.N.Y. 2014).

²⁰⁶ *N.Y. Fish Inc.*, 10 F. Supp. 3d at 361-69.

²⁰⁷ *Id.* at 374.

²⁰⁸ *Id.* at 370 (internal quotations omitted) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

²⁰⁹ *Id.* at 371; see also 21 U.S.C. § 342(a)(4) (2018).

²¹⁰ *N.Y. Fish, Inc.*, 10 F. Supp. 3d at 379 (internal citations omitted).

extends as far as potentially shutting down the business entirely via an injunction.²¹¹

IV. SOLUTION ANALYSIS

A. *Banning of High Seas Fishing*

One solution that would be effective, but perhaps a bridge too far, would be to wholly ban high seas fishing. At least two environmental experts have suggested that this would be the best solution to the problems currently facing the world's ocean populations.²¹² While an interesting solution, it is one that is outside the scope of this article. While it would serve the purposes of keeping potentially irradiated fish off of American dinner plates, no current United States regulatory body would be prepared to wholesale ban high seas fishing, despite experts' argument that it would not collapse the fishing market.²¹³ Rather, experts argue that a temporary high seas fishing ban would allow struggling fishing populations to recover and, over a period of a few generations, become sustainable.²¹⁴ For purposes of this article, such a ban would also allow for sea life in the Pacific Ocean off of Fukushima to "self-regulate," and over time, allow for radioactive materials such as cesium to decay to even lower levels. However, as discussed above, such a solution is too broad for purposes of stopping potentially contaminated fish imports from reaching American consumers.

B. *Adulteration and Irradiation*

If food is intentionally irradiated, then it is considered adulterated and subject to being taken off the market.²¹⁵ However, unintentional irradiation is not considered an adulteration of food.²¹⁶ This article proposes one solution, which is to have the FDA include language that unintentional irradiation of seafood is also considered an adulteration. As discussed above, in the cases of *Blue Ribbon Smoked Fish* and *N.Y. Fish*, the FDA has broad authority in determining what is and is not adulterated. It would be simple to modify the language of what is included as adulterated under 21 U.S.C. § 342. Simply excising the word "intentionally" from "if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption..."²¹⁷ would provide the FDA with extremely broad authority to

²¹¹ See *id.* at 380.

²¹² See Crow White & Christopher Costello, *Close the High Seas to Fishing?* PLOS BIOLOGY 12(3) (Mar. 25 2014), available at <https://doi.org/10.1371/journal.pbio.1001826>.

²¹³ See White, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ 21 U.S.C. §§ 331-333, 342(a)(1) (2018).

²¹⁶ See 21 U.S.C. § 342(a)(1) (2018).

²¹⁷ *Id.*

enjoin fish importers who are importing fish, which should otherwise not be sold for human consumption. This would incentivize Japanese fishermen off the Fukushima coast to not catch high-risk species of fish, such as sardines, or fish higher in the food chain which feed on those high-risk fish. By allowing these fish to roam free in the ocean, the radioactive contaminants in them will, over time, decay and be flushed out.

Such a proposition could be easily undertaken, but there would be some concerns as there are low levels of trace radiation present in almost all fish. The seafood market would likely react harshly to the idea that the FDA could deem their products adulterated if they had any amount of unintentional radiation. If a product is determined to be adulterated, then the FDA has broad authority in matters involving adulterated products which can damage the health of the public. However, this is where the role of the courts could step in and narrow such broad authority, as they did in *Blue Ribbon Smoked Fish*. Further, any questions of jurisdiction would be settled immediately, as the language of the FDCA allows the government to enjoin any producers engaged in interstate commerce. As the fish in question would be coming from Japanese territorial waters, the FDA would be allowed to maintain authority over the importers in this newly worded regulation.²¹⁸

C. Radiation and Additives

While the FDA does not currently consider unintentional radiation to be a food additive,²¹⁹ another solution is for the FDA to deem cancer causing unintentional radiation a food additive. Radioactive particles are themselves “added” to the flesh of the fish and cannot be separated from it. As the fish swims up the food chain, so to speak, these problems become compounded, eventually ending up in the thyroid of an unwitting consumer. However, it is unlikely that the FDA would reclassify unintentional irradiation as a food additive. Considering radioactivity an additive may anger (currently legal) additive producers, for they would not wish to be lumped in with something perceived so deadly as radiation. Additionally, the FDA would likely prefer to have irradiated fish fall under the category of adulterated food, as this could potentially take the products out of the stream of commerce altogether.

D. It is Unwise to Rely on Import Alerts

Therefore, since the other “solutions” are impractical, it is apparent that the solution would have to come in the form of modifying the current practice of FDA import alerts. It is not currently a viable solution to rely on

²¹⁸ See 21 U.S.C. § 321(b) (2018); see also *Blue Ribbon Smoked Fish, Inc.*, 179 F. Supp. 2d at 42.

²¹⁹ See 21 U.S.C. § 342 (2018).

import alerts as a safeguard from potentially dangerous products. As was shown in *Bellarno* and *Benten*, import alerts that do not follow notice-and-comment procedures (like Import Alert #99-33) have been known to be easily challenged, due to the nature and language of the alerts. Import Alert #99-33 is extremely similar in its language and effect to the import alerts that were held to be unlawful in *Bellarno* and *Benten*.²²⁰ Import Alert #99-33 has not yet been challenged in court, most likely because Japan has not yet started to export seafood from Fukushima to the United States. But, as the court stated in *Benten*, there is a “lawsuit waiting to happen.”²²¹ As soon as the first imported shipment of fish from Fukushima is automatically detained pursuant to Import Alert #99-33, an angry plaintiff would have a field day in court, and Import Alert #99-33 would likely be overturned as unlawful due to its substantive effects and failure to follow proper notice-and-comment procedures. If the import alert is overturned, the proverbial flood gates would open and potentially dangerous products from Fukushima could enter the U.S. market and cause harm to unwitting consumers. Japanese producers are eager to resume exporting products from Fukushima and, as such, would take full advantage of a newly opened U.S. market.²²²

E. A New Safety Net Solution

Just because the levels of radiation found in fish caught off the Fukushima coast may not be dangerous to the public at large, they would still be dangerous to the very old or very young. If a very young child living on the West Coast ate enough cesium-laced fish, the element could continue to build in his thyroid until it becomes cancerous, at which point it will have been too late. As in both *N.Y. Fish* and *Blue Ribbon Smoked Fish*, where the greatest health risk was to the very old or very young, the FDA could propose a zero-tolerance ban on potentially irradiated fish for reasons of public health concern. This could be done by adding the radioactive elements to the banned additives list or by including unintentional irradiation in the adulterated food list.

Additionally, a new regulation could be tied into this scheme of modifying a currently existing regulation. In recent years, many

²²⁰ Compare *Benten*, 799 F. Supp. 281 (the import alert was declared unlawful because it was a substantive rule with regard to automatic detention and did not follow note-and-comment procedures) and *Bellarno Int'l Ltd.*, 678 F. Supp. 410 (the import alert was declared unlawful in spite of its “guidance” language because it was too substantive in effect with regard to automatic detention and did not follow note-and-comment procedures) with *FDA Import Alert #99-33*, supra note 140 (an import alert that claims to be a “guideline” but has potential substantive effects regarding automatic detention and that has not followed note-and-comment procedures).

²²¹ *Benten*, 799 F. Supp. at 282.

²²² See *Fukushima Exports First Fish Consignment Since Nuclear Disaster*, supra note

environmental advocacy groups have pushed for traceability in seafood.²²³ “Traceability increases transparency and accountability in the seafood supply chain by ensuring that information such as how and where fish are caught or farmed follows the fish from boat to plate.”²²⁴ The United States has a fledgling traceability program through the National Oceanic and Atmospheric Administration (“NOAA”) that went into effect on January 1, 2018.²²⁵ This NOAA program, entitled the Seafood Import Monitoring Program (“SIMP”), requires the importer to provide and report key data, “from the point of harvest to the point of entry into U.S. commerce.”²²⁶ However, SIMP is not consumer facing and only currently covers thirteen types of imported fish and fish products.²²⁷ As such, this article proposes that consumer facing traceability requirements should be implemented by the FDA in conjunction with NOAA. These requirements should be targeted towards species of fish that may have been most impacted by radiation, such as varieties of sardine or tuna. As Japan seeks to turn the flow of exports of fishery products from Fukushima back on, one can expect there to be pushback on the idea of consumer facing traceability. Even within Japan, consumers are wary of products from Fukushima,²²⁸ and exports that were once lauded are now only just beginning to start back up. This proposed bundle of regulatory schemes would serve to protect the American consumer from start to finish, with unique consumer-facing traceability requirements giving consumers the ability to make informed choices about the source of their seafood.

A truly novel and effective solution would be a mix of most of the proposed solutions discussed above, a “fishing net” solution creating a networking bundle of new or modified regulatory schemes. Combining the options to modify language in FDA definitions of additives and/or adulterated products with the lessening of reliance on potentially toothless

²²³ See *Fish Stories: Success and Value in Seafood Traceability*, OCEANA (Mar. 2016), <https://usa.oceana.org/publications/reports/fish-stories-success-and-value-seafood-traceability>.

²²⁴ *Id.*

²²⁵ *U.S. Seafood Import Monitoring Program*, NOAA, <https://www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx> (last visited Apr. 27, 2020).

²²⁶ See *U.S. Seafood Import Monitoring Program*, *supra* note 225.

²²⁷ *Id.*

²²⁸ See Jun Hongo, *One in Five Japanese Cautious About Fukushima Food*, Wall Street Journal (Oct. 2, 2014), <https://blogs.wsj.com/japanrealtime/2014/10/02/one-in-five-japanese-cautious-about-fukushima-food/> (describing how, even years after the Fukushima disaster, many Japanese consumers are wary of products from Fukushima due to fears of radiation, despite knowing about Japan’s stricter radiation standards on food compared to the U.S.A. and Europe); Chico Harlan, *Please Eat the Vegetables, Japan Tells Radiation-Wary Nation*, WASHINGTON POST (Apr. 15, 2011), https://www.washingtonpost.com/world/please-eat-the-vegetables-japan-tells-radiation-wary-nation/2011/04/15/AFkOfmkD_story.html?utm_term=.446cecb0bdda (describing how even those Fukushima producers of products deemed uncontaminated have had trouble finding consumers willing to purchase their products, requiring the Japanese government to try and incentivize them to trust products from Fukushima).

import alerts, along with tracing measures to ensure that seafood is safe before it gets to a consumer's plate, would create a safety net that would not have the patchwork holes that currently exist. Rather than merely reacting to threats as they arise, the FDA should take proactive measures to ensure that, in the case of radiation entering the seafood market, from Fukushima or elsewhere, there is a broad network of new or modified regulatory schemes interacting with each other as a safeguard. The FDA has a duty to "protect[] the public health by ensuring the safety, efficacy, and security" of America's food supply.²²⁹ Included in this duty is the responsibility to protect the public health from contaminated food, including products that contain radiation.²³⁰ More than any other group of American consumers, the very old and the very young would be the ones to suffer from confusing seafood contaminated by Fukushima's radiation. It is their health that the FDA has to duty to protect, and their lives must be protected and allowed to grow. By implementing this article's proposed safety net solution, one could imagine the FDA crafting a "fishing net," with those contaminated fish that are caught in it allowed to return to the sea from whence they came.

V. CONCLUSION

The 2011 disaster and resulting meltdown at Fukushima created a massive challenge that will take decades to overcome.²³¹ Therefore, it is prudent to get ahead of this challenge now, rather than merely react years down the line when problems may rear their ugly head. Stronger regulations should be passed that promote import practices that preemptively screen out radioactive or contaminated sea life. While the FDA has passed Import Alert #99-33 to serve as a guideline for FDA field agents to detain products from Japan, without physical examination, due to radionuclide contamination, this import alert is a paper tiger, as it has not been published in the Federal Register. A court would likely follow precedent and declare it unlawful in violation of notice-and-comment requirements.

This article's proposed regulatory scheme would be focused on preventing both small and large-scale radioactive contamination of the American seafood supply from Japan. This article's proposed solution is to implement a new regulation that could be tied into a scheme of modifying currently existing regulations. By following the advice of environmental advocacy groups and implementing traceability in seafood products, transparency would be increased throughout the seafood supply chain, ensuring that information on how and where a fish was caught or farmed

²²⁹ *What We Do*, FDA, <https://www.fda.gov/AboutFDA/WhatWeDo/> (last visited Apr. 27, 2020).

²³⁰ *See id.*

²³¹ Farrell, *supra* note 81.

follows the fish throughout its journey from ocean waters into the stomach of a consumer. Preferably, a stomach untainted by radioactive isotopes from Fukushima. While a fledging traceability program does exist, it is not consumer facing and only currently covers thirteen types of imported fish and fish products.²³²

The FDA should be willing to recognize the utility in consumer facing traceability requirements and should begin to implement such a program in order to best protect the health of the average American consumer over a long period of time. These requirements should be targeted towards species of fish that may have been most impacted by radiation from Fukushima, such as varieties of sardine or tuna. This solution would also have the bonus of letting radioactive contaminants work themselves out of the ecosystem, by allowing fish populations to dilute it through successive generations. The half-lives of the contaminants would ensure that the fish are free of any harmful radiation for future generations.

The solution presented in this article is both novel and effective solution, as it proposes a networked bundle of new and modified regulatory schemes. This article's solution combines the ability to modify language in current FDA definitions of additives and/or adulterated products with the lessening of reliance on import alerts that may be found unlawful if challenged. Along with tracing measures to ensure that seafood is uncontaminated before it reaches the market, a safety net could be created that would not have the patchwork holes that currently exist. These measures would be designed to be preventative, so that the FDA can take proactive measures to ensure that only healthy fish enter the seafood market and not fish from Fukushima or some future coastal nuclear disaster. Lessening the reliance on reactive measures would be safer for the American consumer in the long run, ensuring that there is a broad network of proactive regulatory schemes interacting with each other as a safeguard against contaminants. This "fishing net" of regulations would ensure that no contaminated seafood slips through to injure the health of any American consumer.

As Japan prepares to re-commit to nuclear power, a future administration, rather than be wracked with a potentially incurable problem, should let the FDA enact a regulatory scheme to minimize the harm contaminated seafood may present to future generations. Rather than a forcing a terminally ill citizen to face the challenge of seeking relief against an unknown fish market from years past, let him be free of worry when he goes to a restaurant or has Japanese tuna on his dinner plate. The life of any being has immense worth, whether it be a very old or a very young person. Rather than have that life cut short by cancer caused by the build-up of radioactive contaminants consumed in years past, the FDA should adhere to

²³² *U.S. Seafood Import Monitoring Program*, *supra* note 225.

its duty to protect the American consumer from contaminated foodstuffs and implement this article's "fishing net" solution, in order to prevent such a nightmare scenario from affecting even one American family.