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THE HUMAN RIGHTS AND WRONGS OF FOREIGN DIRECT INVESTMENT: ADDRESSING THE NEED FOR AN ANALYTICAL FRAMEWORK

*David Shea Bettwy**

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I. INTRODUCTION

The absence of a global legal framework to hold multinational corporations (“MNCs”) accountable for human rights abuses has long been a concern of human rights activists, and is now receiving widespread attention as part of a worldwide movement against corporate abuses.¹ This article re-examines the relationship between foreign direct investment (“FDI”) and international human rights. It concludes that human rights can be promoted more effectively by developing a framework to identify and to make operational the positive human rights impacts of FDI, in conjunction with, rather than in opposition to, a rights-based approach. To be accurate and therefore effective, a separate framework should be designed to measure the influence of FDI on human rights conditions.

Human rights advocates criticize international human rights law – traditionally built on a state-centric regime – for not effectively addressing negative corporate human rights behavior and its impacts.² Just as valid is the criticism that international human rights advocates do not adequately address the positive human rights impacts of FDI.³ Human rights activists who favor a strictly rights-based approach have a fundamental aversion to acknowledging the positive impacts, since, as Smita Narula explains, “a free market approach emphasizes non-interference by the state, while international human rights law is founded on the notion that states must intervene to respect, protect, and fulfill [certain human rights].”⁴ A complete and objective analysis should take into account the positive impacts of FDI in the arenas of political and civil rights and of economic, social, and cultural rights, uninfluenced by the prospect that the results might favor less governmental fiscal interference.⁵

¹ OCCUPYWALLSTREET, <http://occupywallst.org/> (last visited Dec. 19, 2011).

² Dina Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 297 (2002).

³ Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, Annual Meeting of the Midwest Political Science Association (April 7-10, 2005), <http://nathanjensen.wustl.edu/me/files/Blanton.pdf>.

⁴ Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 701 (2006).

⁵ *Id.*

The next section describes the categories of human rights that FDI most directly influences and then lays the groundwork for an analytical framework of input and output indicators for the measurement of positive and negative impacts. Section III concludes that, because FDI can result in positive, though not automatic, human rights impacts, international efforts to develop universal codes of corporate social responsibility should be complemented by efforts to develop a methodology for objectively gauging and predicting impacts of FDI on human rights.⁶ Efforts should be made to advise governments – especially those of developing countries – on how to turn FDI into a positive force for the advancement of human rights.⁷

II. FOREIGN DIRECT INVESTMENT AND HUMAN RIGHTS

A. Overview

Under the current legal framework, human rights are classified within two broad categories: economic, social, and cultural rights, and civil and political rights. Economic, social, and cultural rights include the rights to health, housing, education, and employment.⁸ Civil and political rights include the rights to due process, safety, protection from certain types of discrimination, the right to participate in civil society, and other basic freedoms.⁹ A great deal of the literature on the human rights impacts of FDI¹⁰ focuses on the need for corporate responsibility, regulation, and accountability¹¹ given the perceived

⁶ *Public Policy for Corporate Social Responsibility* (July 7-25, 2003), http://info.worldbank.org/etools/docs/library/57434/publicpolicy_econference.pdf.

⁷ *Id.*

⁸ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at art. 7 (Dec. 16, 1966), 993 U.N.T.S. 3 [hereinafter ICESCR].

⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at arts. 20, 24 & 26 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁰ The United Nations Conference on Trade and Development (UNCTAD) defines FDI as an “investment made by a resident of one economy in another economy . . . of a long-term nature or of ‘lasting interest’” in which “the investor has a ‘significant degree of influence’ on the management of the enterprise.” The significant degree of influence is understood as 10 percent of the voting shares. United Nations Conference on Trade and Development, Division on Investment and Enterprise, *FDI Flows and Stocks*, UNCTAD TRAINING MANUAL ON FDI STATISTICS AND THE OPERATIONS OF TNCs 35 (2009).

¹¹ See generally John Ruggie, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (summarizing alleged corporate-related human rights

negative impacts of FDI on human rights.¹² While FDI can occur in various forms, MNCs are the “major players,” making FDI essentially “the cross-border expansion of production undertaken by large corporations.”¹³ Perceived violations by MNCs of economic, social, and cultural rights include exploitation and abuse of labor,¹⁴ pollution and other unhealthy damage to the environment,¹⁵ the introduction of un-

abuse in 320 cases posted on the Business and Human Rights Resource Center webpage from Feb. 2005 to Dec. 2007); *On the Margins of Profit*, HUMAN RIGHTS WATCH (Feb. 2008), <http://hrw.org/reports/2008/bhr0208/> (last visited Dec. 19, 2011); see also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶¶ 6-7, U.N. Doc E/C.12/2000/13 (Jan. 22-26, 1997), available at http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (last visited June 20, 2011); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010); Ole Kristian Fauchald & Jo Stigen, *Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1045-46 (2009); Shanaira Udawadia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 366 (2004).

¹² Int'l Comm'n of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability*, vols.1-3 (2008), available at http://www.business-humanrights.org/Updates/Archive/ICJ_Paneloncomplicity (last visited Dec. 19, 2011); Juliette Bennett, *Business in Zones of Conflict - The Role of the Multinationals in Promoting Regional Stability*, INT'L PEACE FORUM (2001), http://www.unglobalcompact.org/issues/conflict_prevention/meetings_and_workshops/Reg_stability.html (last visited Dec. 19, 2011).

¹³ INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS 15-16 (Lyuba Zarsky ed., 2005). The analysis of other possible major players such as state-owned enterprises (SOEs) or so-called “national champions” lies beyond the scope of this article.

¹⁴ See, e.g., Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 519 (2003) (“Transnational corporations exploit the low-wage status of women . . . and, in doing so, create new avenues for sexual abuse and harassment.”).

¹⁵ Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 745 (2004); Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53 (2004); Francis O. Adeola, *Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System*, 8 HUM. ECOLOGY REV. 39, 43-44 (2001); Int'l Comm'n of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations - Philippines*, http://www.icj.org/dwn/img_prd/Philippines-ElecDist.pdf (last visited Dec. 19, 2011).

safe products and technologies,¹⁶ and the displacement of local businesses.¹⁷ Perceived violations of civil and political rights include the displacement of indigenous peoples¹⁸ and the support of regimes that violate the human rights of their peoples.¹⁹

At the same time, some writers acknowledge potential socio-economic benefits of FDI such as the inflow of technology and capital equipment, improvements in infrastructure, the technical training of local labor, and an increase in exports.²⁰ MNCs consider labor productivity as well as labor costs because our global economy demands the “production and delivery of technologically demanding, skill-intensive goods and services.”²¹ Additionally, improvements in economic, social, and cultural rights can lead to improvements in civil and political rights. As Meyer observed, “Foreign investment is positively associated with both civil liberties and political freedoms.”²²

Regarding civil and political rights, political rights are improved because investors favor the free movement of goods and people, and stable, transparent regimes.²³ “The fact that a state does not repress its citizens both reflects and contributes to the political and so-

¹⁶ Robert J. Fowler, *International Environmental Standards For Transnational Corporations*, 25 ENVTL. L. 1, 8-10 (1995); Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 674-81 (1998).

¹⁷ United Nations Conference on Trade and Development, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, UNCTAD/WIR/2003, at xii-xv (2003).

¹⁸ Upendra Baxi, *What Happens Next is up to You: Human Rights at Risk in Dams and Development*, 16 AM. U. INT’L L. REV. 1507, 1509-10 (2001); Erin K. MacDonald, *Playing by the Rules: The World Bank’s Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1030-39 (2001).

¹⁹ See generally Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT’L L. & POL’Y 483, 484 (2011) (“BITs empower MNCs and encumber a State’s regulatory power to promote and protect human rights.”).

²⁰ Jeffrey J. Blatt & Phillip H. Miller, *Preparing for the Pacific Century: Fostering Technology Transfer in Southeast Asia*, 3 ANN. SURV. INT’L & COMP. L. 235, 237 (1996); James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity*, 18 DUKE J. COMP. & INT’L L. 77 (2007) (pointing out that “the oft forgotten human rights advantages that can flow from foreign direct investment in developing countries” and that “one must not neglect the possibility that international investment law and human rights effectively can complement each other.”).

²¹ David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1319 (2008).

²² WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 103-08, 136 (1998).

²³ Law, *supra* note 21, at 1318.

cial stability that investors covet.”²⁴ Statistics tend to show that the promise of FDI is an incentive for a country to improve its human rights conditions.²⁵ Countries that uphold human rights tend to receive more FDI than countries that do not.²⁶ Material evidence demonstrates that FDI and the promise of FDI can help promote democracy.²⁷

In sum, case studies should refrain from advocacy and strive for an objective analysis of the costs and benefits of FDI. As one writer observed, “Traditionally, the relations between human rights and economics have been poisoned by misunderstanding, mutual accusations, mistrust and suspicions.”²⁸ While a case study may examine “crowding out” effects, it should also look at how “spillover effects” and competition have benefited local firms and resulted in greater efficiencies within an industry.²⁹ Case studies that document labor exploitation and abuse should also explore whether unemployment has been reduced and workers have been empowered.³⁰ Reports of environmental damage should also take into account whether there have been trans-

²⁴ *Id.*

²⁵ *Id.* at 1316.

²⁶ See OECD, *More open economies receive more FDI*, OECD, (Dec. 19, 2011), http://www.oecd.org/document/22/0,3746,en_2649_34529562_47500566_1_1_1_34_529562,00.html; See also Law, *supra* note 21, at 1317. Law’s thesis is that “investors and elite workers . . . are likely to favor jurisdictions that respect ‘first generation’ individual rights—namely, civil liberties and property rights of the type found in the U.S. Constitution.” *Id.* at 1282. In Part V of his article, Law “rejects the sometimes popular view that foreign investment has a negative impact on the observance of human rights.” *Id.* at 1283.

²⁷ Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT’L ORG. 587, 599 (2003) (describing “new growth theory”); Adam L. Resnick, *Investors, Turbulence, and Transition: Democratic Transition and Foreign Direct Investment in Nineteen Developing Countries*, 27 INT’L INTERACTIONS 381, 384 (2001); RANDALL PEERENBOOM, *An Empirical Overview of Rights Performance in Asia, France, and the USA: The Dominance of Wealth in the Interplay of Economics, Culture, Law, and Governance*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 21 (Randall Peerenboom et al. eds., 2006) (observing that Asian countries that have experienced high economic growth in recent years have “generally scored highly with respect to the legal protection of economic interests”).

²⁸ Kanstantsin Dzehtsiarou, Book Review, 13 J. INT’L ECON. L. 521, 522 (2010) (reviewing DAVID KINLEY, *CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* (2009)).

²⁹ *Id.*

³⁰ *Id.*

fers of greener technologies.³¹ And case studies of “land grabs” should consider the agricultural benefits that have resulted from FDI.³²

The U.N. Conference on Trade and Development (“UNCTAD”) reported in 2010 that FDI increasingly “has significant social, and often political, ramifications” and that “[t]here is a great need, therefore, for new statistical information to measure these activities.”³³ Objective measurement of human rights is a burgeoning field³⁴ and provides variable indicators that can be measured to objectively gauge the enjoyment of civil and political rights and economic, social, and cultural rights.³⁵ With objective information from both the human rights and investment spheres, human rights scholars can take it a step further and attempt to gauge the direct and indirect impacts of FDI on human rights conditions.³⁶ This will be practical in two ways. It will identify which human rights conditions are being affected and whether the impact is positive or negative.³⁷ If strong relationships are found between particular FDI components and human rights conditions, such findings can direct future policy that produces positive human rights impacts.³⁸

In an attempt to lay groundwork for such research, this article examines the potential benefits of FDI to both civil and political rights and economic, social, and cultural rights. It suggests relationships between FDI and human rights that human rights researchers should objectively measure and analyze. This article concludes by proposing an analytical framework for such measurement and analysis.

B. Economic, Social, and Cultural Rights

1. “Crowding Out” Versus the Benefits of Competition and Spillover

Since the 1980s, states have liberalized their FDI regulations and signed increasingly more bilateral investment treaties with the goal of attracting FDI.³⁹ One of the major reasons for attracting FDI

³¹ *Id.*

³² *Id.*

³³ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2 UNCTAD TRAINING MANUAL ON STATISTICS FOR FDI AND THE OPERATIONS OF TNCs: STATISTICS ON THE OPERATIONS OF TRANSNATIONAL CORPORATIONS 35 (2009).

³⁴ See generally TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS 1-9 (2010).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Magnus Blomström & Ari Kokko, *Multinational Corporations and Spillovers*, 12 J. ECON. SURVEYS 1, 1-2 (1998).

is the prospect of benefiting from positive externalities, or spillovers, which can occur even when a host country's FDI policies are significantly flexible and favorable to MNCs.⁴⁰ A vast amount of research on the subject of FDI has attempted to detect and measure the presence of spillovers.⁴¹ Some of the most scrutinized forms of spillover include technology, technical knowledge, knowledge about more effective business practices, human capital, and market access. Görg and Greenaway surveyed a large number of studies to see whether a consensus existed on the relationship between spillovers and FDI, finding, as previous authors had before,⁴² that the success of spillovers depends on the individual circumstances of each host economy. Although it is difficult to find an overall consensus, several case studies have found that, under certain conditions, spillovers are more likely to occur.

(a) *Spillover Between Linked Firms*

(1) *Technology*

Damijan explains that FDI can lead to technology spillover into horizontally integrated firms of less-developed economies from their foreign affiliates if the circumstances allow it. The host economy needs to have the capacity "to identify, assimilate and exploit outside knowledge," or absorptive capacity, to experience an effective spillover.⁴³ When the technology gap between the investing country and the host country is significantly large, the absorptive capacity might be too low to take advantage of a potential spillover.⁴⁴

Damijan developed a model in which the technology boost of an affiliate firm in the host economy is determined by the firm's investment in research and development, which can increase the firm's absorptive capacity and help it maximize the benefit of the foreign firm's

⁴⁰ *Id.* at 2 ("Foreign investment can result in benefits for host countries even if the MNCs decide to carry out their foreign operations in wholly-owned affiliates, since technology to some extent is a public good.").

⁴¹ See Holger Görg & David Greenaway, *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?* 31-32 Tbl. 2 (IZA, Discussion Paper No. 944, 2003), available at <http://www.econstor.eu/bitstream/10419/3091/1/dp944.pdf> (displaying relevant studies on FDI and productivity spillovers since the 1970s).

⁴² See, e.g., Xiaohui Liu & Chenggang Wang, *Does foreign direct investment facilitate technological progress?: Evidence from Chinese industries*, 32 RES. POL'Y 945, 947 (2002); see also Wilfred J. Ethier and James R. Markusen, *Multinational Firms, Technology Diffusion and Trade*, 41 J. INT'L. ECON. 1 (1996).

⁴³ Jozse P. Damijan et al., *Technology Transfer through FDI in Top-10 Transition Countries: How Important are Direct Effects, Horizontal and Vertical Spillovers* 5 (Inst. Econ. Research, Working Paper No. 17, 2003), available at <http://www.ier.si/files/Working%20paper-17.pdf> (last visited Dec. 19, 2011).

⁴⁴ *Id.* at 5.

presence.⁴⁵ If the absorptive capacity of affiliate firms is adequate, the host economy as a whole can benefit through an increase in “the rate of technical change and technological learning,” which occurs “indirectly through knowledge spillovers to local firms.”⁴⁶ Damijan also cites studies that suggest technology can spill over into a firm of a less-developed state from an affiliate firm with which it is vertically integrated.⁴⁷ “[F]oreign affiliates often provide resources to improve the technological capabilities” of their suppliers “to improve the quality standards.”⁴⁸ A paper prepared for UNCTAD notes a “changing attitude” toward MNCs driven by the realization that they are “one of the main vehicles, or even the main vehicle, for allowing developing countries to start closing the gap with the world technology leaders.”⁴⁹

(2) *Human Capital*

The presence of more knowledgeable and skilled MNCs may result in a spillover effect that improves the quality of local human capital, often through training of local employees. In a case study of firms located in the Czech Republic, Djankov and Hoekman found strong positive correlations between foreign partnerships and adoption of technology and frequency of training.⁵⁰ Damijan notes that human capital spillover is important for less-developed host economies, commenting that “[t]hese spillovers are especially important for firms that lack the technological capabilities and managerial skills to compete in world markets.”⁵¹ Blomström and Kokko note studies that have found empirical evidence of human capital spillovers in less-developed countries, despite a significant gap of skill and knowledge between locals and multinational affiliates.⁵² Moreover, while high-skilled positions

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 8.

⁴⁹ Daniel Chudnovsky & Andrés López, *TNCs and the Diffusion of Environmentally Friendly Technologies to Developing Countries 2* (Copenhagen Bus. Sch. Cross Border Envtl. Mgmt. Project, Occasional Paper no. 9, Aug. 1999), available at <http://cdi.mecon.gov.ar/biblio/docelec/dp1411.pdf>.

⁵⁰ Simeon Djankov & Bernard Hoekman, *Foreign Investment and Productivity Growth in Czech Enterprises*, 14 *WORLD BANK ECON. REV.* 49, 55-56 (2000).

⁵¹ Damijan, *supra* note 43, at 8.

⁵² Blomström & Kokko, *supra* note 39, at 14.

tend initially to be occupied by non-locals,⁵³ Blomström and Kokko note that “the local share typically increases over time.”⁵⁴

Human capital spillover is particularly important for host economies because it may determine the success of technology and knowledge spillovers. In a case study of China, Fu and Li found that, when the “quality” of human capital in a host economy reaches a certain level of ability to expand knowledge and imitate and adopt technology, the negative crowding-out effects of FDI change to positive spillover effects.⁵⁵ Görg and Greenaway describe the acquisition of absorptive human capital as possibly the most important channel for spillover of technology and better business practices.⁵⁶

The increase in the quality of human capital resulting from increased education and training and, ultimately, the increase in high-skilled workers may reduce income inequality and expand the middle class.⁵⁷ Several studies have explored the potential poverty-reduction effects of FDI.⁵⁸ A case study of Mexico found that increased flows of FDI were associated with a decrease in income inequality,⁵⁹ and a study of European countries found similar results.⁶⁰

⁵³ Bilateral investment treaties tend to stipulate something to this effect: “Nationals and companies of either Party. . . shall be permitted to engage, within the territory of the other Party, top managerial personnel of their choice, regardless of nationality.” Treaty Between the Government of the United States of America and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments, U.S.-Pan., Oct. 27, 1982, S. TREATY DOC. NO. 99-14 (1986).

⁵⁴ Blomström & Kokko, *supra* note 39, at 13.

⁵⁵ Miao Fu and Tieli Li, *Human Capital as a Determinant of FDI Technology Spillovers and its Threshold Effects in China: An Analysis Based on Multiple Productivity Estimates* at v (U.N. Indus. Dev. Org., Res. and Stat. Branch, Working Paper No. 21/2009, 2009), available at http://www.unido.org/fileadmin/user_media/Publications/RSF_DPR/WP212009_Ebook.pdf.

⁵⁶ Görg & Greenaway, *supra* note 41, at 3-4. See also Djankov & Hoekman, *supra* note 50, at 51.

⁵⁷ See Branko Milanović, *Can We Discern the Effect of Globalization on Income Distribution?: Evidence from Household Budget Surveys*, 19 WORLD BANK ECON. REV. 21 (2005).

⁵⁸ See Carl Aaron, *The Contribution of FDI to Poverty Alleviation* (Int'l Fin. Corp. Foreign Investment Advisory Service, 1999); Michael Klein et al., *Foreign Direct Investment and Poverty Reduction* (World Bank Pol'y Res., Working Paper No. 2613, 2000) (offering a comprehensive index of other studies that have measured the effects of FDI on poverty reduction), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632682.

⁵⁹ Nathan M. Jensen & Guillermo Rosas, *Foreign Direct Investment and Income Inequality in Mexico, 1990-2000*, 61 INT'L ORG. 467 (2007).

⁶⁰ Dierk Herzer & Peter Nunnenkamp, *FDI and Income Inequality: Evidence from Europe* (Kiel Inst. for the World Econ., Working Paper No. 1675, Jan. 2011), avail-

(3) *Market Access*

In addition, when MNCs establish a presence in a host economy, a “market access spillover” may benefit local firms that establish relationships with foreign firms. Because MNCs operate in multiple countries, they understand the international market and are able to exploit a cross-border network. Obtaining access to a broader network is one of the primary motivations of expanding operations into foreign countries, so MNCs naturally possess the know-how to operate in an international market.⁶¹ Blomström and Kokko write that “the distribution networks and the knowledge of foreign markets that are built up through [FDI] can perhaps benefit the entire home economy.” Local firms that do not possess the same skills or resources need to expand operations abroad to benefit from the presence of MNCs.⁶² Blomström and Kokko note several ways that market access spillover can occur, such as when MNCs employ local firms as suppliers or subcontractors, or when MNCs lobby successfully to reduce trade barriers in other countries, thereby indirectly benefiting their local suppliers.⁶³

(b) *Spillover Between Competing Firms*

Spillover can occur when local firms in a less-developed economy are forced to compete with proximate firms that are linked to more technologically advanced and efficient foreign affiliates. Instead of being crowded out, local firms may experience an “imitation spillover” in which they learn from the example set by firms linked to foreign affiliates.⁶⁴ Buckley observed that, over time, foreign affiliates become embedded in the local economy and increase relationships with local businesses, making technology and knowledge spillovers more natural.⁶⁵ Damijan suggests that these local firms are compelled to imitate “new products, processes and organization forms” that demonstrate “increased efficiency.”⁶⁶

able at http://www.ifw-members.ifw-kiel.de/publications/fdi-and-income-inequality-evidence-from-europe/kwp_1675. .

⁶¹ See S. Lael Brainard, *An Empirical Assessment of the Proximity-Concentration Trade-Off Between Multinational Sales and Trade*, 87 AM. ECON. REV. 520 (1997) (suggesting that MNCs’ choice of location is motivated primarily by access to certain markets, more so than to cheaper factors of production).

⁶² Blomström & Kokko, *supra* note 39, at 7.

⁶³ *Id.* at 7-8.

⁶⁴ Damijan, *supra* note 43, at 8.

⁶⁵ Peter J. Buckley et al., *Inward FDI and host country productivity: Evidence from China’s electronic industry*, 15 TRANSNAT’L CORPS. 13, 17 (2006).

⁶⁶ Damijan, *supra* note 43, at 8.

Imitation may occur by way of “reverse engineering, personal contact and industrial espionage.”⁶⁷ Reverse engineering may be applied not only in imitating product design but also in adopting more advanced managerial schemes.⁶⁸ A study by the Food and Agriculture Organization of the United Nations (“FAO”) of spillovers in African countries found that the presence of MNCs in Ghana benefited local competing firms.⁶⁹ Researchers note, however, that local firms’ ability to compete will depend on their ability to take advantage of technology and knowledge spillovers and adapt competing management skills and technology.⁷⁰ Fu and Li note that absorptive capacity can be increased through, *inter alia*, human capital spillover, as well as investment in research and development and public infrastructure.⁷¹

(c) *Relevance to Human Rights*

The positive economic spillover effects of FDI on local firms also help to improve human rights conditions on a broader scale in the host community. For example, researchers should consider the impacts of the benefits of competition, such as greater productivity and higher-quality products, on the standard of living in the region.⁷² Greater efficiencies in production may result in greater consumer welfare with the transfer of new and safer technologies. The spillover of human capital, especially through “technical and vocational guidance and training programs”⁷³ that MNCs employ, may result in higher-skilled and higher-paid positions for local employees.⁷⁴ The pressure to develop more efficient managerial techniques and technology may improve the quality and safety of products, allowing the local populations of less-developed countries to “enjoy the benefits of scientific progress and its applications.”⁷⁵ Furthermore, market access spillover occurring between foreign and local firms that are horizontally integrated may allow local firms to expand their operations, resulting in greater output and reduced unemployment.⁷⁶

⁶⁷ *Id.*

⁶⁸ Görg & Greenaway, *supra* note 41, at 3.

⁶⁹ Ann-Christin Gerlach & Pascal Liu, *Resource-seeking Foreign Direct Investment in African Agriculture: A review of country case studies* 15 (FAO Commodity & Trade Pol’y, Res. Working Paper No. 31, 2010), available at http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP31.pdf (last visited Dec. 19, 2011).

⁷⁰ See Buckley, *supra* note 65, at 18.

⁷¹ See Fu & Li, *supra* note 55, at 39.

⁷² See ICESCR, *supra* note 8, at art. 11.

⁷³ *Id.* at art. 6(2).

⁷⁴ See also *id.* at art. 6(1) (recognizing the “right to work”).

⁷⁵ *Id.* at art. 15(b).

⁷⁶ See *id.* at art. 6(1).

2. Environmental Damage Versus the Transfer of Greener Technologies and Practices

The harmful environmental effects of MNC activities are well documented in human rights literature,⁷⁷ whereas “relatively little attention has been paid to the role of [FDI] as a contributor to green growth,”⁷⁸ and the “potential for green [FDI] is large but ignored so far.”⁷⁹

(a) *The Natural Incentive of MNCs to be Environmentally Friendly*

FDI can benefit the environment due to certain motivating factors that influence corporate behavior in multinational operations. While the intuitive, if cynical, assumption is that MNCs purposefully locate their operations in countries with relatively weak environmental policies (the “pollution haven” effect), empirical studies have failed to substantiate the accuracy of this assumption.⁸⁰ In fact, a 2004 study concluded that, “[i]f anything, firms in less polluting industries are more likely to invest in the region.”⁸¹ Also, a study by the Organization for Economic Co-Operation and Development (“OECD”) suggests that, even if there is a negative correlation between the stringency of environmental policy and FDI, environmental policy is a relatively small factor compared to overall regulatory quality for MNCs deciding where to locate their operations abroad.⁸² A “mining company does not go to a foreign country to escape environmental con-

⁷⁷ See *supra* note 15; see also PETER UTTING, *THE GREENING OF BUSINESS IN DEVELOPING COUNTRIES* 1 (2002).

⁷⁸ Stephen S. Golub et al., *Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence* 9 (OECD, Working Papers on Int’l Investment, No. 2011/2, 2011), available at <http://www.oecd.org/dataoecd/26/8/48171454.pdf> (last visited Dec. 19, 2011).

⁷⁹ *Id.* at 11 (noting that FDI is a more effective avenue for the transfer of green technologies than official development assistance, in part because the presence of MNCs results in knowledge spillover that allows host countries to better absorb new technologies).

⁸⁰ See Judith Dean et al., *Foreign Direct Investment and Pollution Havens: Evaluating the Evidence from China* ii (U.S. Int’l Trade Comm., Office of Econ., Working Paper No. 2004-01-B, 2003), available at http://www.usitc.gov/publications/332/working_papers/ec200401b.pdf (last visited Dec. 19, 2011).

⁸¹ See Beata Smarzynska Javorcik & Shang-Jin Wei, *Pollution Havens and Foreign Direct Investment: Dirty Secret or Popular Myth?*, 3(2) *CONTRIBS. TO ECON. ANAL. & POL’Y.* 1 (2004).

⁸² Margarita Kalamova & Nick Johnstone, *Environmental Policy Stringency and Foreign Direct Investment* 26 (OECD, Env’t Working Paper No. 33, 2011), available at <http://dx.doi.org/10.1787/5kg8ghvf85d5-en> (last visited Dec. 19, 2011) (“the general measure of regulatory quality used in the analysis has much more significant (and positive) impacts on FDI inflows.”).

siderations [but rather to escape] unreasonable costs, hostile regulatory environments, and oppressive, confiscatory environmental policies that have little to do with sound environmental protection and more to do with creating large, well-funded governmental agencies.”⁸³ And quite the contrary to the pollution-haven assumption, MNCs have natural incentives to use greener technologies and environmentally friendly practices in general.

Several authors have asserted that the reputational costs for being environmentally unfriendly are significant enough to influence corporate behavior.⁸⁴ Reputational costs may arise in multiple ways. For example, increasingly environmentally aware consumers are willing to pay a higher price for products from clean sources. When a corporation engages in reckless environmental activity, it risks bad publicity, protests, and boycotts, which can drive down stock value. Given the rapid transmission of information worldwide, the risks of engaging in activity that will spark controversy and criticism is significant. In response to Coca-Cola’s tarnished and highly-publicized environmental record, protest campaigns and boycotts were so significant that a hedge fund was established for the sole purpose of profiting from the decline of stock prices of companies that “are vulnerable to boycotts and protest campaigns based on the companies’ social and environmental record.”⁸⁵ The threat of bad publicity and its consequences is a particularly important consideration for high-profile MNCs, since their presence in developing countries is “highly visible” and “may be closely scrutinized by local governments.”⁸⁶

The same can be said about countries new to large-scale extraction of natural resources for energy development that are naturally skeptical and averse to new large-scale projects. For example Shell Oil’s Corrib Gas Project in Ireland, faced opposition and considerable

⁸³ Madeline Cohen, *A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries*, 15 STAN. ENVTL. L.J. 130, 168 (1996).

⁸⁴ Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 653-54 (2005); see also Seema Arora & Timothy Cason, *Why Do Firms Volunteer to Exceed Environmental Regulations? Understanding Participation in EPA’s 33/50 Program*, 72 LAND ECON. 413 (1996); Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004).

⁸⁵ See Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2152-53 (2005); see also Gunningham, *supra* note 84, at 323.

⁸⁶ Cohen, *supra* note 83, at 138.

negative publicity even before becoming operational.⁸⁷ MNCs also have a natural incentive to respect environmental standards because it is more cost efficient in the long run. In Latin America, mining companies are operating at high environmental standards at the outset in anticipation of more stringent environmental standards in the future, since “[d]esigning for [tougher] standards at the outset is often far less expensive than having to retrofit an operation later.”⁸⁸ Furthermore, newer technology tends to be more efficient and less impactful on the environment, meaning that investment in greener technologies will be cost beneficial and more sensible anyway. “[T]here is objective data to support the view that if a large mining project includes state of the art environmental controls, the efficiency gains will more than pay for the extra costs.”⁸⁹

Besides, MNCs based in home countries with high environmental standards typically already have the resources needed to invest in new and environmentally friendly technology⁹⁰ and need not innovate technology to operate abroad in an environmentally acceptable manner. Additionally, natural resource projects are becoming more expensive, and MNCs can no longer rely on “internal cash-flows.”⁹¹ They must instead look to “public and private lenders,” and “major lenders such as OPIC and the World Bank now impose stricter environmental conditions on [MNCs] seeking project financing.”⁹² As a result, MNCs that are pursuing expensive extractive projects find it financially wise to assess the environmental impacts of their plans,⁹³ since “[n]o project can be financed with major banks unless the project meets World Bank [environmental] standards.”⁹⁴

(b) *FDI and the Environment*

If human rights researchers and, more disconcertingly, governments are not devoting enough attention to the environmental benefits of FDI, then the international community is failing to reach its potential to promote and spread greener technologies and business prac-

⁸⁷ See, e.g., Diarmaid Fleming, *Bitter dispute over gas pipeline*, BBC NEWS, Aug. 3, 2005, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4739831.stm (last visited July 25, 2011).

⁸⁸ R. Craig Johnson, *Negotiating Mineral Transactions in Latin America*, in MINING IN LATIN AMERICA, IN INTERNATIONAL OIL, GAS & MINING DEVELOPMENT IN LATIN AMERICA 6A-1, 6A-13 (Rocky Mt. Min. Law Found. ed., 1994).

⁸⁹ Richard A. Westin, *Intergenerational Equity and Third World Mining*, 13 U. PA. J. INT'L BUS. L. 181, 188 (1992).

⁹⁰ Cohen, *supra* note 83, at 139.

⁹¹ *Id.* at 138.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Johnson, *supra* note 88, at 6A-13.

tices. A report by the U.S. Chamber of Commerce states “many countries impose tariffs of up to 70% on climate-friendly goods and services, impeding access to cutting edge technologies.”⁹⁵ The World Bank found that, “by removing these types of barriers, trade in green technologies and services could rise 7-14% annually.”⁹⁶

Vietnam is one example of a country that is becoming proactive in utilizing FDI to invite the transfer of environmental-friendly business and technology.⁹⁷ Kazakhstan, a country with a mixed environmental history, has also signaled positive steps in the direction of becoming more environmentally friendly by way of FDI. Kazakhstan’s President Nursultan Nazarbayev eyes FDI as a means of achieving development and intends to attract environmentally friendly technology financed by capital from outside investment.⁹⁸ For developing countries, FDI from developed countries is not only beneficial but vital for environmental protection, since “[t]he technical know-how for controlling pollution resides primarily in firms in more developed countries.”⁹⁹

Indeed, MNCs “are increasingly considered as leaders in the introduction of good environmental management practices and in the diffusion of environmentally sound technologies.”¹⁰⁰ MNCs are also becoming increasingly aware of their environmental impact, “moving from simply remedying environmental problems through *ad hoc* solutions to preventing them through a more holistic or systemic approach.”¹⁰¹

⁹⁵ Global Intellectual Property Ctr., *Promoting Technology Diffusion to the Developing World: A Blueprint for Advancing, Protecting, and Sharing Innovation*, Global Intellectual Property Center 1-2 (2009), http://www.theglobalipcenter.com/sites/default/files/reports/documents/Promoting_Tech_Diffusion.pdf (last visited Dec. 19, 2011).

⁹⁶ *Id.*

⁹⁷ *Vietnam to focus on raising quality of FDI projects*, VIETNAM BUS. NEWS, Aug. 8, 2011, <http://vietnambusiness.asia/vietnam-to-focus-on-raising-quality-of-fdi-projects/> (last visited Dec. 19, 2011) (“In 2011, the country will concentrate on luring FDI in infrastructure and projects using hi-tech and green technology that are capable of turning out products of high competitiveness.”).

⁹⁸ Yuliya Mitrofanskaya, *Environmental Protection in Kazakhstan: The New Oil Legislation*, 1999 COLO. J. INT’L ENVTL. L. & POL’Y 76, 79 (2000) (also stating that, in addition to introducing greener technologies, “foreign investors will be required to help Kazakhstan create new jobs and improve Kazakhstan’s public health and education, and its cultural and athletic offerings.”).

⁹⁹ Golub, *supra* note 78.

¹⁰⁰ Chudnovsky & López, *supra* note 49, at 2.

¹⁰¹ UTING, *supra* note 77, at 3.

General Electric, the sixteenth largest MNC in the world,¹⁰² became “one of several U.S. energy companies” to invest in coal-energy projects that will be less impactful than conventional power plants.¹⁰³ The investment deal partnered General Electric with Shenhua Group, China’s biggest coal producer, in building integrated gasification combined cycle (“IGCC”) facilities in China. The technology will “deliver immediate benefits through reduced emissions of traditional pollutants and improved thermal efficiencies”¹⁰⁴ in the largest coal-producing and consuming country in the world.¹⁰⁵ Also, IBM, Nokia, Pitney Bowes, and Sony partnered with the World Business Council for Sustainable Development in 2008 to launch the Eco-Patent Commons¹⁰⁶ to encourage the sharing of patents and reduce the barrier of intellectual property rights to environmental solutions.¹⁰⁷ Since the launch, “[m]ore than 100 eco-friendly patents have been pledged by 11 companies that covenant not to assert their rights against those using technologies in the Commons for environmental benefit.”¹⁰⁸ Governments welcoming FDI have much to gain from a business community that is increasingly environmentally aware and voluntarily developing ways to make technologies and practices environmentally beneficial.

(c) *Relevance to Human Rights*

Environmental protection and human rights conditions are increasingly viewed as overlapping concerns.¹⁰⁹ Although the human right to a healthful environment is not yet recognized as legally bind-

¹⁰² *Global 500*, CNN MONEY, Jul. 25, 2011, http://money.cnn.com/magazines/fortune/global500/2011/full_list/ (last visited Dec. 19, 2011).

¹⁰³ Todd R. Miller & Dawn M. Amos, *Cleantech Innovators Should Be Aware of Certain Global Intellectual Property Issues*, 22 INTELL. PROP. & TECH. L.J. 1 (2010).

¹⁰⁴ Samuel C. Schon & Arthur A. Small III, *Climate change and the potential of coal gasification*, 20 GEOTIMES 51.9 (2006), available at http://www.geotimes.org/sept06/feature_ClimateChange.html.

¹⁰⁵ BP, STATISTICAL REVIEW OF WORLD ENERGY 32-33 (June 2011), available at http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf (last visited Dec. 19, 2011).

¹⁰⁶ Miller & Amos, *supra* note 103, at 5.

¹⁰⁷ William M. Bulkeley, *Companies to Share Eco-Friendly Patents*, WALL ST. J., Jan. 14, 2008, available at <http://online.wsj.com/article/SB120027151743287307.html> (last visited Dec. 19, 2011).

¹⁰⁸ Miller & Amos, *supra* note 103, at 5.

¹⁰⁹ See generally Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT’L HUM. RTS. 186 (2005); see also United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12,

ing under international law, there are recognized rights that may be affected by environmental harm (or enrichment). Plaintiffs in *Flores v. Southern Peru Copper Corp.*¹¹⁰ pointed out that environmental pollution can threaten, for example, the rights to life¹¹¹ and health.¹¹² The U.S. Environmental Protection Agency (“EPA”) notes numerous health effects of environmental changes.¹¹³ Temperature change,¹¹⁴ contamination of waters,¹¹⁵ changes in air quality,¹¹⁶ and several other environmental changes have negative impacts on humans, including their overall health and occupational success.

The human rights impacts of environmental damage are well documented,¹¹⁷ but the fact that MNC activities can have positive and needed impacts on the environment and, ultimately, human rights conditions, is often ignored. When FDI introduces more efficient and greener technologies that emit less greenhouse gas, it replaces less efficient, environmentally harmful technologies.¹¹⁸ Replacement technologies are especially beneficial in developing countries, which typically have limited access to electricity and rely primarily on carbon-emitting fuel sources.¹¹⁹ With the improvement of environmental conditions, developing countries will inevitably see improvements in health and reduced risk of diseases associated with environmental damage. It is therefore counterproductive for human rights advocates to ignore that FDI is essential to spread greener technologies to developing countries with weak environmental standards.

1992) (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).

¹¹⁰ *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 144 (2d Cir. 2003).

¹¹¹ ICCPR, *supra* note 9, at art. 6.

¹¹² ICESCR, *supra* note 8, at art. 12.

¹¹³ CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (M.L. Parry et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm (last visited Dec. 19, 2011) [hereinafter EPA 2007].

¹¹⁴ *Id.* at 396.

¹¹⁵ *Id.* at 400.

¹¹⁶ *Id.* at 401.

¹¹⁷ See, e.g., Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT’L & COMP. L. REV. 849 (1991); see also, e.g., Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT’L L.J. 261 (1997).

¹¹⁸ See EPA 2007, *supra* note 113, at 418.

¹¹⁹ *Id.* at 419.

3. “Land Grabs” Versus Agricultural Advancement

FDI that involves land acquisition has been criticized as “a new form of colonialism” that will negatively impact food security of the host region and drive people from their land.¹²⁰ The FAO notes that, on the other hand, “if the objectives of land purchasers are reconciled with the investment needs of developing countries,” then land investments can significantly benefit the host region.¹²¹ Indeed, studies suggest that FDI in land can bring socio-economic benefits to host regions and have direct positive human rights impacts.

(a) *Negative Impacts of FDI in Land*

It is well recognized that FDI in land can be detrimental to economic, social and cultural human rights conditions if the interests and priorities of host regions are not adequately considered in investment agreements. The 2009 Deutsche Gesellschaft für Technische Zusammenarbeit (“German Society for International Cooperation” or “GTZ”) study notes a number of potential negative economic, social, and environmental impacts, including conflict over land due to strong competition, “marginalization of small-size land owners” which negatively effects “development geared towards the needs of the poor,” reduced access to land, social friction due to income inequality between foreign and local employees, and various threats to the environment.¹²²

The FAO notes the risk of displacing indigenous peoples and decreasing standards of living,¹²³ which may undermine economic, social and cultural rights.¹²⁴ Regarding the right to food, investment in land may be counterproductive to the goals of the World Food Summit if food is exported and not made available for local consumption.¹²⁵ Authors have noted with concern that regional interests are likely to be compromised due to the strong leverage of MNCs over host countries.¹²⁶

¹²⁰ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, FROM LAND GRAB TO WIN-WIN: SEIZING THE OPPORTUNITIES OF INTERNATIONAL INVESTMENTS IN AGRICULTURE, 4 (2009), <ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf> (last visited Dec. 19, 2011) [hereinafter FAO POLICY BRIEF].

¹²¹ *Id.*

¹²² *GTZ Study, infra* note 127, at 23-24.

¹²³ Gerlach & Liu, *supra* note 69, at 9.

¹²⁴ See ICESCR, *supra* note 8, at arts. 1, 11 (recognizing the rights to self-determination and an adequate standard of living).

¹²⁵ See *GTZ Study, infra* note 127, at 22.

¹²⁶ See, e.g., Nadia Cuffaro & David Hallam, “Land Grabbing” in *Developing Countries: Foreign Investors, Regulation and Codes of Conduct* 13 (Int’l Conf. on Global Land Grabbing, Paper, 2011), <http://www.future-agricultures.org/index>.

(b) Positive Impacts of FDI in Land

The 2009 GTZ study of FDI in land also lists several economic impacts that may have important positive implications for human rights conditions in host regions. Positive economic impacts include increased productivity on agricultural land through the use of more advanced and efficient technologies, which “raises” yields and reduce post-harvest losses.¹²⁷ Increased productivity may also accompany knowledge spillover to local farmers, more efficient use of existing resources through investment in irrigation schemes, and improvement of marginal land through “melioration measures.”¹²⁸ Some additional positive impacts include market access spillover to local farmers, human capital spillover, increased consumption, and improved infrastructure such as road building and investment in transportation and communication.¹²⁹ Furthermore, increased commodity production for export “generates foreign currencies and additional taxes and may expand the ability of national governments to invest in projects that improve living conditions.”¹³⁰ The FAO also acknowledges potential benefits of FDI in land, including technology transfer to local farmers, reduced unemployment, and more food supplies for both the region and for export.¹³¹

An FAO survey of case studies on FDI in African agriculture provides empirical evidence of positive impacts. The FAO survey reported significant increases in employment in Sudan, Uganda, Ghana, Morocco, and Mali as a result of FDI in land, generating both direct and indirect jobs.¹³² Some case studies demonstrated a positive relationship between FDI and productivity, which resulted in higher and more diversified output and lower prices for the domestic population.¹³³ The survey also found evidence of positive spillover effects, resulting in more efficient marketing, the adoption of technical and organizational knowledge, significant technology transfers, new infrastructure in rural areas, and better access to credit facilities.¹³⁴ Regarding environmental impacts, the survey notes negative impacts on

php?option=com_docman&task=doc_download&gid=1305&Itemid=510 (last visited Dec. 19, 2011).

¹²⁷ Matthias Görgen et al., *Foreign Direct Investment (FDI) in Land in Developing Countries* 21 (Division 45 - Agriculture, fisheries and food, Deutsche Gesellschaft für Technische Zusammenarbeit) (Dec. 2009) [hereinafter *GTZ Study*].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ FAO POLICY BRIEF, *supra* note 120.

¹³² Gerlach & Liu, *supra* note 69, at 9.

¹³³ *Id.* at 10.

¹³⁴ *Id.* at 10-12.

forests and biodiversity, but also notes the introduction of greener production techniques by MNCs.¹³⁵

(c) *Relation to Human Rights*

The human right most apparently impacted by FDI in land is the right to food. Article 11 of the International Covenant on Economic, Social and Cultural Rights establishes as a part of the right to an adequate standard of living the right to adequate food and the right of “everyone to be free from hunger.”¹³⁶ Article 11 calls upon states parties to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge” and to “achieve the most efficient development and utilization of natural resources.”¹³⁷ Therefore, FDI in land by MNCs brings not only more efficient and productive agricultural use to host lands, but also addresses the broader concerns of world hunger and the right to food. As the FAO reports: “In order to halve the world’s hungry by 2015, as targeted by the 1996 World Food Summit[] . . . at least US\$ 30 billion of additional funds are required annually.”¹³⁸ The FAO regrets that “[t]he gravity of the current food crisis is the result of 20 years of under-investment in agriculture and neglect of the sector”¹³⁹ and notes that official development assistance in agriculture is trending downward and “offers no real alternative.”¹⁴⁰ MNCs possess the resources and efficiency that governments lack to make a serious impact on hunger. Consider Wal-Mart (a frequent target of human rights critics), which announced in 2011 its plan to open 275 to 300 stores serving “food deserts” between now and 2016.¹⁴¹ Like the hundreds of existing Wal-Mart stores located in food deserts, these new stores will provide healthy and affordable food for over one million food-desert in-

¹³⁵ *Id.* at 13.

¹³⁶ ICESCR, *supra* note 8, at art. 11.

¹³⁷ *Id.*

¹³⁸ FAO POLICY BRIEF, *supra* note 120.

¹³⁹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, WORLD SUMMIT ON FOOD SECURITY (2009), <http://www.fao.org/wsfs/world-summit/en/> (last visited Dec. 19, 2011).

¹⁴⁰ FAO POLICY BRIEF, *supra* note 120; *see also* Rome Declaration on World Food Security and the World Food Summit Plan of Action, Commitment Six (49), 13-17 November 1996, <http://www.fao.org/docrep/003/w3613e/w3613e00.htm> (last visited Dec. 19, 2011) ((arguing “Foreign Direct Investment (FDI) and other private financial flows have increased considerably recently and provide an important source of external resources. Official Development Assistance (ODA) has exhibited a decline in recent years.”).

¹⁴¹ Press Release, Walmart to Open up to 300 Stores Serving USDA Food Deserts by 2016; More than 40,000 Associates Will Work in These Stores, (July 20, 2011), <http://walmartstores.com/pressroom/news/10635.aspx>.

habitants.¹⁴² The activity of MNCs in land investment will therefore be critical to upholding the universal right to food and meeting the goals of the World Food Summit.

FDI in land also has potential social impacts, including improved living conditions¹⁴³ and improved living infrastructures “. . . by establishing [for example] schools or health care organizations.”¹⁴⁴ Empirical studies support this conclusion. The FAO survey of African agriculture reported that MNCs in Uganda contributed to the construction of schools, HIV prevention, and counseling services.¹⁴⁵

Considering the crucial role of FDI in land and its potential to bring economic, social and environmental benefits to host regions, it is clear that practical research and application can help governments of developing countries develop the best legal framework to ensure that FDI in land has a positive effect on human rights conditions.

C. Civil and Political Rights: “Race to the Bottom” Versus Using Human Rights to Attract FDI

1. Nexus of FDI and Civil and Political Rights

Recent literature and empirical evidence demonstrate that FDI has a positive impact on civil and political rights. There remains, however, a discrepancy between empirical evidence and the sentiments of human rights advocates. The popular view is that countries trying to attract FDI are in a race to the bottom with civil and political rights to appease MNCs, who prefer “repressive states capable of crushing efforts by labor to secure better wages or working conditions.”¹⁴⁶ Yet several studies have found a positive relationship between “the extent to which a country honors civil liberties . . . and the amount of foreign investment that the country receives.”¹⁴⁷

¹⁴² *Id.*

¹⁴³ See ICESCR, *supra* note 8, at art. 11 (discussing the right to “an adequate standard of living”).

¹⁴⁴ See *id.* arts. 12, 13 (listing rights to health and education).

¹⁴⁵ Gerlach & Liu, *supra* note 69, at 16.

¹⁴⁶ See Law, *supra* note 21, at 1313.

¹⁴⁷ See *id.* at 1314; see MEYER, *supra* note 22, at 103-08, 136 (noting that “[f]oreign investment is positively associated with both civil liberties and political freedoms”); see also David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the “Conventional Wisdom”* (Int’l Inst. for Labour Stud., Discussion Paper DP/130/2001, 2001), available at <http://ilo.org/public/english/bureau/inst/publications/discussion/dp13001.pdf> (last visited Dec. 19, 2011) (finding that “no solid evidence is found in support of the ‘conventional wisdom,’ with all evidence of statistical significance pointing in the opposite direction.”).

2. Obtaining Human Capital

This positive relationship is explained by the practical implications of securing fundamental human rights for inward FDI. As discussed above, human capital spillover is a useful and necessary means of spreading the use of more advanced and efficient technologies. It is the gateway to newer technology and innovation. Repressive governments in developing countries realize they lack the absorptive capacity required for the adoption of new technologies. They are therefore drawn to the logical conclusion that, to attract right human capital and the inward investments they desire, they must guarantee fundamental human rights.¹⁴⁸

Law notes that Silicon Valley, “the high-tech envy of the world,” has profited significantly from talented imported human capital: “[E]ntrepreneurs of Chinese and Indian origins have founded over thirty percent of its technology firms over the last quarter-century.”¹⁴⁹ Naturally, skilled workers from developed countries that uphold basic civil and political rights are more inclined to do business in a foreign country with adequate human rights guarantees.¹⁵⁰ In fact, skilled workers require certain rights as a prerequisite to conducting business. As Levy points out, “Given the requirements of modern broad-based international commerce, successful economic engagement requires a country to broaden the ability of its citizens to communicate, allow the development of a potential leadership class, and expand the rule of law.”¹⁵¹ As a result, countries competing for FDI are engaged in what Law describes as a “race to the top” in terms of securing those rights that skilled workers from developed countries expect and value.¹⁵² Governments do not need to be composed of altruistic, selfless leaders to realize the importance of human rights; they should find in the cost-benefit analysis that guaranteeing fundamental human rights is economically advantageous.¹⁵³

¹⁴⁸ See Law, *supra* note 21, at 1307-08.

¹⁴⁹ *Id.* at 1327.

¹⁵⁰ *Id.* at 1330-41.

¹⁵¹ Philip I. Levy, *Economic Integration and Incipient Democracy* (Am. Enterprise Inst. for Pub. Pol’y Res, Working Paper No. 142, Mar. 26, 2008), available at http://www.aei.org/files/2008/03/26/20080327_IncipientDemocracy20Mar08.pdf (last visited Dec. 19, 2011).

¹⁵² Law, *supra* note 21, at 1316.

¹⁵³ *Id.* at 1331-33 (explaining the economic incentive for governments to guarantee human rights).

3. Rights Affected

Freedom House¹⁵⁴ evaluates the civil and political rights of countries by looking at freedom of expression or belief,¹⁵⁵ associational and organizational rights,¹⁵⁶ rule of law,¹⁵⁷ individual rights, electoral process,¹⁵⁸ political participation,¹⁵⁹ and functioning of government. Law finds a positive correlation between Freedom House's scores and globalization.¹⁶⁰ A study sponsored by the International Labour Organization found a positive relationship between "core labour standards" and FDI.¹⁶¹ These labor standards included fundamental workers' rights such as freedom of association, the right to collective bargaining, elimination of forced or compulsory labor,¹⁶² abolition of child labor,¹⁶³ and the elimination of discrimination.¹⁶⁴

D. *The Development and Use of an Objective Analytical Framework*

Once FDI-influenced human rights conditions are identified, they should be objectively measured and analyzed in a meaningful framework.¹⁶⁵ As Malhotra and Fasel note, "there is a near absence of a conceptual framework in these initiatives that could be readily considered as a starting point for undertaking a meaningful work on human rights indicators."¹⁶⁶ This article recommends a framework

¹⁵⁴ Freedom House, *Methodology* (2012), www.freedomhouse.org/report/freedom-world-2012/methodology (last visited Dec. 19, 2011).

¹⁵⁵ See ICCPR, *supra* note 9, at arts. 18-19.

¹⁵⁶ See *id.* art. 22.

¹⁵⁷ See Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted Oct. 24, 1970, preamble, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc.A/8028 (1971) (recognizing "the paramount importance of the Charter of the United Nations in the promotion of the rule of law").

¹⁵⁸ See ICCPR, *supra* note 9, at art. 25(b).

¹⁵⁹ See *id.* arts. 25(a), 25(c).

¹⁶⁰ Law, *supra* note 21, at 1298-1307.

¹⁶¹ Kucera, *supra* note 147, at 2.

¹⁶² See ICCPR, *supra* note 9, at art. 8.

¹⁶³ See ICESCR, *supra* note 8, at art. 10(3).

¹⁶⁴ See ICCPR, *supra* note 9, at art. 26.

¹⁶⁵ See generally LANDMAN & CARVALHO, *supra* note 34.

¹⁶⁶ RAJEEV MALHOTRA & NICHOLAS FASEL, QUANTITATIVE HUMAN RIGHTS INDICATORS: A SURVEY OF MAJOR INITIATIVES 24 (Mar. 3, 2005), http://hrbaportal.org/wp-content/files/1237942217malhotra_and_fasel.pdf (last visited Dec. 19, 2011) [hereinafter Malhotra & Fasel]; see also BARD ANDERS ANDREASSEN & HANS-OTTO SANO, WHAT'S THE GOAL? WHAT'S THE PURPOSE? OBSERVATIONS ON HUMAN RIGHTS IMPACT ASSESSMENT, NORWEGIAN CENTRE FOR HUMAN RIGHTS 2 (2004), <http://www.fao.org/righttofood/kc/downloads/vl/docs/214054.pdf> (last visited Dec. 19, 2011)

that measures the influence of FDI on the human rights conditions discussed above.

Beginning with the premise that human rights reform is a process and that processes have measurable input and output,¹⁶⁷ the first step of developing a framework is to identify appropriate input and output indicators that measure the impacts of FDI on human rights conditions.¹⁶⁸ In such a framework, input indicators would measure aspects of FDI, and output (or outcome or impact) indicators would measure FDI-influenced human rights conditions.

1. Input Indicators: Measuring FDI

Measuring FDI involves measuring two, interrelated indicators, the business atmosphere and the foreign investment itself.¹⁶⁹ If a country changes its employment, property, immigration, or environmental laws, for example, to attract or accommodate FDI, such changes are indicators that should be measured,¹⁷⁰ since they can directly affect human rights, either positively or negatively. The U.S. Department of State¹⁷¹ and the United Nations¹⁷² both provide measurements of the openness of countries to foreign investment. In addition, The Heritage Foundation is a private think tank that measures the “economic freedom” of 184 countries with its “Index of Economic

(advocating the development of “better methods and analytical tools for making inferences about the impact of human rights projects than has been done so far.”) [hereinafter Andreassen & Sano].

¹⁶⁷ See ILAN KAPOOR, INDICATORS FOR PROGRAMMING IN HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT: A PRELIMINARY STUDY 5 (1996), available at <http://brown.school.wustl.edu/sites/DevPractice/Human%20Rights%20Reports/Programming%20in%20Human%20Rights%20and%20Democratic%20Development.pdf> (last visited Dec. 19, 2011) [hereinafter Kapoor].

¹⁶⁸ See G.T. Doran, *There's a S.M.A.R.T. way to write management's goals and objectives*, 70 MGMT. REV. 35-36 (1981) (stating that indicators should be specific, measurable, acceptable, relevant, and time-specific (SMART)).

¹⁶⁹ See OECD, MORE OPEN ECONOMIES RECEIVE MORE FDI, http://www.oecd.org/document/22/0,3746,en_2649_34529562_47500566_1_1_1_34529562,00.html (last visited Dec. 19, 2011).

¹⁷⁰ See U.N. Conference on Trade and Development, July 2006, *Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies*, 17 (2006), available at http://www.unctad.org/en/docs/iteiia20061_en.pdf (last visited Dec. 19, 2011) (“A strong negative correlation is clear between restriction measures and FDI activity.”).

¹⁷¹ U.S. DEPT. OF STATE, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, INVESTMENT CLIMATE STATEMENTS 2011 (2011), <http://www.state.gov/e/eb/rls/othr/ics/2011/index.htm>.

¹⁷² The World Bank, *Doing Business: Economy Rankings* (2011), <http://www.doingbusiness.org/rankings>.

Freedom.”¹⁷³ The Foundation defines economic freedom as “the fundamental right of every human to . . . work, produce, consume, and invest in any way they please, with that freedom both protected by the state and unconstrained by the state.”¹⁷⁴ And the responsibility of government is to “allow labor, capital and goods to move freely, and refrain from coercion or constraint of liberty beyond the extent necessary to protect and maintain liberty itself.”¹⁷⁵ Specific or “component” freedoms measured concern business, trade, fiscal and monetary, government spending, investment, finance, property, corruption, and labor. Relevant indicators of FDI itself include amount, type and source. Such information is readily available from such sources as the OECD¹⁷⁶ and UNCTAD.¹⁷⁷

2. Output Indicators: Measuring FDI-influenced Human Rights Conditions

Human rights trends are difficult to measure, and achieving objectivity is especially challenging when FDI-influenced measurements are qualitative¹⁷⁸ and therefore vulnerable to subjectivity and political biases. A Carr Center for Human Rights Policy Project Report notes, regarding human rights research, that “[w]e often approach qualitative research with an anecdotal attitude that lacks methodological rigor; and generally speaking, our track record with quantitative research is even worse.”¹⁷⁹

¹⁷³ THE HERITAGE FOUNDATION, THE COUNTRIES, <http://www.heritage.org/index/book/chapter-6> (last visited Feb. 20, 2012).

¹⁷⁴ THE HERITAGE FOUNDATION, FREQUENTLY ASKED QUESTIONS, <http://www.heritage.org/index/faq> (last visited Feb. 20, 2012).

¹⁷⁵ *Id.*

¹⁷⁶ See OECD, *About the Organisation for Economic Cooperation and Development*, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 20, 2012); OECD Directorate for Financial and Enterprise Affairs, *Foreign Direct Investment (FDI) Statistics - OECD Data, Analysis and Forecasts* (Oct. 26, 2011), http://www.oecd.org/document/8/0,3746,en_2649_33763_40930184_1_1_1_1,00.html; Golub, *supra* note 78.

¹⁷⁷ UNCTAD, *UNCTADStat*, <http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx> (last visited Dec. 19, 2011); UNCTAD, *World Investment Report* (July 26, 2011), <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf> (last visited Feb. 20, 2012).

¹⁷⁸ See Kapoor, *supra* note 167, at 7 (“Qualitative indicators aim at capturing people’s socio-economic and political beliefs, opinions, perceptions, narratives.”).

¹⁷⁹ CARR CENTER FOR HUMAN RIGHTS, MEASUREMENT & HUMAN RIGHTS: TRACKING PROGRESS, ASSESSING IMPACT 4 (2005), available at <http://www.hks.harvard.edu/cchrp/mhr/publications/documents/Measurement%20and%20Human%20Rights%20Tracking%20Progress,%20Assessing%20Impact%20Report%202005.pdf> (last visited Jan 20, 2012); see also Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 HUM. RTS. Q. 906 (2004).

Objective analyses should rely, as much as possible, on quantitative indicators of human rights conditions such as socio-economic information related to standards of living and other facets of life.¹⁸⁰ The U.N. Statistical Office is one source of such information.¹⁸¹ The U.N. Statistical Office is bound to impartiality according to principles set forth in 1994 by the U.N. Statistical Commission.¹⁸² Sources of potentially FDI-influenced quantitative information include the following:

Development

U.N. Development Programme Human Development Reports¹⁸³

World Bank World Development Indicators¹⁸⁴

Education

OECD Education and training database¹⁸⁵

World Bank Education Statistics (EdStats)¹⁸⁶

Food and Agriculture

Food and Agriculture Organization of the United Nations (FAOSTAT)¹⁸⁷

OECD Agricultural Policy Indicators¹⁸⁸

¹⁸⁰ Malhotra & Fasel, *supra* note 166, at 9.

¹⁸¹ See UNITED NATIONS HANDBOOK OF STATISTICAL ORGANIZATION, OPERATION AND ORGANIZATION OF A STATISTICAL AGENCY, U.N. DOC. ST/ESA/STAT/SER.F/88 (2003), available at <http://unstats.un.org/unsd/dnss/hb/default.aspx> (last visited Dec. 19, 2011); UNITED NATIONS HANDBOOK ON SOCIAL INDICATORS, DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS, at 15-17, U.N. DOC. ST/ESA/STAT/SER.F/49 (1980), available at http://unstats.un.org/unsd/publication/SeriesF/SeriesF_49e.pdf (last visited Dec. 19, 2011).

¹⁸² Malhotra & Fasel, *supra* note 166, at Annex 3.

¹⁸³ U.N. Development Programme Human Development Reports, *International Human Development Indicators*, <http://hdr.undp.org/en/statistics/> (last visited Dec. 19, 2011).

¹⁸⁴ The World Bank, *World Development Indicators 2011*, <http://data.worldbank.org/data-catalog/world-development-indicators/wdi-2011> (last visited Dec. 19, 2011).

¹⁸⁵ OECD, *Education and Training*, http://www.oecd.org/topicstatsportal/0,2647,en_2825_495609_1_1_1_1_1,00.html (last visited Dec. 19, 2011).

¹⁸⁶ The World Bank, *Edstats - Education Statistics*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTEDUCATION/EXTDATASTATISTICS/EXTEDSTATS/0,,menuPK:3232818~pagePK:64168427~piPK:64168435~theSitePK:3232764,00.html> (last visited Dec. 19, 2011).

¹⁸⁷ Food and Agriculture Organization of the United Nations, *FAOSTAT*, <http://faostat.fao.org/default.aspx> (last visited Dec. 19, 2011).

¹⁸⁸ OECD, *Agriculture and Fisheries, Agricultural Policy Indicators*, http://www.oecd.org/topicstatsportal/0,3398,en_2825_494504_1_1_1_1_1,00.html#494525 (last visited Dec. 19, 2011).

Health

OECD Health Database¹⁸⁹

Labor

Human Rights First, Measurement Units for
Workers Rights (MUWR)¹⁹⁰

International Labour Organisation (ILO)

Bureau of statistics databases¹⁹¹LABORSTA internet¹⁹²ILO Statistical Databases¹⁹³

Living Standards

World Bank Living Standards Measurement Study
(LSMS)¹⁹⁴

Prominent sources of qualitative measurements of human rights conditions include Human Rights Watch¹⁹⁵ and The Heritage Foundation.¹⁹⁶ Human Rights Watch “conducts regular, systematic investigations of human rights abuses . . . in more than 90 countries.”¹⁹⁷ In closed regions, researchers have to overcome practical challenges, “including identifying rights violations, gaining a thorough understanding of the local context, identifying victims and witnesses, and identifying suitable recommendations and advocacy opportunities.”¹⁹⁸ The gathered information is then assembled and published in a formal report.¹⁹⁹ The reports are organized by country and by issues.²⁰⁰ Listed topics that most directly relate to potential impacts of FDI in-

¹⁸⁹ OECD, *Health Data 2011*, <http://www.oecd.org/health/healthdata> (last visited Dec. 19, 2011).

¹⁹⁰ Human Rights First, www.humanrightsfirst.org (last visited Apr. 16, 2012).

¹⁹¹ International Labour Organization [ILO], *Department of Statistics*, <http://www.ilo.org/public/english/bureau/stat/index.htm> (last visited Dec. 19, 2011).

¹⁹² ILO, *LABORSTA Internet*, <http://laborsta.ilo.org/> (last visited Dec. 19, 2011).

¹⁹³ ILO, *Statistics and Databases*, <http://www.ilo.org/global/statistics-and-databases/lang-en/index.htm> (last visited Dec. 19, 2011).

¹⁹⁴ The World Bank, *Living Standards Measurement Study*, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTLSMS/0,,contentMDK:21610833~pagePK:64168427~piPK:64168435~theSitePK:3358997,00.html> (last visited Dec. 19, 2011).

¹⁹⁵ HUMAN RIGHTS WATCH, WHO WE ARE, <http://www.hrw.org/node/75136> (last visited Dec. 19, 2011).

¹⁹⁶ THE HERITAGE FOUND, INDEX OF ECONOMIC FREEDOM, <http://www.heritage.org/Index/> (last visited Dec. 19, 2011).

¹⁹⁷ HUMAN RIGHTS WATCH, OUR RESEARCH METHODOLOGY, <http://www.hrw.org/node/75141> (last visited Dec. 19, 2011).

¹⁹⁸ *Id.*

¹⁹⁹ See HUMAN RIGHTS WATCH, PUBLICATIONS, <http://www.hrw.org/publications/reports> (last visited Dec. 19, 2011).

²⁰⁰ *Id.*

clude Education, Environment, ESC Rights Health, Labor, Child Labor, Migrant Workers, and Forced Labor & Trafficking.²⁰¹ Other sources of qualitative measurements of FDI-influenced human rights conditions include governmental, non-governmental and inter-governmental sources such as Amnesty International,²⁰² Human Rights First,²⁰³ and the U.N. human rights program.²⁰⁴

3. Analytical Framework

Below is a tabular representation of indicators that ought to be considered in the development of an analytical framework. Once measurable input and output indicators have been identified and the data has been collected, the next, and perhaps most difficult, step is to analyze the information in an objective and meaningful manner. Apart from the normal risk that information will be used selectively to satisfy a political or other agenda, the most significant obstacle to honest, unbiased analysis is the fallacy of equating statistical correlation with causation.²⁰⁵ Andreassen and Sano call this the “problem of attribution.”²⁰⁶ A change in human rights conditions can stem from a number of factors other than FDI, including the work of human rights organizations, lobbying, regime changes, and so on.²⁰⁷ Also, short-term effects may differ from long-term effects.

²⁰¹ *Id.*

²⁰² AMNESTY INT’L, ANNUAL REPORT 2011, <http://www.amnesty.org/en/annual-report/2011> (last visited Dec. 19, 2011).

²⁰³ HUMAN RIGHTS FIRST, 2010 ANNUAL REPORT (2011), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-2010-Annual-Report.pdf> (last visited Dec. 19, 2011).

²⁰⁴ Office of the High Commissioner for Human Rights [OCHR], *OHCHR Report 2010*, *available at* http://www2.ohchr.org/english/ohchrreport2010/web_version/media/pdf/0_Whole_Report.pdf (last visited Dec. 19, 2011).

²⁰⁵ *See* Andreassen & Sano, *supra* note 166, at 12.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

HUMAN RIGHT	INPUT INDICATOR (FDI +)	OUTPUT INDICATOR	NEGATIVE IMPACT	POSITIVE IMPACT
ECONOMIC FREEDOMS				
Economic freedoms		Market access; host nation laws; fees and taxes	Lower FDI	Increased FDI
ECONOMIC, SOCIAL AND CULTURAL RIGHTS				
Environment: Health, Life & Safety (<i>see also</i> consumer welfare)	Technology transfers; R&D; construction of health care facilities	Pollution indices; host nation laws; sources of energy; forest volume; biodiversity; mortality/illness rates	Pollution; damage to environment; unsafe products and technology	Transfer of cleaner environment (“green growth”); safer products and technologies
Standard of Living (consumer welfare)	Infrastructure changes: transportation & communications	Consumer price index; consumption; access to public utilities; product liability	Dangerous products and technologies	Cheaper, higher quality and/or safer products; <i>see also</i> Food and Agriculture
Economy		GNP; balance of payments		Economic growth; improved balance of payments
Labor & Employment	Technical and vocational training	Unemployment index; average income; distribution of income; host nation laws	“Crowding out”; exploitation of local labor	“Knowledge spillover”; Increased employment; increased skills; increased pay
Education	Construction of schools; <i>see also</i> Labor and Employment	School attendance & graduation rates; test scores; <i>see also</i> Labor and Employment		<i>See</i> Labor and Employment
Local Business	Technology transfers	Local business start-ups and closures; product imitation; productivity; profits; exports; unemployment index	“Crowding out”; anti-competition	“Market access (know-how) spillover”; increased productivity and efficiencies; increased employment
Food & Agriculture	Technology transfers; land ownership	Yields; losses; productivity; food exports; food prices; demographics; <i>see</i> Labor & Employment	Displacement of peoples (“Crowding out”)	“Knowledge spillover”; increased yields and efficiencies; increased consumption; cheaper and greater variety of foods
CIVIL AND POLITICAL RIGHTS				
Basic Freedoms	All of the above	Host nation laws; workers’ rights; child labor; demographics	MNC support of oppressive regimes; displacement of peoples	Greater freedoms

III. CONCLUSION AND RECOMMENDATIONS

FDI has demonstrated a potential to be a positive force for human rights. It can result in transfers of human capital and more efficient and greener technologies, reduced unemployment and poverty, improvements in agriculture, and other things that positively impact human rights conditions. Human rights advocates should attempt to harness FDI to improve human rights conditions consistently.

An OECD publication notes that “the main policy conclusion that can be drawn . . . is that the economic benefits of [FDI] are real, but they do not accrue automatically.”²⁰⁸ With this in mind, Kumar puts forth recommendations for developing countries such as “promoting national enterprises, assisting them in the process of building technological capability by costing linkages with R&D institutions and by giving protection from the threat of take-over, especially in the strategic sectors.”²⁰⁹ The GTZ study states, “foreign investors and the target country can and should contribute to minimise the negative and increase the positive impacts.”²¹⁰ Similarly, “win-win situations should be possible if the right business model is in place.”²¹¹

Ironically, demonization of FDI and promotion of solely hard-law approaches subvert human rights goals. An international legal framework that subjects all MNCs to a universal human rights code will require the universal support of governments and vast, intricate resources to enforce such a framework. The existing state-centered framework in which states are expected to monitor MNCs in their territory with due diligence is an increasingly unfeasible and unsatisfactory way to adequately hold MNCs accountable for failing to respect international human rights. Governments hesitate to take actions that may impede FDI.

Consider, for example, the potential effect of relying on the Alien Tort Statute (“ATS”)²¹² as an enforcement mechanism. *The*

²⁰⁸ OECD, *FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS* 25 (2002).

²⁰⁹ Nagesh Kumar, *Foreign direct investments and technology transfers in an era of globalization and prospects for developing countries: a policy postscript*, in NAGESH KUMAR, *GLOBALIZATION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFERS* 209 (1998).

²¹⁰ *GTZ Study*, *supra* note 127, at 52.

²¹¹ *Id.*

²¹² 28 U.S.C. § 1350 (2006). *See generally* Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 519, 530 (2010); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635 (2004); Mark W. Wilson, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of Jus Cogens and Exhaustion*, 39 ENVTL. L. 451 (2009).

Awakening Monster,²¹³ a study which measures the potential economic costs of the ATS, found that “[a]ny MNC that operates a subsidiary in a target country necessarily has contacts with the government” and that “[t]hese contacts can easily turn the firm into an ATS defendant.”²¹⁴ The study reasons that since MNCs doing business in countries with sub-par human rights standards could give rise to corporate liability under the ATS, the MNCs will shy from doing business in any of those countries, thereby stifling FDI.²¹⁵ The 2003 study calculated that the ATS put \$55 billion of U.S. FDI stocks in target countries as well as \$270 billion of world FDI at risk.²¹⁶ Also, foreign-based MNCs with assets in the United States are vulnerable to ATS litigation and therefore compelled to divest their operations in the United States.²¹⁷ This is troubling from a human rights standpoint because, as the study suggests, it has the counterproductive effect of causing foreign-based MNCs to divest in their U.S. operations instead of investing in operations in countries with sub-par human rights standards.²¹⁸ As the U.S. Chamber of Commerce noted, ATS suits could deter outbound U.S. FDI headed “where it is needed most.”²¹⁹

Soft-law approaches to FDI do not suffer from the same counter-productivity of hard-law approaches. Corporate accountability instruments such as the 2011 Guiding Principles, however, give inadequate attention to the positive aspects of corporate influence on human rights. The Guiding Principles suffer from functional fixedness, viewing states solely as preventative agents in the protection against human rights abuses. Recommendations to states on the subject of MNCs and human rights should consider that MNCs present an opportunity – not just a threat – for the improvement of human rights conditions. For example, the Guiding Principles declare that businesses should “maintain adequate domestic policy space to meet their human rights obligations when pursuing . . . investment treaties,” yet offer no policy recommendations regarding the use of investment treaties to improve socio-economic rights. The document merely notes that

²¹³ GARY CLYDE HUFBAUER & NICHOLAS MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003).

²¹⁴ *Id.* at 17.

²¹⁵ *Id.* at 16-17; *see also* Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Appellee at 23, *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (arguing that ATS corporate lawsuits “deter U.S. business activity abroad . . . and chill foreign investment”) [hereinafter U.S. Chamber Brief].

²¹⁶ HUFBAUER & MITROKOSTAS, *supra* note 213, at 38-39.

²¹⁷ *Id.* at 41.

²¹⁸ *Id.*

²¹⁹ U.S. Chamber Brief, *supra* note 215, at 25.

investment treaties “create economic opportunities for States” and then advises caution in proceeding with them.

Yet, there is substantial evidence supporting the idea that states’ human rights practices are more effectively regulated through preferential trade agreements, which, unlike international human rights treaties, “supply hard standards that tie material benefits of integration to compliance with human rights principles” and are better at “changing repressive behaviors.”²²⁰ Similarly, bilateral investment treaties, which typically contain provisions on “standards of treatment, expropriation, losses from armed conflict or internal disorder, transfers and convertibility of payments, [and] settlement of disputes,”²²¹ may provide governments attracting FDI opportunities to direct corporate activity in a way that will improve human rights conditions.

Indeed, with globalization moving governments toward privatization and market liberalization, the incentive-based approach to human rights is the way of the future. As one author proposes, “advocates should begin to supplement their ongoing efforts to promote and protect human rights by starting to use arguments that take account of the instrumental or market value of human rights, rather than relying on arguments that are focused exclusively on the intrinsic value of human rights.”²²² Realistically, the risk of being held accountable by regional or international treaty-based human rights bodies may weigh significantly less than the opportunity cost of forgoing inward investment that increases technological and economic development. If governments can avoid this opportunity cost through the fulfillment of human rights, they will benefit. It is indicative of the distressing question facing human rights advocates of whether the growth of multinational business activity renders the traditional international human rights framework aloof and obsolete.

Responsible efforts to guard against the human rights abuses of MNCs therefore should include objective consideration of the potential positive impacts of FDI on human rights so that they can be operationalized. The formulation of empirically based models can be used to advise governments – especially those of developing countries – on how to turn FDI into positive forces for human rights.

In an age of increasing power and speed of information proliferation, as well as increasing concern over climate change and environ-

²²⁰ Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 593 (2005).

²²¹ Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Least-Developed Countries*, 10 ANN. SURV. INT’L & COMP. L. 215, 226 (2004).

²²² Mark Freeman, *Doing Well by Doing Good: Linking Human Rights with Corporate Self-Interest*, 6 INT’L BUS. L. J. 741, 742 (2001).

mental impacts in general, MNCs find it increasingly advantageous to convey an image of environmental friendliness and prevent images of environmental carelessness and disrespect. Shamir's main contention is that MNCs emphasize social responsibility and corporate citizenship through extensive campaigns to combat the urge to hold MNCs accountable under international human rights law.²²³ Whether strategic, altruistic, or both, MNCs are "becoming more proactive rather than defensive" and "instead of simply complying with legislation, they move 'beyond compliance' and become more a 'policy-maker, not a policy-taker.'"²²⁴ With a better understanding of how FDI can benefit human rights conditions, human rights advocates can be more effective in implementing the ideals that are set forth in soft-law documents and in campaigns of corporate social responsibility.

²²³ Shamir, *supra* note 212, at 659.

²²⁴ UTING, *supra* note 77, at 3.

LEGAL SERVICES IN INDIA: IS THERE AN OBLIGATION UNDER THE GATS OR ARE THERE POLICY REASONS FOR INDIA TO OPEN ITS LEGAL SERVICES MARKET TO FOREIGN LEGAL CONSULTANTS?

Arno L. Eisen

I. INTRODUCTION

The globalization of trade and business has led to a globalization of legal services¹ and a growing demand for legal advice that transcends the borders of one jurisdiction. Clients often prefer to have one legal adviser rather than several in different jurisdictions. This has led to the development of international law firms with offices around the world that provide their clients with legal services for all their international ventures. In this context, foreign legal consultants (FLCs) have become a common feature of the legal profession. FLCs are foreign lawyers supplying legal services abroad by advising on international law, their home country's laws, or on the laws of a third country where they are qualified.²

Some jurisdictions, such as India, restrict access for foreign lawyers and law firms to their legal services market. India is particularly interesting because it is one of the world's strongest developing economies. India has become a major global force, especially in the services sector and continues to attract large amounts of foreign direct and indirect investment. In 2004 and 2005, India's services exports reached \$39.6 billion, and their services imports reached \$40.9 billion, making the country the sixteenth largest services importer and exporter in the world during that period.³

Against this background it is interesting to examine the reasons why India will not allow foreign law firms to provide legal services within the country. Further, it is necessary to examine if India has an obligation to open its legal services market as a founding member of the World Trade Organization (WTO) under the General Agreement on Trade in Services (GATS). In addition, this paper will explore

¹ Krishnendu Sen & Ritankar Sahu, *Need for FLCs in India with Respect to Honoring GATS*, 6 J. INT'L TRADE L. & POL'Y 25, 27 (2007).

² GOV'T OF INDIA, DEP'T OF COMMERCE, TRADE IN LEGAL SERVICES: A CONSULTATION PAPER ON LEGAL SERVICES UNDER GATS (2006), <http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf> [hereinafter GOV'T OF INDIA]; Sen & Sahu, *supra* note 1, at 27.

³ GOV'T OF INDIA, *supra* note 2, at III.2.

whether policy arguments support this restriction or, rather, point in the opposite direction.

In Part II, this paper will examine the status quo of legal services regulation with regard to foreign law firms in India. Part III will address whether there is an obligation under GATS for India to open its legal service market to foreigners. Part IV will examine the policy arguments and whether they argue for or against opening the Indian legal services market to foreigners. Part V will present conclusions, a proposal for the liberalization of India's legal services market, and an outlook.

The current state of this issue is highlighted by a recent case decided by the Division Bench of the Mumbai High Court; with its decision, the court effectively denied foreign law firms entry into India.⁴ Furthermore, a new case has been filed with the Madras High Court by the Lawyers' Collective and was heard on April 8, 2010. The case alleged violations of the Advocates Act of 1961 and Indian Immigration Law by several foreign law firms and a legal process outsourcing firm (LPO) that have a presence in India in the form of a back office service provider or alliance agreement.⁵ The case broadened as more lawyers' associations joined it.⁶ This, along with an obvious interest on the side of the Indian government to move the matter to the Supreme Court,⁷ demonstrated this case was of high interest to both the Indian and the international legal communities. The international law firms are lobbying actively to change the domestic situation, and the matter was reportedly raised by British Prime Minister David Cameron with Indian law minister Veerapa Moily during a visit to India with Stuart Popham, a partner with the London-based global law firm Clifford

⁴ *14-Year Epic Battle Draws to a Close as Bombay High Court Rules Against Liaison Offices for Foreign Firms*, BAR & BENCH (Dec. 16, 2009), <http://www.barandbench.com/index.php?page=brief&id=400&full=> [hereinafter BAR & BENCH].

⁵ *Writ Petition Filed Against 31 Foreign Law Firms and an LPO – Immigration Law Violations Also Alleged*, BAR & BENCH (Mar. 22, 2010), <http://www.barandbench.com/index.php?title=writ%20Petition%20filed%20against%2031%20foreign%20law%20firms%20and%20an%20LPO%20%E2%80%93%20Immigration%20law%20violations%20also%20alleged&page=brief&id=597&gn=0>.

⁶ *Foreign Law Firms Case Heats Up: Women Lawyers Association and TN Advocates Association Join; More Foreign Firms to be Added to the List*, BAR & BENCH (Apr. 16, 2010), <http://barandbench.com/brief/2/646/foreign-law-firms-case-heats-up-women-lawyers-association-and-tn-advocates-association-join-more-foreign-firms-to-be-added-to-the-list>.

⁷ Kian Ganz, *Madras Writ Petition v. Foreign Firms Will be Moved to Supreme Court for "final decision," Says Moily*, LEGALLYINDIA.COM (July 20, 2010), <http://www.legallyindia.com/201007201116/Law-firms/madras-writ-petition-v-foreign-firms-will-be-moved-to-supreme-court-for-qfinal-decisionq-says-moily>.

Chance.⁸ United Kingdom Secretary of State for Justice Kenneth Clarke raised the issue again during a visit to India in September 2011.⁹ After several postponements the case was scheduled to be heard by the Madras court on February 1, 2012.¹⁰

II. CURRENT ACCESS FOR FLCS TO THE INDIAN LEGAL SERVICES MARKET

The Indian legal services market is the second largest in the world with somewhere between 600,000 and over 800,000 practicing lawyers.¹¹ The legal profession in India is regulated by the Advocates Act of 1961 and the Bar Council of India Rules of 1975. Under these rules, legal services can only be provided by natural persons¹² who are on the rolls of the advocates in the states where the service is being provided. To be enrolled as an advocate, the candidate has to be a citizen of India or a country that allows Indian nationals to practice.¹³ As per reciprocity treatment, these individuals must hold a degree in law from an institution/university recognized by the Bar Council of India and must be at least twenty years old.¹⁴

In India, legal service providers may operate within the partnership context provided profits from legal work are shared with other licensed attorneys.¹⁵ Partnerships also include limited liability partnerships (hereinafter “LLP”) since the Limited Liability Partnership Act of 2008 was passed and subsequently took effect on March 31, 2009.¹⁶ The maximum number of partners for a partnership in India is fixed at twenty.¹⁷ Whether this also applies to new LLPs remains un-

⁸ *Madras High Court: Foreign Law Firms Get Time Till August 19 to File Objections; US Firms Choose Dua; Government Needs 8 Weeks*, BAR & BENCH (Aug. 5, 2010), <http://barandbench.com/brief/2/898/madras-high-court-foreign-law-firms-get-time-till-august-19-to-file-objections-us-firms-choose-dua-government-needs-8-weeks>.

⁹ Nikhil Kanekal, *Kenneth Clarke: UK Pushing for Indian Legal Sector Reform*, LIVEMINT.COM (Sept. 29, 2011), <http://www.livemint.com/2011/09/28221451/Kenneth-Clarke—UK-pushing-fo.html>.

¹⁰ Kian Ganz, *Corporate Law 2011: The Year That Was*, LIVEMINT.COM (Dec. 23, 2011), <http://www.livemint.com/2011/12/22214808/Corporate-Law-2011-The-year-t.html>.

¹¹ FALI S. NARIMAN, *INDIA’S LEGAL SYSTEM: CAN IT BE SAVED?* 117 (2006) (stating over 800,000); GOV’T OF INDIA, *supra* note 2, at IV.3 (stating 600,000).

¹² The Advocates Act, No. 25 of 1961, INDIA CODE (1961), §§ 24, 29, 33, *available at* <http://indiacode.nic.in/>.

¹³ *Id.* § 24(1)(a).

¹⁴ *Id.* § 24(1)(b)-(c).

¹⁵ The Bar Council of India Rules, Pt. VI, Ch. III (2).

¹⁶ The Limited Liability Partnership Act, No. 6 of 2008, INDIA CODE (2008).

¹⁷ The Companies Act, No. 1 of 1956, INDIA CODE (1956), § 11(2).

clear. Section 64(1) of the Limited Liability Partnership Act of 2008 requires the Indian Central Government to notify any application of the Companies Act of 1956 to all or specific LLPs; however, section 71 of the Limited Liability Partnership Act of 2008 declares that the Act is supplementary and not derogative in relation to any existing acts.¹⁸ The Mumbai High Court held in its decision in *Lawyers' Collective* that the words "practicing the profession of law" in section 29 of the Advocates Act of 1961 include advisory legal services provided in non-litigation matters.¹⁹ Thereby, the court made clear that FLCs are barred even from doing transactional or other non-litigation work in India.²⁰

Hence, foreign lawyers or law firms effectively cannot establish themselves in India because they will not fulfill the requirements.²¹ This has been true since 1995 when the Mumbai High Court ended a brief window when the licensing of foreign law firms seemed possible in India.²² The firms White & Case, Chadbourne & Parke, and Ashurst had gained licenses from the Reserve Bank of India to open liaison offices during that period.²³ These firms were parties in the proceeding that ultimately ended in the final 2009 decision by the Mumbai High Court after the Supreme Court of India remanded the case back.²⁴ White & Case and Chadbourne & Parke closed their Indian operations after the ruling of the Mumbai High Court in 1995.²⁵ Ashurst closed its Delhi office after the recent ruling when its license expired on February 22, 2010.²⁶

Beyond these barriers, market access is further limited by the ban of advertisements for legal services under section 36 of the Bar Council of India Rules. Under the new case brought by the Lawyers' Collective, it is alleged that the claims of some law firms on their web-

¹⁸ The Limited Liability Partnership Act, *supra* note 16, at §§ 64(a), 71.

¹⁹ See Writ Petition No. 1526/1995 at ¶¶ 47, 49, *Lawyers Collective v. Bar Council of India* (Bombay H.C. 2009), available at <http://barandbench.com/userfiles/files/File/Lawyers%20Collective%20foreign%20firms%20Bbay%20HC.pdf> [hereinafter *Writ Petition No. 1526/1995*].

²⁰ See *id.*; BAR & BENCH, *supra* note 4.

²¹ See Sen & Sahu, *supra* note 1, at 27, 29.

²² Cf. Zach Lowe, *Still No Passage to India for Foreign Law Firms*, THE AM LAW DAILY (June 16, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/06/waiting-on-india.html>.

²³ *Id.*

²⁴ BAR & BENCH, *supra* note 4.

²⁵ Douglas Wong, *India's 'Not For Sale' Legal Market Draws U.S., U.K. Law Firms*, BLOOMBERG NEWS (June 16, 2009), <http://www.bloomberg.com/apps/news?pid=20601109&sid=AHz8zYy8.Vdg>.

²⁶ Kian Ganz, *Ashurst Shuts Down Indian Office; Not Unhappy*, LEGALLYINDIA.COM (Feb. 19, 2010, 04:13 AM), <http://www.legallyindia.com/20100218517/Law-firms/ashurst-shuts-down-indian-office-not-unhappy>.

sites to have an “India practice” amount to advertisement and, therefore, violate the Bar Council of India Rules.²⁷ The ban on advertising is even understood to encompass entries in directories.²⁸

The existing alliances, or “best friends agreements,” between leading Indian law firms and international law firms, which are sometimes referred to as joint ventures, are reported to be merely non-exclusive referral agreements.²⁹ Most of the Indian practice of international law firms, therefore, is performed offshore from Singapore, London, New York, Hong Kong, or elsewhere.³⁰

III. IS THERE AN OBLIGATION FOR INDIA TO OPEN ITS LEGAL SERVICES MARKETS TO FOREIGNERS?

As a WTO founding member, India is bound by the GATS. The GATS sets out several general obligations which could create an obligation for India to open its legal services market. The GATS applies to all trade in services, including legal services.³¹ The three major principles relevant to the situation at hand are most favored nation (MFN) treatment,³² market access,³³ and progressive liberalization.³⁴

1. Market Access under Article XVI of GATS

While market access is a general principle under GATS, Article XVI does not contain a general obligation to grant market access to nationals of other WTO members.³⁵ This is due to GATS’s development-friendly approach, which allows the WTO member to make specific commitments for the service sectors that it wants to submit to the GATS regime and to determine to what extent these service sectors are subject to Article XVI market access obligations.³⁶ Such a commit-

²⁷ BAR & BENCH, *supra* note 4.

²⁸ GOV’T OF INDIA, *supra* note 2, at IV.4.

²⁹ Cf. Jonathan Ames, *Currying Favour*, EUR. LAW., Oct. 2008, at 28, 31; Desh Gaurav Chopra Sekhri, *Column: Liberalise Legal Services*, FIN. EXPRESS (Jan. 30, 2009), <http://www.financialexpress.com/news/column-liberalise-legal-services/416706/>.

³⁰ See Ames, *supra* note 29, at 28.

³¹ Laurel S. Terry, *GATS, Legal Services and Bar Examiners: Why Should You Care*, THE BAR EXAMINER, May 2002, at 25, 26; cf. Sen & Sahu, *supra* note 1, at 26; Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT’L L. 269, 282 (1994).

³² General Agreement on Trade in Services art. 2, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATS].

³³ *Id.* art. XVI.

³⁴ *Id.* art. XIX.

³⁵ Kilimnik, *supra* note 31, at 284.

³⁶ Kasturi Das, *GATS Negotiations and India, Evolution and State of Play ix*, (CENTAD, Working Paper No. 7, 2006).

ment only becomes an obligation once a member makes a commitment in its schedule to GATS.³⁷ Because India has not made any commitment with regards to legal services in its schedules to the GATS,³⁸ it is under no obligation to open its legal services market under its schedules to Article XVI of GATS.³⁹

2. MFN Treatment under Article II of GATS

If India granted the nationals of another nation, whether a WTO member or not, a certain treatment in a bilateral agreement, then it would have the obligation to treat all nationals of other WTO members in accordance with the MFN treatment under Article II of GATS.⁴⁰ The obligation to grant MFN treatment under Article II(1) of GATS is a general obligation that India has, notwithstanding the lack of any scheduled commitments for a specific service sector such as legal services.⁴¹

None of the bilateral investment treaties (BITs) or free trade agreements (FTAs) that India has concluded with other countries contains any rights with regards to legal services.⁴² The only document referring to “trade in services” as a category within the scope of a forthcoming joint study group is the free trade agreement between Chile and India in Article 4(2)(ii)(b).⁴³ Legal services are not mentioned in any of the treaties. Hence, there is no right contained in any of these instruments that could give rise to an obligation to India to provide these rights to FLCs from other GATS member countries under the MFN treatment principle.

3. Obligation of Progressive Liberalization

Under Article XIX(1) of GATS, India seems to be under the obligation to move progressively toward liberalization of the services sector.⁴⁴ Hence, the strict restriction on market access for foreign lawyers and law firms in place in India would have to be softened at

³⁷ Kilimnik, *supra* note 31, at 284.

³⁸ *India, Services Database*, WORLD TRADE ORGANIZATION, <http://tsdb.wto.org/Default.aspx> (last visited Apr. 6, 2010); *see also* GOV'T OF INDIA, *supra* note 2, at IV.3.

³⁹ Kilimnik, *supra* note 31, at 284; *see also* GOV'T OF INDIA, *supra* note 2, at IV.3.

⁴⁰ *Cf.* GATS, *supra* note 32, art. II(1) (“any other country”).

⁴¹ *Id.*; *see also* GOV'T OF INDIA, *supra* note 2, at IV.3, V.5.

⁴² GOV'T OF INDIA, *supra* note 2, at IV.3.

⁴³ Free Trade Agreement to Promote Economic Cooperation between the Republic of Chile and the Republic of India, Chile-India, Jan. 20, 2005, *available at* <http://www.eximguru.com/exim/Trade-Agreement/India-Chile-Free-Trade-Agreement.aspx>.

⁴⁴ GATS, *supra* note 32, art. XIX(1).

one point. Nonetheless, this “obligation” comes in the form of an obligation to negotiate about new specific and more liberal commitments. While the GATS sets a five-year deadline to start new negotiations, there is no binding schedule as to when there must be further liberalizations and which services should be liberalized further. Similarly, Das has also interpreted this provision as an “understanding that periodical negotiations will be undertaken.”⁴⁵

Adding to this assessment, Article XIX(2) of GATS stipulates that the process of liberalization, which is the aim of Article XIX(1), “shall take place with due respect for national policy objectives and the level of development of individual members.”⁴⁶ Therefore, one cannot derive an obligation of India to open its legal services market from Article XIX(1) of GATS.⁴⁷

IV. POLICY REASONS FOR AND AGAINST OPENING THE INDIAN LEGAL SERVICES MARKET FOR FOREIGNERS

1. *Benefits for India from Opening its Legal Services Market*

Opening its legal services market would allow India to profit from the advantages of the globalization of trade services.⁴⁸

a. *Swift Development of the Legal Services Market Due to Strengthened Competition*

The competition that is created at an international level speeds up the economic development of the domestic market.⁴⁹ Access to the international market of world-class services increases creativity and innovation in the home market.⁵⁰

b. *Growth of the Legal Services Market in India Through Foreign Investment*

Foreign investment will cause the domestic legal services market to grow.⁵¹ In general, the Indian services sector is already the big-

⁴⁵ Das, *supra* note 36, at 5.

⁴⁶ GATS, *supra* note 32, art. XIX(1), (2).

⁴⁷ *Id.*

⁴⁸ *Benefits of International Trade*, ECONOMYWATCH (June 30, 2010), available at <http://www.economywatch.com/international-trade/benefit.html>.

⁴⁹ *Id.*

⁵⁰ See, e.g., *A Vision and Strategy for the Future*, MICROSOFT, <http://www.microsoft.com/about/diversity/en/us/vision.aspx> (last visited Mar. 20, 2011).

⁵¹ Karl P. Sauvart, Wolfgang A. Maschek & Geraldine McAllister, *Foreign Direct Investment By Emerging Market Multinational Enterprises, The Impact of the Financial Crisis and Recession and Challenges Ahead*, in ORG. FOR ECON. CO-OPERATION AND DEV. GLOBAL FORUM ON INT'L INV. 2 (2009), available at <http://www.oecd.org/dataoecd/9/2/44246197.pdf>.

gest contributor to the Indian economy.⁵² In 2007, services contributed 54% to the Indian economy, and the sector was projected to grow at 7%, resulting in a projected contribution of about 60% to the Indian economy.⁵³

Furthermore, the opening up of the legal services market would facilitate international transactions, as there would be increased expertise available on the foreign, international, and third country law problems arising in international transactions.⁵⁴ This would create growth chances by expanding the practice in legal services in the region of Central and South Asia. With its vast resources of legal professionals and the know-how of international law firms, India could become the legal services hub of the region.⁵⁵

c. Qualitative Increase of the Services Rendered by the Legal Profession

New techniques and knowledge brought in by foreign market participants spill over into the domestic market.⁵⁶ The competition and the inflow of foreign expertise will increase the quality of work in parts of the legal services sector, where local lawyers and firms are currently delivering inadequate services.⁵⁷ Competition would increase the legal profession qualitatively and make it more effective.⁵⁸

d. Loss of Work for Indian Lawyers in Advisory Services on Domestic Law would be Minimal

Advisory legal services on domestic law and litigation play only a marginal role in the practice of foreign lawyers and law firms in foreign countries.⁵⁹ Indeed, reports emphasize the main aim of foreign law firms is to establish a presence in India but not to advise on Indian law.⁶⁰

⁵² Dr. Arjun S. Sirari & Narendra S. Bohra, *Foreign Direct Investment (FDI) in India Service Sector (A Study of Post Liberalization)*, 2(2) INT'L J. ECON. RES. 10, 10-18 (2011), available at [http://www.ijeronline.com/documents/volumes/Vol2issue2/ijer20110202\(2\).pdf](http://www.ijeronline.com/documents/volumes/Vol2issue2/ijer20110202(2).pdf).

⁵³ Sen & Sahu, *supra* note 1, at 26.

⁵⁴ See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L. L. 941, 956 (1995) (discussing the benefit of liberalizing legal services in general).

⁵⁵ Cf. Jeremy Fleming, *The Barred Pavilions*, EUR. LAW., Oct. 2007, at 34, 37, 72.

⁵⁶ Cf. Sen & Sahu, *supra* note 1, at 25.

⁵⁷ Chandra Krishnamurthy, *Legal Education and Legal Profession in India*, 36 INT'L J. LEGAL INFO. 245, 263 (2008).

⁵⁸ Chapman & Tauber, *supra* note 54, at 954-55.

⁵⁹ Cf. Sen & Sahu, *supra* note 1, at 27.

⁶⁰ Fleming, *supra* note 55, at 34-35.

The number of foreign lawyers that would enter India on a permanent basis would be limited.⁶¹ Mostly, such legal services would be limited to major commercial centers such as Mumbai and New Delhi where the demand for the specific services in international law, etc., would be the highest. The establishment of permanent offices of foreign law firms would lead to openings for new lawyers, too, as firms would be full service. Even in a fully liberalized market, Indian lawyers are better suited to cover the advisory services on domestic law. Therefore, foreign law firms will want to hire Indian attorneys as local counsel.

e. Enhanced Potential for Indian Lawyers and Law Firms to Expand Abroad

By opening the legal services market to foreigners, Indian lawyers and law firms will have the opportunity to branch out internationally and build up a worldwide representation of the Indian legal profession. Indian law firms may offer legal advice on an international level, and will be in a better position to cater to both major Indian companies investing worldwide and multinational companies. Entering the international market will allow Indian firms to participate in the highly profitable legal services market.

f. Increase in Remuneration Packages and Job Opportunities for Indian Legal Professionals

The influx of foreign firms and heightened competition for top graduates and professionals, resulting from the liberalization of legal services, will create a market in which remuneration packages will necessarily rise above the current Indian standards. Additionally, there will be an increase in job opportunities through the establishment of new law firms and the expansion of existing ones. This in turn will increase the opportunities for Indian legal professionals to become partners in a law firm. These partnerships are harder to obtain in a family-run or smaller partnerships, which are limited to twenty partners.⁶²

⁶¹ Chapman & Tauber, *supra* note 54, at 27.

⁶² *Cf.* Fleming, *supra* note 55, at 35.

2. Additional Policy Reasons for Opening the Indian Legal Services Market

a. Rapid Integration of India into the Global Economy Creates the Need for Capacity Building

India is rapidly integrating itself into the global economy, becoming a major destination for services exports.⁶³ Indian businesses are frequently buying foreign companies, and foreign companies are acquiring Indian companies. Foreign acquisitions by Indian companies increased from \$4.5 billion in 2005 to \$13.9 billion in 2008.⁶⁴ In 2007, there were more than 600 cross-border mergers and acquisitions involving an Indian element.⁶⁵ These numbers reveal the need for legal advice on international law, third country law and on issues like the international protection of intellectual property in cross-border legal transactions. Indian lawyers and law firms need to start building capacity now to meet future needs. One way to achieve this, apart from legal education, is to allow foreign law firms to practice in the country. These firms bring an expertise in third country law and international law, and Indian lawyers who are hired by these firms will profit from their experiences.

b. Keeping the LPO Business and Guarding its Growth in India

Opening up the legal services market in India will protect the big market share that India has in the global LPO market. In a recent case filed by the Lawyers' Collective before the Madras High Court, one of the defendants is an LPO firm. The Lawyers' Collective alleges this firm was not only doing back office work for international law firms but was also providing legal services, thereby violating the Advocates Act of 1961.⁶⁶ A negative outcome for the LPO firm in this case could have a negative impact on the legal services market and its growth potential. As a Mode 1, Cross-border service under Article I(2)(a) of GATS, the LPO falls within one of the areas of GATS in which India is aggressively looking for growth potential.⁶⁷ By opening up its legal services market, India could diffuse any doubts about the potential benefits of LPO for India.⁶⁸

⁶³ See *supra* Part IV.1.b.

⁶⁴ Wong, *supra* note 25.

⁶⁵ Ames, *supra* note 29, at 28.

⁶⁶ BAR & BENCH, *supra* note 5.

⁶⁷ Das, *supra* note 36, at 34-35.

⁶⁸ See *Global Services Location Index (GSLI) 2009 Report*, A.T. KEARNEY, <http://www.atkearney.com/index.php/Publications/global-services-location-index-gsli-2009-report.html#> (last visited Mar. 19, 2012) (rating India as the most attractive location in the world for outsourcing in 2009).

3. *Detriments to be Suffered by India from Opening its Legal Services Market*

a. *Shrinking Opportunities for Local Indian Lawyers*

The Bar Council of India, along with various members of the Indian legal profession, has expressed concern that even a limited opening of the legal services market would lead to a decrease in opportunities available to local Indian lawyers.⁶⁹ Therefore, the protections of the local Indian legal professionals have to be kept in place.

b. *“Brain Drain” of Top Indian Legal Talent*

Critics also argue opening the legal services market will lead to a “brain drain,” taking the top legal talent away from Indian firms and sending it to foreign law firms. As the most talented attorneys migrate to foreign firms, Indian firms would begin to lose major business to those foreign law firms.⁷⁰

c. *Indian Firms Being “Pushed” Out of the Legal Services Market*

If the legal services market in India is opened up to international law firms, critics fear these firms will push Indian firms out of the market. Once these international firms are established, they will take over the most lucrative mandates from local Indian firms because of their international brand name and expertise. This especially will be the case if a mandatory joint venture phase is implemented in the opening up procedure. This was allegedly the experience in Singapore. In Singapore, informal reports allege that once foreign law firms began independently operating and advising on Singaporean law as well as foreign and international law, the foreign firms terminated their joint venture agreements, under which they were operating prior to the liberalization. In doing so, they took the most valuable clients with them into their independent Singaporean practice.⁷¹

⁶⁹ GOV'T OF INDIA, *supra* note 2, at IV.3.

⁷⁰ *Cf.* Lowe, *supra* note 22.

⁷¹ *Cf.* Weng Meng Meng, *President's Message, Foreign Lawyers in Singapore: Any Future for Singapore Law Firms?*, SINGAPORE LAW GAZETTE, <http://www.lawgazette.com.sg/2012-03/> (last visited May 1, 2012) (stating the general view regarding this risk for Singapore); Mack Ross, *Liberalization of India's Legal Services Market and the Impact on the Legal Process Outsourcing Industry*, LEGAL PROCESS OUTSOURCING (July 5, 2007), <http://blog.law-scribe.com/2007/07/liberalization-of-indias-legal-services.html> (reporting on the general perception of such risk in India).

4. *Additional Reasons not to Open up the Indian Legal Services Market*

a. *Domestic Liberalization is Necessary Before Opening the Legal Service Market to Foreign Lawyers and Law Firms*

Some argue it is first necessary to liberalize the domestic legal service market before opening the market to foreign legal professionals. This entails removing the prohibition on advertisements by lawyers and law firms, the limitation on the available forms of associations of legal professionals,⁷² the limit on the number of partners in a partnership, and the bar on multidisciplinary partnerships. Removing these limitations will liberalize the Indian domestic legal services market before it is further opened to foreign legal professionals.

b. *Indian Law Firms Would be Deprived of the Chance to Benefit from the Domestic Liberalization*

Indian firms should not be deprived of the chance to profit from the opportunities created by liberalizing the domestic legal services market. Once restrictions like the ban on advertisement, the limit of twenty partners per partnership, and the ban of multidisciplinary partnerships are lifted, Indian law firms could expand and develop to a level more similar in size and revenue to larger international firms. Therefore Indian law firms should receive a chance to profit from this liberalization before facing the international competition in the domestic legal services market.

c. *Indian Legal Services Market is Already Highly Competitive*

Some critics claim opening the legal services market will lead to lower prices for clients because better competition in a closed market raises prices. They are wrong. The Indian legal services market is highly competitive, and price pressures are enormous.⁷³ Opening up the legal services market will further reduce market prices and create an environment in which smaller law firms cannot survive without the financial backing of a large international firm, thus pushing them out of the market.

⁷² This is less a factor after the passage of the Limited Liability Partnership Act 2008. Cf. Anirudh Hariani, *Foreign Law Firms in India, Advocates Act Insufficient*, HARIANI & Co. (Feb. 2, 2010), http://www.hariani.co.in/newsletter_February_Foreign_Law_Firms_10.php; Ross, *supra* note 71.

⁷³ Ames, *supra* note 29, at 31.

d. Opening the Door to Lawyers from All WTO Member Countries

Through the MFN clause in Article II of GATS, India would open its door to FLCs from all WTO members with greatly varying backgrounds.⁷⁴ This risks undermining the quality control of legal services by the Bar Council of India and domestic authorities.⁷⁵ Nonetheless, scheduling a commitment for legal services when opening the legal services market and listing MFN exemptions for certain countries in the Annex on Article II exemptions to the GATS counterbalances this risk.⁷⁶

V. CONCLUSION, PROPOSAL, AND OUTLOOK

1. Conclusion

India currently does not allow FLCs to provide any legal services in India.⁷⁷ It had no obligation to change this situation under GATS, but there are considerable policy reasons that suggest India should open its legal services market to FLCs.

Despite this, the global situation does not provide many reasons to be optimistic about multilateral discussions. For example, the Doha rounds and the GATS 2000 negotiations were suspended in July 2006 and have stalled since being resumed.⁷⁸

2. Proposal for Liberalization

In the light of the current situation, I propose a step-by-step approach for India to liberalize its legal services market and integrate into the global legal services market.⁷⁹

This step-by-step approach is in line with the concept of Progressive Liberalization in Article XIX(1) of GATS.⁸⁰ Furthermore, a similar step-by-step approach has been successfully implemented in other jurisdictions, such as Singapore and Japan.⁸¹ There is a pool of experience from other countries to draw upon when working out the details of the three liberalization steps.

⁷⁴ GATS, *supra* note 32, art II.

⁷⁵ Chapman & Tauber, *supra* note 54, at 969.

⁷⁶ *Id.* at 970.

⁷⁷ Sen & Sahu, *supra* note 1, at 27.

⁷⁸ *Services Negotiations*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (last visited Mar. 20, 2012).

⁷⁹ *Cf.* Sen & Sahu, *supra* note 1, at 25 (discussing the necessity for such liberalization).

⁸⁰ GATS, *supra* note 32, art. XIX.

⁸¹ Arfat Selvam, *Cross Border Legal Services in Asean Under WTO*, ASEAN L. ASS'N, http://www.aseanlawassociation.org/docs/w2_sing.pdf (last visited Mar. 20, 2012).

a. Liberalizing Domestic Legal Services Market and Allow Joint Ventures of Foreign Lawyers and Law Firms with Indian Firms

Liberalizing the domestic legal services market does not conflict with the first step of opening the legal services market to foreign lawyers and law firms. They will have local partners in a good position to adapt to the domestic changes. Therefore, there is no need to conclude domestic liberalization before commencing to open the legal services market.

Liberalizing the domestic market should include passing new legislation amending The Companies Act of 1956 to allow partnerships with more than twenty partners, and ensuring the applicability of this new rule to limited liability partnerships (LLP). This would allow Indian law firms to scale up their number of partners and scale in general, thereby reaching new revenue levels. It is important to note that a Companies Act Bill is currently pending in the Indian Parliament.⁸² This Bill raises the maximum number of partners to 100.⁸³

Furthermore, the Bar Council of India should amend its Rules to allow lawyers and law firms to advertise, which would provide an avenue for market access to new firms and would facilitate competition. At the same time, India should permit multidisciplinary practices to allow lawyers and law firms to provide a broader range of services to their clients. By taking these measures, India would start the process of elevating its own domestic legal profession to a level playing field with the rest of the international legal community.

Taking this step would open the door for FLCs to enter into joint ventures with local law firms. The regulation could, at this step, allow the foreign joint venture partner to acquire a maximum of 49% of the joint venture, ensuring Indian control of the entity. It also would allow FLCs within these joint ventures to provide legal advice on international law, their respective domestic law, and third country law for which they qualify. The government would have to amend the Bar Council Rules of India to allow FLCs to partner with domestic lawyers. Through joint ventures, the FLCs could offer their international clients full service in India, because Indian joint venture partners could advise on domestic law and could appear in front of Indian courts. This would enable international law firms to enhance their existing alliances, which some have called “merely non-exclusive referral agreements.”⁸⁴ As a result, international law firms could establish a real practice in India, within the limitations of the specific fields of law. It

⁸² The Companies Bill, 2009, No. 59, Acts of Parliament, 2009 (India), *available at* <http://www.mca.gov.in> (follow “Acts, Bills, & Rules” hyperlink; then follow “The Companies Bill, 2009” hyperlink) (last visited Mar. 20, 2012).

⁸³ *Id.* at § 422(1).

⁸⁴ Sekhri, *supra* note 29.

would also help clear up the situation created by the Bombay High Court, when it held foreign firms could not practice law, even in non-litigious matters, in India.⁸⁵

b. Allowing Independent Practice by FLCs in India

The Indian government should allow FLCs to operate independently in the country, providing legal advice on international law, their respective domestic law, and third country law for which they qualify in India.

c. Fully Liberalizing the Legal Service Market in India

The Indian government should adjust the qualification requirements and procedure for FLCs in a way that would allow FLCs to join Indian bar associations. This would permit FLCs to advise on Indian law and to appear before Indian courts.

d. Benefits of This Approach for India, the Indian Legal Profession, and the International Legal Profession

India and its legal profession will benefit from opening the legal services market. By taking this approach, India can further develop its status as “one of the champions of services trade liberalization.”⁸⁶ The joint venture structures will lead to a knowledge transfer in the fields of law in which the FLCs can practice. In turn, this will lead to capacity building through the expertise that FLCs bring into the joint ventures. Secondments, or temporary reassignments, of Indian legal professionals with the international offices of the foreign joint venture partner will further this knowledge transfer.

From a young legal professional’s perspective, the heightened competition and extended scope of legal services offered yield more job opportunities and better payment packages. With rising competition and demand for young legal professionals, offers will increase as well.

By following this approach, India will eventually fulfill the bilateral and multilateral requests by the United States, the European Union, Australia, Singapore, Japan, the People’s Republic of China, Switzerland, New Zealand and Brazil to commit under the GATS in legal services.⁸⁷ This will create some negotiation mass for future

⁸⁵ *Bombay High Court on the Entry of Foreign Law Firms*, INDIAN CORP. L. (Dec. 18, 2009), <http://indiakorplaw.blogspot.com/2009/12/bombay-high-court-on-entry-of-foreign.html> (discussing the results of *Lawyers Collective v. Bar Council of India*).

⁸⁶ Samar Verma, *Foreword to Kasturi Das, GATS Negotiations and India: Evolution and State of Play* (CENTAD, Working Paper No. 7, 2006), available at <http://ssrn.com/abstract=1587370>.

⁸⁷ GOV’T OF INDIA, *supra* note 2, at V.5.

WTO negotiations. India could promote its own interests in the GATS negotiations, such as other WTO members' further opening for services of Indian nationals.⁸⁸ This commitment to opening its legal services market would come at a low risk of suffering from a serious obstacle to the domestic legal profession and a high likelihood of increasing the quality of the domestic legal profession. It also would increase legal jobs in India and would expand the Indian legal profession internationally, both independently and as new parts of international law firms.

India presents a vast market with great opportunities for FLCs. As Brooks Entwistle, head of Goldman Sachs Group in India, implied at a 2009 International Bar Association conference in Mumbai, "India's a place you have to be from a global business franchise standpoint."⁸⁹ Coupled with the fact that India already is among the top ten largest economies in the world⁹⁰ and with its vast growth potential, India provides a lucrative future market for legal services, especially for international law firms that advise on cross-border transactions.⁹¹

3. Outlook

Opening up the legal services market will be a great bargaining chip for India in future negotiations, as it seeks to achieve its goals with regard to its services interests in Modes 1 and 4 of Article I of the GATS. Despite the discussion of the subject in India and beyond in the wake of the Mumbai High Court decision of December 2009, however, the parties are not even approaching the negotiating table at the moment. Currently, there seems to be no major incentive for the Indian government to put the issue high on its agenda. Indeed, the foreign lawyers' case pending at the Madras Court has been dragging on for some time now. Still, the reality of the legal services market's needs is being recognized. The Indian government released a consultation paper on the subject in 2006,⁹² and the government has experienced the disadvantages of its strict regulation when having to hire foreign coun-

⁸⁸ See GATS, *supra* note 32, art. I(2)(d).

⁸⁹ Wong, *supra* note 25.

⁹⁰ THE WORLD BANK, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Apr. 6, 2010) (reporting the GDP of India in 2010 was the world's ninth largest by producing \$1,729,010 million); *World Economic and Financial Surveys: World Economic Outlook Database*, IMF, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (last visited Mar. 28, 2010).

⁹¹ See *supra* Part IV.2.a. for the growth in foreign acquisitions by Indian companies.

⁹² GOV'T OF INDIA, *supra* note 2.

sel for legal advice on the privatization of two airports.⁹³ At the very least, there seems to be a greater awareness of the necessity to eventually open up the Indian legal services market.

⁹³ Fleming, *supra* note 55, at 35.

OPPORTUNISTIC DISCIPLINE: USING EURASIAN INTEGRATION TO IMPROVE SANCTIONS AGAINST BELARUS

Ilya Zlatkin

PART I: INTRODUCTION

“The last true dictatorship in the heart of Europe.”¹ Since former United States Secretary of State Condoleeza Rice coined this phrase in 2005, this less than flattering title has clung to Belarus.² For its part, however, the former Soviet republic’s government has done enough to maintain the moniker. Under President Alexander Lukashenko’s rule, the authorities have quashed nonviolent demonstrations, imprisoned political adversaries, and dominated media outlets.³ After thousands of Belarusians protested Lukashenko’s reelection in December 2010, the Belarusian president further clamped down on the public’s right to assemble.⁴ In addition, seven opposing candidates found themselves behind bars.⁵

Despite the West’s assertion that President Lukashenko violated human rights, Lukashenko refused to change his approach, prompting a new wave of economic and political sanctions.⁶ Regardless of legal arguments against sanctions, such measures often fail to produce desired results.⁷ Worse, they frequently hamper the invoking party’s aims,⁸ and this case is no different. Still, the United States and the European Union (“EU”) can improve the currently detrimental framework. A positive outcome requires the reassessment not only of

¹ ANDREW WILSON, *BELARUS: THE LAST DICTATORSHIP IN EUROPE*, at x, xi (2011).

² *Id.*

³ Michael Mostyn, *Democratic Wave Bypasses Belarus*, THE TORONTO STAR, Dec. 28, 2011, <http://www.thestar.com/opinion/editorialopinion/article/1108141—democratic-wave-bypasses-belarus>.

⁴ *Id.*

⁵ Michael Schwirtz, *Belarus Signals It Could Seize Opponent’s Son*, N.Y. TIMES, Jan. 9, 2011, <http://www.nytimes.com/2011/01/10/world/europe/10belarus.html?pagewanted=all>.

⁶ See *House Passes Bill Tightening Belarus Sanctions*, HUFFINGTON POST (Dec. 20, 2011, 9:54 PM), <http://www.huffingtonpost.com/huff-wires/20111220/us-belarus/>.

⁷ Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT’L L. 413, 449 (2001).

⁸ *Id.* at 446-47.

Belarus's role in the international arena, but also of its internal ideological developments.

In August 2011, the U.S. Office of Foreign Assets Control ("OFAC") froze the properties of four Belarusian enterprises, prohibited American citizens from transacting with these state-owned businesses, and added more individuals to the Specially Designated Nationals ("SDN") List.⁹ A few months later, President Barack Obama signed the Belarus Democracy and Human Rights Act of 2011.¹⁰ Even though Congress labeled the bill as a sanction, the legislation simply itemizes America's displeasure with the Lukashenko regime.¹¹ The Act does not impose any new penalties on the country, though it does attempt to pressure the International Hockey Federation ("IHF") into relocating a tournament the IHF previously granted to Belarus.¹²

Facially, the sanctions imposed by the OFAC and the Belarus Democracy and Human Rights Act seem to cost the United States little. While the United States might not achieve its goal of crippling the Lukashenko regime, it can appear proactive in the fight against oppression.¹³ Belarus's nonexistent economic influence decreases its sanction costs.¹⁴ If in fact the United States stands to lose nothing, then it would be remiss to not pass an anti-Lukashenko declaration, regardless of the normative arguments against such action. The real costs of sanctioning Belarus, however, are not limited to bilateral trade with the former Soviet republic. Belarus's perpetual alliance

⁹ *Treasury Sanctions Four Entities of State-Owned Belarusian Petrochemicals Conglomerate*, U.S. TREAS. DEPT. (Aug. 11, 2011), http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/belarus_notice_08112011.pdf. See generally *Specially Designated Nationals List (SDN)*, U.S. TREAS. DEPT., <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last updated Mar. 7, 2012).

¹⁰ *Barack Obama Signs into Law Belarus Sanctions Bill*, RIA NOVOSTI (Jan 4, 2012, 7:59 AM), <http://en.ria.ru/world/20120104/170614305.html>.

¹¹ See Belarus Democracy and Human Rights Act of 2011, Pub. L. No. 112-82, 125 Stat. 1863 [hereinafter Belarus Democracy and Human Rights Act].

¹² *Id.* § 3(10). Since the bill's passing, the IHF has already stated that it does not intend to get involved in political struggles. It will host the 2014 World Championships in Minsk. *E.g., Ice Hockey Championship to be Held in Europe's Last Dictatorship?*, CHARTER '97 (Jan. 9, 2012), <http://charter97.org/en/news/2012/1/9/46557/>.

¹³ See, *e.g.*, Belarus Democracy and Human Rights Act § 3(1) ("It is the policy of the United States to . . . condemn the conduct of the December 19, 2010, presidential election and crackdown on opposition candidates, political leaders, and activists, civil society representatives, and journalists . . .").

¹⁴ See EUROPEAN COMMISSION, EU BILATERAL TRADE AND TRADE WITH THE WORLD – USA (Jan. 10, 2012), available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf.

with Russia¹⁵ and its strategic importance to China's entrance into European markets¹⁶ make the small nation increasingly vital to American interests.

The preferred methods of sanctioning Belarus do not materially impact the nation's government.¹⁷ Instead, they deteriorate the prospects of regular citizens – allegedly the intended beneficiaries of these measures.¹⁸ Better solutions exist. While the advent of the Single Economic Space (“SES”) and the Eurasian Economic Union (“EEU”) will render some sanctions inept, these new institutions could provide an avenue for improving the American position.¹⁹

In addition, the United States should reevaluate Belarus's economic and political landscape. If the United States government wishes to improve the lives of ordinary Belarusians, it should consider altering aspects of travel regulations.²⁰ Free visas for ordinary citizens would help open up the country.²¹ Likewise, the United States and the

¹⁵ See Fyodor Ptitsyn, *Russia Saves Strongman Lukashenko from Complete Isolation*, PRAVDA (Nov. 14, 2011), http://english.pravda.ru/russia/economics/14-11-2011/119610-russia_belarus-0/; *Vladimir Putin Supports the Merger of Russia and Belarus*, THE TELEGRAPH (Aug. 1, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/russia/8675759/Vladimir-Putin-supports-merger-of-Russia-and-Belarus.html>.

¹⁶ *All-round Ties with China Priority for Belarus*, CHINA DAILY (Dec. 22, 2011), http://www.chinadaily.com.cn/usa/china/2011-12/22/content_14309094.htm.

¹⁷ Cf. Yaraslau Kryvoi, *The Robert E. Hudec Article on Global Trade: Why European Union Trade Sanctions Do Not Work*, 17 MINN. J. INT'L L. 209, 243–44 (2008).

¹⁸ See Belarus Democracy and Human Rights Act § 3(2)–(5).

¹⁹ The SES, which began operating in 2012, is a common market. This removes all barriers to movement of factors of production among Russia, Belarus, and Kazakhstan. In November 2011, these three nations also signed a set of documents, setting the framework for a transition to the EEU – a complete economic union scheduled to begin operating in 2015. Kyrgyzstan and Tajikistan plan to join as well. See INTEGRATION COMM. SECRETARIAT OF THE EURASIAN ECON. CMTY., EURASEC TODAY 35 (2011). [hereinafter EURASEC TODAY], available at http://www.evrases.com/i/other/EurAsEC-today_eng.pdf; *Russia, Belarus, Kazakhstan Agree on Economic Union*, RADIO FREE EUROPE/RADIO LIBERTY, Nov. 18, 2011, http://www.rferl.org/content/russia_belarus_kazakhstan_plan_economic_union/24395264.html.

²⁰ See Andrei Liakhovich, *Getting the Travel Ban Right*, BELARUS DIGEST (Nov. 27, 2011), <http://belarusdigest.com/story/getting-travel-ban-right-6713> [hereinafter *Getting the Travel Ban Right*]; *Shushkevich: Best Sanctions – Free Visas*, TELEGRAF.BY (Jan. 5, 2012), <http://telegraf.by/en/2012/01/shushkevich-luchshie-sankcii-besplatnie-vizi> [hereinafter *Shushkevich*].

²¹ *Shushkevich*, *supra* note 20.

EU should reconsider their approach to travel bans.²² Rather than continuing to blacklist members of the Belarusian bureaucracy, the West should closely examine the behaviors of individual politicians. Realistically, only time will lead to change, but proper management of sanctions may achieve that goal quicker.

Though this comment focuses on the effects of America's sanctions, it inherently implicates the EU. While Belarus does not play a major role in the American economy, it does significantly impact the EU's economy.²³ Ineffective sanctions, regardless of who imposes them, harm both the innocent citizens of the sanctioned country and the citizens of states who interact with the sanctioned country.²⁴ Consequently, any successful solution likely depends on EU participation. Western governments cannot *directly* accomplish every solution proposed here. Some changes, only the private sector can drive, but governments need to provide the proper incentives to elicit the desired responses.

This comment does not condemn or condone the Lukashenko regime's policies. Instead, it evaluates the effectiveness of the U.S. sanctions and provides some feasible alternatives. Also, this comment avoids normative arguments against sanctions, concentrating more on the probable economic and political effects.²⁵ Part II supplies background information on the political developments within Belarus since the Soviet Union's collapse, including prior sanctions that the West

²² *Getting the Travel Ban Right*, *supra* note 20. See S.B., *Nomenclature and the Hope for Democracy in Belarus*, BELARUS DIGEST (Dec. 8, 2011), <http://belarusdigest.com/story/nomenclature-and-hope-democracy-belarus-6886>.

²³ See EUROPEAN COMMISSION, EU BILATERAL TRADE AND TRADE WITH THE WORLD – BELARUS (Jan. 10, 2012), *available at* http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113351.pdf [hereinafter EC STATISTICS - BELARUS].

²⁴ See Cann, *supra* note 7, at 427.

²⁵ One of the most powerful arguments against sanctions is their selective enforcement, which creates a double standard. *Id.* at 450–52. In short, the United States chooses to punish an authoritarian regime in Belarus while choosing to ignore human rights violations in Uzbekistan and political imprisonment in Ukraine. The United States has imposed farcical, half-hearted sanctions in Venezuela. See generally, Muzaffar Suleymanov, *What United States Can't Accept in Belarus, It Supports in Uzbekistan*, COMM. TO PROTECT JOURNALISTS BLOG (Jan. 11, 2012, 2:15 PM), <http://www.cpj.org/blog/2012/01/what-us-cant-accept-in-belarus-it-supports-in-uzbe.php>; Yulia Tymoshenko's *Trials*, THE ECONOMIST, Oct. 15, 2011, <http://www.economist.com/node/21532290>; Michael Economides, *Silly Sanctions Against Venezuela Boost Hugo Chavez*, FORBES, June 13, 2011, <http://www.forbes.com/sites/greatspeculations/2011/06/13/silly-sanctions-against-venezuela-boost-hugo-chavez/>. Interestingly, Venezuela is not even listed on the United States Treasury's website as a sanctioned country. See *Sanctions Programs and Country Information*, U.S. TREAS. DEPT., <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last updated Jan. 12, 2012).

imposed. Part III explains why the United States can legally institute sanctions. Parts IV and V discuss how American sanctions facilitate appropriation of significant Belarusian state assets by Russia and China, respectively. Part VI posits that the United States can use Eurasian integration to benefit its own economic interests, which include helping ordinary Belarusian citizens. Part VII examines the practice of using travel bans to sanction Belarusian officials and suggests a change to the visa regime as a way to further Western goals. Part VIII concludes this comment.

PART II: BACKGROUND

Alexander Lukashenko came to power in 1994, less than three years after the Soviet Union collapsed.²⁶ He succeeded in minimizing opposition to his rule during the transitional turbulence of the following decade.²⁷ The U.S. Congress passed the Belarus Democracy Act of 2004 in response to waves of repression and reports of Belarus's weapons trade with Iran.²⁸ Aside from listing grievances, the Act intended to promote democracy in Belarus, even permitting fund allocation to support the opposition.²⁹ The Act was only supposed to last two years,³⁰ but without any improvement in the country's situation, President George W. Bush issued Executive Order 13405 reaffirming condemnation of the Belarusian government.³¹ Executive Order 13405 authorized asset freezes and prohibited American citizens from helping circumvent these financial sanctions.³² Later in the year, Congress passed the Belarus Democracy Reauthorization Act of 2006, renewing the 2004 version.³³

The outlook brightened in 2008 when the Belarusian government released political prisoners and improved its human rights policies.³⁴ In response, both the United States and the EU removed sanctions.³⁵ With the onset of the financial crisis, the Belarusian leadership had to rely on the International Monetary Fund ("IMF") for eco-

²⁶ WILSON, *supra* note 1, at xi.

²⁷ *See id.* at 194-208.

²⁸ STEVEN WOEHREL, CONG. RESEARCH SERV., RL 32534, BELARUS: BACKGROUND AND UNITED STATES POLICY CONCERNS 2 (2010).

²⁹ Belarus Democracy Act of 2004, § 3(a), Pub. L. No. 108-347, 118 Stat. 1383 (codified as amended at 22 U.S.C. § 5811 (2012)).

³⁰ *See id.* § 3(d)(1).

³¹ Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 20, 2006).

³² *Id.* §§ 1-2.

³³ Belarus Democracy Reauthorization Act of 2006, Pub. L. No. 109-480, 120 Stat. 3666 (2012) (codified as amended at 22 U.S.C. § 5801 (2012)).

³⁴ WOEHREL, *supra* note 28, at 2.

³⁵ *Id.* Though it was proposed, attempts to pass the Belarus Democracy Reauthorization Act of 2008 stalled. *H.R. 5970: Belarus Democracy Reauthoriza-*

conomic relief.³⁶ The IMF conditioned the loans on a liberalization of economic norms, most notably a twenty-percent devaluation in the Belarusian ruble.³⁷ The EU even invited Belarus to participate in the Eastern Partnership Initiative, an attempt to develop former Soviet republics that have not yet joined the EU.³⁸ Unfortunately, this détente did not last.

On December 19, 2010, Lukashenko won a fourth term in what was deemed a rigged election.³⁹ Tens of thousands of Belarusians poured out into the streets to protest, and the government reacted with a vicious crackdown, detaining hundreds.⁴⁰ In the aftermath, Lukashenko imprisoned the majority of his opponents, most of whom still remain incarcerated.⁴¹ While the West renewed its criticism of the Belarusian president, the economic crisis began to wreak havoc.⁴² A sharp increase in natural gas prices exacerbated the country's woes, as the Belarusian ruble inflated by over 100 percent in less than a year.⁴³ With the nation on the verge of ruin, Belarusians initiated a protest via social media to mimic the Arab Spring.⁴⁴ Unlike the Arab Spring, however, this did not yield regime change. In August 2011, the OFAC issued new sanctions against four state-owned conglomerates – a fer-

tion Act of 2008, GOVTRACK, <http://www.govtrack.us/congress/bill.xpd?bill=H110-5970> (last visited Feb. 11, 2012).

³⁶ WOEHREL, *supra* note 28, at 3.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ A.O., *Belarus's Election: Lukashenka Uncovered*, THE ECONOMIST, Dec. 20, 2010, http://www.economist.com/blogs/easternapproaches/2010/12/belarus_election.

⁴⁰ *Id.*

⁴¹ Schwirtz, *supra* note 5.

⁴² Yauheni Preiherman, *2011: Year Under the Sign of Crackdown*, BELARUS DIGEST (Dec. 29, 2011), <http://belarusdigest.com/story/2011-year-under-sign-crack-down-7133>. In April 2011, the busiest Minsk subway station was bombed. Rampant inflation followed. Though the two problems are almost certainly unrelated, they converged and exacerbated the atmosphere of fear within the country. See generally Y.K., *The Consequences of the April 11 Minsk Bombing*, BELARUS DIGEST (Apr. 12, 2011), <http://belarusdigest.com/2011/04/11/the-consequences-of-the-april-11-minsk-bombing>.

⁴³ *Belarus' Base Inflation in 11 Months of 2011 Reported at 113.6 Percent*, NAVINY.BY (Dec. 9, 2011, 4:10 PM), http://naviny.by/rubrics/english/2011/12/09/ic_news_259_382426/.

⁴⁴ Ellen Barry, *Sound of Post-Soviet Protest: Claps and Beeps*, N.Y. TIMES, July 14, 2011, http://www.nytimes.com/2011/07/15/world/europe/15belarus.html?page_wanted=all.

tilizer manufacturer, a tire factory, a fiber producer, and a major oil refinery.⁴⁵

The combination of popular unrest and Western pressure most likely caused Lukashenko to search for new ways of entrenching himself. In October, Russia's Prime Minister (and most likely future President) Vladimir Putin pitched his idea of a "Eurasian Union," an economic union of former Soviet republics.⁴⁶ With Lukashenko's urging, the parties streamlined the process, and the presidents of Russia, Belarus, and Kazakhstan met a month later to create the framework for Eurasian reintegration.⁴⁷ At the end of December, Congress passed the Belarus Democracy and Human Rights Act of 2011, which President Obama signed on January 3, 2012, placing various visa and financial restrictions upon many Belarusian officials.⁴⁸

PART III: AMERICA'S JUSTIFICATIONS FOR IMPOSING SANCTIONS

National law permits the United States to pass the Belarus Democracy and Human Rights Act. In issuing an executive order freezing Belarusian assets, President George W. Bush labeled the situation in Belarus an "unusual and extraordinary threat to . . . national security and foreign policy,"⁴⁹ and invoked the International Emergency Economic Powers Act⁵⁰ and the National Emergencies Act.⁵¹ Additional justification for sanctions is found both in the Foreign Commerce Clause, which allows the United States to shape its international economic policies,⁵² and the Restatement (Third) of Foreign Relations Law, which expressly permits economic sanctions.⁵³

⁴⁵ *New Sanctions Against Belarus*, U.S. DEPT. OF STATE (Aug. 11, 2011), <http://www.state.gov/r/pa/prs/ps/2011/08/170405.htm>.

⁴⁶ Dmitry Polikanov, *Soviet Reunion?*, RT (Oct. 20, 2011, 2:48 PM), <http://rt.com/politics/columns/man-nature-political-animal/soviet-cis-russia-economy/>; Robert Bridge, *One Eurasian Union, Please. And Hold the Imperialism!*, RT (Oct. 19, 2011, 6:08 PM), <http://rt.com/politics/union-putin-integration-soviet-207/>.

⁴⁷ *See Agreement on the Eurasian Economic Community*, World Bank, <http://wits.worldbank.org/GPTAD/PDF/archive/EAEC.pdf> (last visited Mar. 9, 2012); *see also Russia, Belarus, Kazakhstan Agree on Economic Union*, *supra* note 19.

⁴⁸ *Barack Obama Signs into Law Belarus Sanctions Bill*, *supra* note 10.

⁴⁹ Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 20, 2006).

⁵⁰ *See* 50 U.S.C. § 1702 (2006).

⁵¹ *See* 50 U.S.C. § 1631 (2006).

⁵² U.S. CONST. art. I, § 8, cl. 3.

⁵³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 703 cmt. f (1987) ("A state may criticize another state for failure to abide by recognized international human rights standards, and may shape its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations.").

In denouncing these new sanctions, however, the Belarusian government claims that the United States has breached the security assurances it made in the Budapest Memorandum of 1994.⁵⁴ The United States (along with the United Kingdom and Russia) promised former Soviet republics that it would “refrain from economic coercion designed to subordinate to [its] own interest.”⁵⁵ In exchange, Belarus, Ukraine, and Kazakhstan agreed to surrender the nuclear weapons stored within their territory.⁵⁶ Belarus also claims that the United States has violated exactly the same obligations under the Helsinki Final Act, which the United States had concluded with the USSR.⁵⁷ Additionally, the United Nations General Assembly has passed several resolutions to denounce unilateral sanctions.⁵⁸ In a practical sense, however, none of these international rules are likely to matter. Though the United States may simply choose to ignore its international law obligations as it has often done in the past, it will likely point to Lukashenko’s illegal acts to justify its own violations. In doing so, the United States likely will claim that the Belarusian President’s actions pose an international security threat.

The General Agreement on Tariffs and Trade (“GATT”) creates a framework for unimpeded trade, but it does provide an out for national security reasons.⁵⁹ Article XXI, also called the “security exception,” states that “[n]othing in [the GATT] shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.”⁶⁰ Unfortunately, the GATT fails to clarify what exactly constitutes an emergency or a national security threat.⁶¹ This lack of guidance allows

⁵⁴ *Lukashenka’s Dictatorship Started Nuclear Blackmailing of U.S.*, Charter ’97 (Aug. 19, 2011), <http://charter97.org/en/news/2011/8/19/41757/>.

⁵⁵ *Security Assurances: Memorandum on Security Assurances in Connection with the Republic of Belarus’ Accession to the Treaty on the Non-Proliferation of Nuclear Weapons K-7* (Dec. 5, 1994), available at <http://www.ppnn.soton.ac.uk/bb2/Bb2secK.pdf>.

⁵⁶ *Id.*

⁵⁷ Press Release, Republic of Belarus, MFA Press Secretary Andrei Savinykh Replies When Asked by the Media on the Countermeasures in Response to United States Sanctions (Aug. 19, 2011), available at http://www.belarus.by/en/press-center/press-release/mfa-press-secretary-andrei-savinykh-replies-when-asked-by-the-media-on-the-countermeasures-in-response-to-us-sanctions_i_0000002559.html.

⁵⁸ G.A. Res. 62/162, ¶ 4, U.N. Doc. A/RES/62/162 (Mar. 13, 2008); G.A. Res. 62/183, ¶ 2, U.N. Doc. A/RES/62/183 (Jan. 31, 2008).

⁵⁹ Cann, *supra* note 7, at 414.

⁶⁰ General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁶¹ Cann, *supra* note 7, at 415–16.

each nation to claim the right to define its national security interests as it sees fit.⁶² States could interpret the section to include any threat to fundamental ideology, foreign policy, political stability, or domestic industry.⁶³ Under its current language, it seems impossible for a country to violate Article XXI.⁶⁴

Attempts to justify this mentality have revolved around the distinction in wording between Article XXI and Article XX, which lists other exceptions to GATT rules.⁶⁵ While the security exception allows a nation to take measures “it considers necessary,” Article XX allows nations to take “necessary” steps to invoke the other exceptions.⁶⁶ States wishing to use the exception have articulated that the wording in Article XXI gives them more leeway in determining what works better.⁶⁷ The International Court of Justice (“ICJ”) partially agreed with this assessment, but did not give states carte blanche to use Article XXI.⁶⁸ In *Nicaragua v. United States*, the ICJ denied individual countries the ability to determine the meanings of “self-defense” and “necessity.”⁶⁹ The ICJ nonetheless upheld the use of unilateral economic sanctions in *Nicaragua*, basing its decision on the principle that a state has the right to choose its trade partners.⁷⁰

Though the GATT security exception may develop limits, countries like the United States continue to impose sanctions at will.⁷¹ For example, Congress did not consider national security interests when passing the Belarus Democracy Act of 2004.⁷² In many ways, it has become “politically expedient to allow [A]rticle XXI to remain an unspoken authority.”⁷³ If a sanctioned country protests such methods, then the appeal to international regulatory bodies takes a long time

⁶² *Id.*

⁶³ *Id.* at 425.

⁶⁴ *Id.* at 415–16.

⁶⁵ *Id.* at 422.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.* at 422–23.

⁶⁹ Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 448–49 (2008). It is worth noting that the ICJ does not have a formal obligation to follow its former rulings but it still frequently relies on its prior decisions in its reasoning. The ICJ typically explicitly distinguishes precedent from its current case when it chooses to deviate from this informal *stare decisis*. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 255–56 (5th ed. 2009).

⁷⁰ Claire M. Diallo, Note, *The United States Empire: Is Any Sovereign Nation Safe After the Russian and Belarus Democracy Acts?*, 91 IOWA L. REV. 673, 706–07 (2006).

⁷¹ Cann, *supra* note 7, at 425.

⁷² Diallo, *supra* note 70, at 690.

⁷³ Cann, *supra* note 7, at 425.

with no guarantees of success. For this reason, a sanctioned country such as Belarus has no real recourse other than retaliation. Of course, it has virtually no leverage, so sanctions will remain “legal” in practice until the imposing nation decides to lift them. In fact, as discussed below, current conditions have rendered U.S. sanctions against Belarus not only moot, but also detrimental to American interests.

PART IV: RUSSIA’S EVER-PRESENT INFLUENCE

Belarus’s close ties to Russia are not a secret. Lukashenko dissented when the Belarusian legislature voted to secede from the USSR⁷⁴ and has since consistently supported reintegration.⁷⁵ The two nations have a close relationship despite their periodic disagreements.⁷⁶ As the SES develops and progresses toward the EEU, Belarus’s dependence on its big brother will continue to grow. Russia’s considerable influence makes the majority of sanctions ineffective by creating low-cost trade outlets for sanctioned Belarusian enterprises.⁷⁷ More pertinently, Belarus’s precarious economic position permits Russia to vulture ownership of Belarusian state-owned ventures.⁷⁸ Reintegration with other former Soviet republics does bring considerable

⁷⁴ See Andrei Liakhovich, *Belarus-Russia: Optimistic Rhetoric and Unsolvably Contradictions*, BELARUS DIGEST (Nov. 16, 2011), <http://belarusdigest.com/story/belarus-russia-optimistic-rhetoric-and-unsolvable-contradictions-6482>.

⁷⁵ *Id.*

⁷⁶ See Ptitsyn, *supra* note 15; Vladimir Putin Supports the Merger of Russia and Belarus, THE TELEGRAPH, Aug. 1, 2011, <http://www.telegraph.co.uk/news/world-news/europe/russia/8675759/Vladimir-Putin-supports-merger-of-Russia-and-Belarus.html>.

⁷⁷ It is worth giving brief (and non-comprehensive) definitions of the different levels of integration. A free trade agreement eliminates import tariffs and quotas between the signatories. A customs union builds on a free trade area by, in addition to removing internal barriers to the trade of goods, also creating a unified external trade policy. A common market improves on a customs union by removing all obstacles to the mobility of people, capital and other resources, as well as eliminating non-tariff barriers to trade, within the area. An economic union further harmonizes economic institutions and policies. See generally *Different Forms of Integration*, U.N. UNIV. OCW, <http://ocw.unu.edu/programme-for-comparative-regional-integration-studies/introducing-regional-integration/different-forms-of-integration/> (last visited Feb. 20, 2012) (explaining the various ways that social systems integrate with one another). The Single Economic Space, which started operating on January 1, 2012, is a common market. See *EurAsEC*, EURASIAN ECON. CTR., www.eurasian-ec.com/index.php?option=com_content&task=view&id=2&Itemid=7 (last visited Feb. 20, 2012).

⁷⁸ See Andrei Liakhovich, *The Russian Expansion: Tricolor, Mercedes and a Three-fold Increase in Salary*, BELARUS DIGEST (Dec. 26, 2011), <http://belarusdigest.com/story/russian-expansion-tricolor-mercedes-and-three-fold-increase-salary-7102> [hereinafter *The Russian Expansion*].

benefits to regular Belarusian citizens, but it also creates new problems.⁷⁹ In contrast to the people, the Lukashenko regime only stands to profit.

To some extent, sanctions against Belarusian state-owned companies do succeed in hurting those ventures. The aftermath, however, makes those measures counterproductive to Western interests. The Belarusian president has shown that he will repay Russia for its support with shares of Belarusian industries so long as he remains in power of Belarus.⁸⁰ The economic crisis has forced Belarus to rely on loans from other countries to stay afloat. Meanwhile, the nation's foreign debt sits at over a third of its projected GDP.⁸¹ Russia owns the majority of this figure, providing it with incredible leverage over Belarus.⁸² Without any significant natural resources, Belarus cannot quickly increase its real wealth.⁸³ Its population is too poor to finance the massive debt.⁸⁴ Consequently, it will have no choice but to capitalize state assets once the loans become due.⁸⁵

Russia has already begun this type of acquisition.⁸⁶ Gazprom, the state-owned Russian natural gas conglomerate, previously had obtained a 50 percent ownership in Beltransgaz, the Belarusian natural gas transportation company, in 2006.⁸⁷ Russia and Belarus agreed to transfer the remaining stake in Beltransgaz to Gazprom within a

⁷⁹ See George Plaschinsky, *Is the Customs Union Good for Belarus?*, BELARUS DIGEST (Nov. 11, 2011), <http://belarusdigest.com/story/customs-union-good-belarus-6491>.

⁸⁰ See, e.g., Andrei Liakhovich, *The Reasons Behind Putin's Unprecedented Generosity Towards Lukashenka*, BELARUS DIGEST (Jan. 5, 2011), <http://belarusdigest.com/story/reasons-behind-putin%E2%80%99s-unprecedented-generosity-towards-lukashenka-7103> [hereinafter *Putin's Unprecedented Generosity*].

⁸¹ Yauheni Preiherman, *Belarus the Indebted*, BELARUS DIGEST (Dec. 9, 2011), <http://belarusdigest.com/story/belarus-indebted-6882>.

⁸² *Id.*

⁸³ See Jacob Koch-Weser, "Lenders of Last Resort": *Sino-Russian Rivalry in Belarus?*, BELARUS DIGEST (Nov. 30, 2011) <http://belarusdigest.com/story/%E2%80%99clenders-last-resort%E2%80%9D-sino-russian-rivalry-belarus-6767> [hereinafter *Lenders of Last Resort*].

⁸⁴ See *Average Monthly Income in Belarus – 145\$*, BELSAT TV (Nov. 17, 2011), <http://belsat.eu/en/wiadomosci/a,5836,average-monthly-income-in-belarus-145.html> (showing that Belarusians' average monthly income was only \$145 at the end of 2011).

⁸⁵ Preiherman, *supra* note 81.

⁸⁶ See *The Russian Expansion*, *supra* note 78.

⁸⁷ *Gazprom to Acquire Balance of Beltransgaz*, NATURAL GAS EUROPE (June 18, 2011, 2:26 PM), <http://www.naturalgaseurope.com/gazprom-expect-acquire-balance-beltransgaz>.

week of agreeing to the EEU framework.⁸⁸ While debt repayment did not directly motivate this deal, Belarus had no other realistic option.⁸⁹ Minsk had to find a way to minimize future gas prices before the previous gas deal expired.⁹⁰ It made the correct decision under the circumstances, because the creation of alternative transport routes would have eaten into Beltransgaz's profits.⁹¹ As Lukashenko was quick to point out, the pipeline would lose all value without any gas flowing through it – a factor completely in Russia's control.⁹² The recent opening of the Nord Stream would have given Russia the opportunity to bypass Belarus completely.⁹³ The Nord Stream passes through the Baltic Sea directly to Germany, circumventing not only Belarus but also Poland.⁹⁴ Moreover, Russia plans to construct a southern pipeline under the Black Sea, avoiding Belarus and Ukraine.⁹⁵ Even though Gazprom stated it would not decrease gas transport through Belarus,⁹⁶ Lukashenko would have left much to chance. Now, with full control of Beltransgaz, Russia has nothing to lose from continuing to pump gas through Belarus.⁹⁷ As a result, Ukrainian and Slovakian pipelines will absorb the brunt of the cut in volume.⁹⁸

In return for the remaining shares of the transit company, Belarusians received the lower gas prices they coveted.⁹⁹ Gas-price hikes were the primary cause of the Belarusian economy's collapse earlier in the year.¹⁰⁰ As part of the deal, Belarusians received a forty percent "integration discount,"¹⁰¹ as well as \$2.5 billion as compensation for the remaining shares.¹⁰² In addition, the Beltransgaz deal includes a

⁸⁸ Vladimir Soldatkin & Denis Pinchuk, *UPDATE 2 – Russia Woos Belarus with Gas Price Cut, \$10 Billion Loan*, UK REUTERS (Nov. 25, 2011, 6:13 PM), <http://uk.reuters.com/article/2011/11/25/russia-belarus-idUKL5E7MP1JW20111125>.

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Lukashenka Describes Gas Agreements with Russia as Very Advantageous*, NAVINY.BY (Dec. 3, 2011), http://naviny.by/rubrics/english/2011/12/03/ic_articles_259_176044/.

⁹³ Soldatkin & Pinchuk, *supra* note 88.

⁹⁴ *The Pipeline*, NORD STREAM AG, <http://www.nordstream.com> (last visited Feb. 15, 2012).

⁹⁵ Soldatkin & Pinchuk, *supra* note 88.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*; Plaschinsky, *supra* note 79.

¹⁰⁰ Soldatkin & Pinchuk, *supra* note 88.

¹⁰¹ *Id.*

¹⁰² Scott Rose, *Russian-led Fund to Disburse Belarus \$440 Million Next Month*, BUSINESS WEEK, Nov. 28, 2011, <http://www.businessweek.com/news/2011-11-28/russian-led-fund-to-disburse-belarus-440-million-next-month.html>.

loan of \$10 billion to build Belarus's first nuclear power station.¹⁰³ In the long term, this will allow Belarus to alleviate its power supply problems to an extent.¹⁰⁴ Preparations have already begun in western Belarus.¹⁰⁵

The Beltransgaz deal had plenty of positive results for ordinary Belarusian citizens. The country's coffers received an immediate infusion, and the drastic decrease in gas prices will likely help remedy short-term economic woes.¹⁰⁶ The steady source of power from the nuclear reactor will likewise help. Unfortunately, the pipeline sale also set a conspicuous precedent of Russian appropriation of significant Belarusian state assets. Already, the Belarusian government intends to sell the Minsk Automobile Plant ("MAZ") to its Russian counterpart KamAZ.¹⁰⁷ The sole remaining obstacle concerns the company's worth.¹⁰⁸ Auditors valued MAZ at only \$800 million, an amount the Belarusian authorities find inadequate.¹⁰⁹ They wish to obtain a second opinion, but, pending the appraisal, it looks like MAZ will belong to Russia soon.¹¹⁰

Moscow likely will continue the pattern of acquiring Belarusian industries.¹¹¹ It has already sent a clear signal to its neighbor's enterprises that they should *want* to belong to Russia.¹¹² Immediately following the Beltransgaz transaction, the company's executives all received a threefold bump in salary and a new car.¹¹³

Considering that the four newly-sanctioned companies do not trade much with the United States, American sanctions will not impoverish them.¹¹⁴ If the EU balks at conducting business with them, however, then losses may make these enterprises more susceptible to

¹⁰³ Ekaterina Shokhina, *A New Eurasian Union is Born*, EXPERT MAGAZINE (Nov. 29, 2011), available in English at http://rbth.ru/articles/2011/11/29/a_new_eurasian_union_is_born_13838.html; Soldatkin & Pinchuk, *supra* note 87.

¹⁰⁴ Shokhina, *supra* note 103.

¹⁰⁵ *Id.*

¹⁰⁶ See Soldatkin & Pinchuk, *supra* note 88.

¹⁰⁷ *Surikov: Belarusians Drag Feet MAZ and KamAZ Merger*, TELEGRAF.BY (Jan. 5, 2012), <http://telegraf.by/en/2012/01/surikov-belorusi-tormozyat-sliyanie-maza-i-kamaza>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *The Russian Expansion*, *supra* note 78.

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ *United States Sanctions "Harmless" for Belneftekhim*, BELARUSIAN TELEGRAPH AGENCY (Aug. 12, 2011), <http://news.belta.by/en/news/econom?id=649636>. Total trade with the United States accounts for only 0.3 percent of Belarusian exports. EC STATISTICS – BELARUS, *supra* note 23.

Russian appropriation.¹¹⁵ While Russian ownership brings with it certain efficiencies, perks, and short-term infusions of cash, long run revenues will still flow out of Belarus. Thus, if the United States cares about the wellbeing of Belarusian citizens,¹¹⁶ these sanctions will counter American interests. When Belarus reforms, its people will have been deprived of their most effective moneymaking businesses.

Realistically, Lukashenko will remain in power only as long as Russia wants him in that role.¹¹⁷ At the moment, he happens to be indispensable to Russian interests.¹¹⁸ If Washington wishes to change the state of affairs in Belarus, it should try to find incentives for Moscow to elicit regime change. Russia's gains are not limited to economic advantages. Russia has two military bases in Belarus, for which it pays no rent.¹¹⁹ In contrast, Ukraine charges Russia \$40 billion over thirty years for one naval base on the Black Sea.¹²⁰ Politically, Moscow can also rely on Lukashenko as a mouthpiece against the West. While the Kremlin has to tread carefully in its diplomatic relations with the United States and the EU, Lukashenko has thrown plenty of derogatory comments their way.¹²¹ Unless Russia finds an alternative that suits its interests at least as well, it will continue supporting Lukashenko.

PART V: CHINA'S GROWING INFLUENCE

In the last few years, a new superpower has gained an interest in Belarus. China has exhibited a tendency to swoop into nations with

¹¹⁵ Cf. *Belshina Export to Non-CIS up 2.2 Times in H1*, BELARUSIAN TELEGRAPH AGENCY (Aug. 5, 2011), <http://news.belta.by/en/news/econom?id=648280> (indicating that one of the sanctioned companies had experienced a significant increase in exports to Europe just before the United States sanctions were instituted).

¹¹⁶ See Belarus Democracy and Human Rights Act, *supra* note 18, at § 3(2)-(5).

¹¹⁷ See *Putin's Unprecedented Generosity*, *supra* note 80.

¹¹⁸ See S.B., *Lukashenka in Moscow: The Prodigal Son Is Coming Back?*, BELARUS DIGEST (Dec. 1, 2011), <http://belarusdigest.com/story/lukashenka-moscow-prodigal-son-coming-back-6742> [hereinafter *Lukashenka in Moscow*].

¹¹⁹ *Lukashenko Reminds of Russia's Free Rent of Two Military Bases in Belarus*, BELARUSIAN TELEGRAPH AGENCY (Apr. 25, 2010), <http://news.belta.by/en/news/president?id=522386>.

¹²⁰ Philippe Conde & Vasco Martins, *Russia's Black Sea Fleet in Sevastopol Beyond 2017*, DIPLOWEB.COM (May 23, 2010), <http://www.diploweb.com/Russia-s-Black-Sea-fleet-in.html>.

¹²¹ E.g., *Belarus President Lukashenko Calls George W Bush World's Main Terrorist*, MOSNEWS.COM (Mar. 19, 2006), http://www.nogw.com/download/2006_lukash_bush_terrorist.pdf.

totalitarian governments.¹²² While Western powers criticize dictators and limit economic interaction with authoritarian regimes, the Chinese have willingly filled the vacuums left by United States withdrawal.¹²³ Similar to Moscow, Beijing has extended low interest loans in exchange for stakes in Belarusian state enterprises.¹²⁴ For example, in October 2011, Belarus received a \$1 billion loan at three percent interest, for which China will get preference in the purchase of Belarusian chemistry assets.¹²⁵ The Chinese have announced a plan to drastically increase foreign direct investment in Belarus.¹²⁶ Beijing does not fear the risks associated with an economically unstable partner, mainly because Chinese state-owned investors do not face as much pressure to make quick profits.¹²⁷ Moreover, Belarus has experienced underinvestment in manufacturing and infrastructure – two strengths for the Chinese.¹²⁸ With other countries feeling comfortable investing only in trade and services, China has the opportunity to corner the capital formation market.¹²⁹

Beijing's actions clearly support the idea that it takes its relationship with Belarus seriously. Over the past two years, Chinese banks have invested \$15 billion in Belarus.¹³⁰ At least five of the Chinese companies currently in Belarus are publicly listed and have a market cap of over \$500 million.¹³¹ The two governments have already agreed to create a Chinese industrial park with a massive hotel serving Chinese businessmen.¹³² More telling, Lukashenko has expressed a desire to develop a Chinatown in Minsk.¹³³ The two nations' budding cooperation extends beyond the business sector. The Chinese are building a satellite for Belarus, the first time they have done so for any

¹²² See Andrew Brady Spalding, *The Irony of International Business Law: United States Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 354 (2011).

¹²³ *Id.*

¹²⁴ Iacob Koch-Weser, *China Helps an Ailing Autocracy*, BELARUS DIGEST (Nov. 10, 2011), <http://www.belarusdigest.com/story/china-helps-ailing-autocracy-6495> [hereinafter *China Helps an Ailing Autocracy*]; *Cash-flooded China to Loan \$1Bln to Cash-hungry Belarus*, RT (Sept. 20, 2011), <http://rt.com/news/china-loan-belarus-deal-929/>.

¹²⁵ *Cash-flooded China to Loan \$1Bln to Cash-hungry Belarus*, *supra* note 124.

¹²⁶ Iacob Koch-Weser, *Chinese FDI in Belarus: Investing in a Backwater?*, BELARUS DIGEST (Oct. 27, 2011), <http://www.belarusdigest.com/story/chinese-fdi-belarus-investing-backwater-6359> [hereinafter *Chinese FDI in Belarus*].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *Cash-flooded China to Loan \$1Bln to Cash-hungry Belarus*, *supra* note 124.

¹³¹ *China Helps an Ailing Autocracy*, *supra* note 124.

¹³² *Id.*

¹³³ *Id.*

European nation.¹³⁴ In addition, they have exported nuclear and thermal energy projects, as well as chemical production.¹³⁵

As China continues to entrench itself within its European ally, tensions between China and Russia may arise.¹³⁶ Based purely on economic importance, Russia should win over China in Belarus. Russia accounts for about half of Belarus's foreign trade, while China comprises less than five percent.¹³⁷ For the most part, however, these two international superpowers seem to focus on noncompeting industries.¹³⁸ Russia is focused on Belarus's oil and gas reserves, while China focuses on Belarus's infrastructure and machinery.¹³⁹ Russia and China compete, however, over Belarus's power generation and chemical industries.¹⁴⁰

Even with this potential for friction, they can split the Belarusian pie easily. Considering that Belarus is set to privatize 180 state-owned ventures, Russia and China are in a prime position to carve up Belarus between them.¹⁴¹ In 2012 alone, the Belarusian government has decided to sell \$2.5 billion of state property.¹⁴² With this trend, it is conceivable that even if Lukashenko is ousted, there may be limited room for Western influence.

PART VI: TAKING ADVANTAGE OF THE EURASIAN UNION

Eurasian integration offers substantive aspects that counteract American interests and defeat economic sanctions. Still, the creation of a Eurasian common market will likely offer the United States certain opportunities, some of which it can use to deal with Belarus. If it acts quickly, the United States can rely on integration among the former Soviet republics to help it secure a foothold in the growing market. Even without United States involvement, however, the EEU's stated goal of having all member nations join the World Trade Organization ("WTO") will help liberalize the Belarusian economic system.¹⁴³

¹³⁴ Xin Dingding, *China to Build Satellite for Belarus*, CHINA DAILY (Sept. 20, 2011), http://europe.chinadaily.com.cn/china/2011-09/20/content_13737721.htm.

¹³⁵ *China Helps an Ailing Autocracy*, *supra* note 124.

¹³⁶ *Lenders of Last Resort*, *supra* note 83.

¹³⁷ EC STATISTICS – BELARUS, *supra* note 23, at 6.

¹³⁸ *Lenders of Last Resort*, *supra* note 83.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Belarus Government Plans to Sell State Property for \$2.5 Billion in 2012*, TELEGRAF.BY (Jan. 3, 2012), <http://telegraf.by/en/2012/01/v-2012-godu-v-belarusi-planiruyut-prodat-gossobstvennosti-na-2-5-mlrd-dollarov>.

¹⁴³ *See Declaration on the Eurasian Economic Integration*, ADVISORY AND EXPERT COUNCIL OF THE CUSTOMS UNION (Nov. 18, 2011), available at <http://www.sovet->

As China's involvement illustrates, Belarus can offer solid investment opportunities.¹⁴⁴ Unhindered access to the massive Russian market is one of the main incentives for Russia's neighbors to join the EEU framework.¹⁴⁵ The vast majority of Russia's population resides in the European portion of the country, which places Central Asian EEU members at a disadvantage.¹⁴⁶ On the other hand, Belarus, which is the only other European member of the EEU framework, can offer cheap labor and proximity to the target EEU market.¹⁴⁷ Belarus ranks considerably higher than Russia on the Doing Business Index,¹⁴⁸ making it a surprisingly solid option for American businesses searching for investment opportunities. Similarly, the United States may benefit significantly by emulating Russia and China in providing low interest loans in exchange for stakes in Belarusian state-owned enterprises. Though Belarus's recent economic troubles have caused rating agencies to lower the ratings of Belarusian debt,¹⁴⁹ it still remains an intriguing opportunity. Admittedly, such a scheme would require the United States to overhaul its sanction structure entirely. Current United States sanctions discourage foreign aid to the Belarusian government.¹⁵⁰ Moreover, with the OFAC's freezing of Belarusian assets, Lukashenko probably would respond in kind if given the opportunity.¹⁵¹ Nonetheless, if the United States decides to deviate from the erroneous approach of sanctioning Belarusian enterprises, it could see a significant windfall. If the United States hesitates, however, it may lose its chance.

The United States can invest in other EEU members and also benefit from Eurasian integration. Of the five nations currently con-

ts.ru/poleznie_materiali/normativno_pravovie_dokumenti/deklaraciya_o_evraziyskoy_ekonomicheskoy_integracii/.

¹⁴⁴ *China Helps an Ailing Autocracy*, *supra* note 124.

¹⁴⁵ See *The World Factbook – Belarus*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/bo.html> (last updated Nov. 15, 2011).

¹⁴⁶ See Anatoly Vishnevsky, *Replacement Migration: Is It a Solution for Russia?*, 6, U.N. Doc. UN/POP/PRA/2000/14 (Aug. 15, 2000), available at <http://www.un.org/esa/population/publications/popdecline/vishnevsky.pdf>.

¹⁴⁷ Sergei Blagov, *International Trade Customs Union of Kazakhstan, Russia, Belarus Approves Kyrgyzstan's Membership*, Int'l Trade Rep. Online (BNA) No. 28, at A-18 (Oct. 20, 2011).

¹⁴⁸ See *Economy Rankings*, WORLD BANK (June 2011), <http://www.doingbusiness.org/rankings>.

¹⁴⁹ Preiherman, *supra* note 81.

¹⁵⁰ See, e.g., Belarus Democracy Act of 2004, § 3(a), Pub. L. No. 108-347, 118 Stat. 1383 (codified as amended at 22 U.S.C. § 5811 (2012)).

¹⁵¹ For now, the only retaliatory sanction that Belarus has instituted is the suspension of a uranium exchange program. *No Future for US-Belarus Relations*, RT (Jan. 13, 2012), <http://rt.com/politics/belarus-democracy-gordon-opposition-683/>.

sidered in the EEU framework,¹⁵² Kazakhstan has the most favorable business environment.¹⁵³ The Central Asian republic stands to benefit significantly from Eurasian integration, and the United States can use it as a gateway into the EEU. Unlike Belarus and Kyrgyzstan, Kazakhstan does not depend on Russian markets to survive.¹⁵⁴ Goods sold to Russia account for less than a tenth of the Kazakhs' exports,¹⁵⁵ but this is anticipated to increase quickly.¹⁵⁶

Since the EurAsEC customs union ("Customs Union") began operating in 2010, Kazakhstan's exports to Russia have increased by almost 40 percent, and its exports to Belarus have more than doubled.¹⁵⁷ Moreover, due to its geography, Kazakhstan depends on the ability to transport goods through other countries to Western markets.¹⁵⁸ The Customs Union has allowed Kazakhstan to lower these shipping costs.¹⁵⁹

Though its financial sector still has problems, Kazakhstan's fiscal future seems positive.¹⁶⁰ The restructuring of three banks has reduced foreign indebtedness and the insurance sector has improved.¹⁶¹ Also, in an effort to upgrade the domestic securities market, the government has created proactive plans, which include increased collaboration with international organizations.¹⁶² Both Fitch Ratings and Standard & Poor's have raised the country's foreign currency debt

¹⁵² Currently, Russia, Belarus, and Kazakhstan have agreed to form the EEU by 2015. Kyrgyzstan and Tajikistan have both indicated that they are interested in joining. Blagov, *supra* note 147, at A-18.

¹⁵³ *Russia, Kazakhstan and Belarus Promise Eurasian Union Not to Become New USSR*, GAZETA.KZ (Nov. 22, 2011), <http://engarticles.gazeta.kz/art.asp?aid=352668>.

¹⁵⁴ See *World Factbook – Kazakhstan*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/kz.html> (last updated Feb. 23, 2012); see also *World Factbook – Belarus*, *supra* note 145; *World Factbook – Kyrgyzstan*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/kg.html> (last updated Feb. 23, 2012).

¹⁵⁵ *World Factbook – Kazakhstan*, *supra* note 154.

¹⁵⁶ See Plaschinsky, *supra* note 79.

¹⁵⁷ *Id.* EurAsEC is the Eurasian Economic Community, which initially set in motion the creation of a customs union and a common market among former Soviet republics. See also, EURAsEC TODAY, *supra* note 19, at 35.

¹⁵⁸ *WTO Accession*, EMBASSY OF THE REPUBLIC OF KAZAKHSTAN, <http://www.kazakhembus.com/index.php?page=wto-accession> (last visited Feb. 14, 2012).

¹⁵⁹ *Id.*

¹⁶⁰ Scott Rose, *Kazakhstan Upgraded at Fitch to Tie Russia on Foreign Assets*, BLOOMBERG (Nov. 21, 2011), <http://www.bloomberg.com/news/2011-11-21/kazakhstan-upgraded-at-fitch-to-tie-russia-on-foreign-assets-1.html#>.

¹⁶¹ *Financial Sector*, EMBASSY OF THE REPUBLIC OF KAZAKHSTAN, <http://www.kazakhembus.com/index.php?page=banking-system> (last visited Feb. 14, 2012).

¹⁶² See *id.*

rating most likely because of these developments.¹⁶³ Until now, the main source of economic trouble in Kazakhstan has been the lack of quality investors.¹⁶⁴ The United States has the ability to fill that void. If it does not, then another country will likely take advantage of Kazakhstan's favorable legal infrastructure and economic opportunities.

Even if the United States decides not to invest in the EEU or to extend loans to Belarus, Eurasian integration may elicit some positive changes. The EEU strives to have all of its members become a part of the WTO in the near future.¹⁶⁵ In 2010, Belarus's government stated that it wished to intensify WTO accession efforts in 2012.¹⁶⁶ During the economic crisis of 2011, however, the legislature limited exports of gasoline, food, and other essential consumer products to countries outside the Customs Union.¹⁶⁷ This was a step in the wrong direction, but with Russia getting the green light to enter the WTO, Belarus will not be far behind.¹⁶⁸ To do that, the government will need to liberalize the country's economic policies.¹⁶⁹ For example, Belarus will have to relax currency control regulations.¹⁷⁰ Prior to the integration efforts, all enterprises conducting business in Belarus had to sell foreign currency to the state.¹⁷¹ Now, however, as a requirement for entering the SES, the government will have to abolish this law.¹⁷² Further economic liberalization will naturally continue due to Russia's guidance.¹⁷³ These byproducts of Eurasian integration will inherently benefit American interests.

PART VII: READJUSTING TRAVEL LAWS

Since 2006, both the United States and the EU have intermittently placed Lukashenko and members of his government on travel

¹⁶³ Rose, *supra* note 160.

¹⁶⁴ *Financial Sector*, *supra* note 161.

¹⁶⁵ *Presidents of Belarus, Russia and Kazakhstan Sign Eurasian Economic Integration Declaration*, BELTA (Nov. 11, 2011), http://news.belta.by/en/main_news?id=667406.

¹⁶⁶ Sergei Blagov, *WTO: Kazakh Minister Says Nation Will Finalize WTO Accession Negotiations by End of 2012*, Int'l Trade Rep. Online (BNA) No. 28, at 1078 (June 30, 2011).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Sergei Blagov, *WTO: Russian President Vows Domestic Industry Will Not Be Hobbled by WTO Commitments*, Int'l Trade Rep. Online (BNA) No. 28, at 1973 (Dec. 8, 2011).

¹⁷⁰ *Id.*

¹⁷¹ See Plaschinsky, *supra* note 79.

¹⁷² *Id.*

¹⁷³ See Blagov, *WTO: Russian President Vows Domestic Industry Will Not Be Hobbled by WTO Commitments*, *supra* note 169.

blacklists.¹⁷⁴ Soon after the United States issued its newest round of sanctions in early 2012, the EU followed suit by blacklisting 135 Belarusian officials.¹⁷⁵ Probably more so than any other sanction, travel bans are much more applicable through the EU than the United States. While travel bans do succeed in punishing only those whom the West wishes to discipline, they are not necessarily effective in forcing the desired results.¹⁷⁶ Although the current travel ban structure is not detrimental to Western interests, its breadth should be reconsidered.¹⁷⁷ As a corollary, Western powers should also change their visa laws.¹⁷⁸

While the United States and the EU desire changes in the Belarusian government, the volume of banned Belarusian officials is excessive.¹⁷⁹ Not all Belarusian politicians sympathize with Lukashenko's policies, particularly in the realm of economics.¹⁸⁰ From a more symbolic standpoint, in stark contrast to the norm, certain officials even deliver all their public speeches in Belarusian.¹⁸¹ Interestingly, whereas in past years a disgruntled politician would have to leave the ruling party in order to oppose mainstream policies, it has become possible for Belarusian politicians to dissent while remaining a member of the government.¹⁸²

This indicates that perhaps the West's best chance of ousting Lukashenko involves allowing current members of the Belarusian government to liberalize the regime from the inside. Of course, this is no easy task. The United States and the EU cannot expressly support particular Belarusian politicians, as that would likely doom the politicians' careers. A decision not to ban particular officials, however, may implicitly support politicians who might not share the current government's views. Instead of categorically blacklisting all prominent Be-

¹⁷⁴ WOEHREL, *supra* note 28, at 2.

¹⁷⁵ *EU Closes Its Border for 135 More Belarusian Officials*, TELEGRAF.BY (Jan. 13, 2012), <http://telegraf.by/en/2012/01/es-zakroet-svoyu-granicu-esche-dlya-135-belorusских-chinovnikov>.

¹⁷⁶ See, e.g., Mathew Charles, *The EU and Belarus: Sanctions? What Sanctions?*, EU OBSERVER, Jan. 27, 2012, <http://euobserver.com/7/115040> (describing the ineffectiveness of the travel ban, as a blacklisted Belarusian official was able to go to a conference in France).

¹⁷⁷ See *Getting the Travel Ban Right*, *supra* note 20.

¹⁷⁸ See *Shushkevich*, *supra* note 20.

¹⁷⁹ See *Getting the Travel Ban Right*, *supra* note 20.

¹⁸⁰ See S.B., *supra* note 22.

¹⁸¹ See Y.K., *Who Rules Belarus?*, BELARUS DIGEST (Nov. 21, 2011), <http://belarusdigest.com/story/who-rules-belarus-6597> [hereinafter *Who Rules Belarus?*].

¹⁸² S.B., *supra* note 22.

larusian officials, the West should first conduct a thorough analysis of those individuals it considers sanctioning.¹⁸³

If the West wishes to make a meaningful change that would help ordinary Belarusian citizens without helping the government, it should revise its visa regimes in regard to Belarus.¹⁸⁴ Free visas for non-blacklisted individuals would go a long way. Currently, visas to the European Union range from €60 to €99 – a huge portion of the average monthly income in Belarus.¹⁸⁵ Belarusians also have to deal with more red tape in obtaining an EU visa than the citizens of any other European nation.¹⁸⁶ In a country where freedom of the press is virtually nonexistent, travel restrictions can exacerbate the lack of Western thought.

Free visas should not cost the West much, but they would facilitate more exchange and cooperation projects.¹⁸⁷ Such a policy would also make it easier for Belarusians to obtain Western educations, which is arguably one of the most effective ways to infuse Western ideals into a country.¹⁸⁸ Also, outside of their homeland, Belarusians prefer Europe for travel and work.¹⁸⁹ Currently, Poland is the only EU country where well-educated Belarusians can work without restrictions.¹⁹⁰ Though the EU has every right to be concerned with security and illegal immigration, Belarusians have not exhibited any threatening signs in those areas.¹⁹¹ With the country's entire population less than 10 million, Belarusians are unlikely to create an unmanageable influx of people.¹⁹² Moreover, a distinction should be drawn between free visas and uncontrolled travel. The West would still have the capability of screening the people to whom it issues visas. In comparison to

¹⁸³ *Getting the Travel Ban Right*, *supra* note 20.

¹⁸⁴ *Shushkevich*, *supra* note 20.

¹⁸⁵ *Schengen Visa Fees*, SHENGEN VISA FEES, http://www.euro-dollar-currency.com/schengen_visa_fees.htm (last visited Feb. 13, 2012) (showing costs of Schengen visas); *Average Monthly Income in Belarus – 145\$*, BELSAT (Nov. 17, 2011), <http://belsat.eu/en/wiadomosci/a,5836,average-monthly-income-in-belarus-145.html> (listing the average monthly income of Belarusians at the end of 2011). At the time of this Comment's writing, €1 equaled about \$1.27.

¹⁸⁶ George Plaschinsky, *Belarus Is the World's Schengen Visa Champion*, BELARUS DIGEST (Jan. 31, 2012), <http://belarusdigest.com/story/belarus-worlds-schengen-visa-champion-7541>. It is worth noting that Europeans also struggle with the visa process when they wish to visit Belarus. Lack of reciprocity, however, should not have any effect on the EU's choice of visa regime. These are *unilateral* sanctions, after all. *Id.*

¹⁸⁷ S.B., *supra* note 22.

¹⁸⁸ *Shushkevich*, *supra* note 20.

¹⁸⁹ *Lukashenka in Moscow*, *supra* note 118.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

the more costly economic sanctions, free visas for the marginal number of individuals who may wish to travel to Europe is an insignificant expense. Most importantly, this policy would help the West forge closer ties with Belarus's people as opposed to its government.

PART VIII: CONCLUSION

Though international law validates economic and political sanctions, such sanctions are detrimental to Western interests. Assuming that the West actually wishes to improve the plight of Belarusian citizens, sanctioning Belarusian enterprises is not the best means to accomplish this goal. While the Belarusian government cannot respond in a fashion that would be detrimental to the United States, the political and economic forces at play in this Eastern European nation should concern Washington. Although it is no surprise that Russia continues to build its influence within Belarus, China's recent entry should also concern the United States. These two Eastern superpowers will continue appropriating Belarusian assets. While Belarus will acquire short-term relief from its economic woes, it will sell out its future. At the same time, American enterprise should actively consider entering the EEU market; if not in Belarus then in Kazakhstan, which provides an excellent climate for foreign investment. EEU members will have to compete among each other to draw foreign investment, and the United States should take advantage of these opportunities.

The West also should reconsider its travel bans and visa regimes. Though blacklists succeed in punishing the government rather than the populace, they still fail to help ordinary Belarusians. Younger politicians espouse more liberal ideologies,¹⁹³ and while they are still part of the Lukashenko machine, they might be the most effective source of change. Travel bans, instead, only serve to alienate them. Likewise, high costs of visas prevent many Belarusians from visiting, working, and studying in Western countries. Eliminating these debilitating costs should not pose economic or security threats to the West, while it would expose Belarusians to the Western methodologies of thinking and living.

Regardless of the West's policies, change in Belarus will not occur overnight. A new generation of Belarusians may need to come to power before any real change occurs. Right now, Belarus is mostly a gerontocracy, similar to the Soviet Union in its later years.¹⁹⁴ In addition, most of Lukashenko's support comes from older citizens.¹⁹⁵ Quite simply, many of these people will die soon, and with them much of

¹⁹³ *Who Rules Belarus?*, *supra* note 181.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Lukashenko's support. When that finally occurs, the West should benefit from having politicians and voters who have not been isolated and alienated as before.

